
MAJOR COURT DECISIONS OF 1999*

UNITED STATES TELEPHONE ASSOCIATION V. FEDERAL COMMUNICATIONS COMMISSION 188 F.3d 521 (D.C. Circuit 1999)

Issue: Whether the FCC failed to give a rational explanation of its selection of six percent as the historical component of productivity offset, or “X-factor,” to be used in adjusting price caps by which the FCC regulates access charges paid to local exchange carriers (LECs) by interexchange carriers (IXCs) for transmission of long-distance telephone calls.

Holding: Remand was required to permit the FCC to explain its decision, in modifying the methodology used to limit access charges paid to LECs by IXCs for transmission of long-distance telephone calls.

Discussion: The court held that the FCC failed to give a rational explanation of its selection of 6.0% as the historical component of productivity offset (“X-factor”) to be used in adjusting price caps by which the FCC regulated charges. The court questioned the FCC’s methodology, stating that its decision to devalue the lowest averages as improbable was not justified. The court further held that the FCC’s reliance on what it perceived as an upward trend reflected an unexplained assumption that the trend would continue in the immediate future, where reasons exist to doubt the continuation of that trend. Finally the court found that the FCC’s use of only one carrier’s X-factor estimates appeared in light of the FCC’s rejection of that carrier’s analysis.

SOUTHWESTERN BELL TELEPHONE COMPANY V. FCC 180 F.3d 307 (U.S. App. D.C. 1999)

Issue: Local exchange carriers sought review of FCC order denying LEC’s motion for reconsideration of investigation order finding certain rates charged to interexchange carriers unjust and unreasonable.

Holding: The court held that a petition seeking

review of an order denying reconsideration is cannot be reviewed absent new evidence or changed circumstances. The court refused to read the petition as a petition for review of the investigation order itself, since intent to seek review of the investigation order could not fairly be inferred from the petition for review or from subsequent filings.

Discussion: According to the court, evidence relating to the growth in minutes of use per common line, in connection with the calculation of rates to be charged to interexchange carriers, was not new evidence that would warrant judicial review of an FCC order denying reconsideration of a prior investigation order finding certain rates unjust and unreasonable. The court reasoned that the evidence was not new in the sense of being discovered after the FCC issued its investigation order. The court stated that the purported evidence was not evidence at all but simply argument that the FCC made a material error.

U.S. WEST INC., V. FCC 182 F.3d 1224 (10th Cir. 1999)

Issue: Whether the FCC regulations that required telecommunications companies, in most instances, to obtain affirmative approval from the customer before the company could use that customer’s “customer proprietary network information” for marketing purposes constitutes a restriction on speech within the meaning of the First Amendment’s free speech clause.

Holding: The Court of Appeals held that “customer proprietary network information” (CPNI) is “commercial speech” for purposes of the First Amendment’s free speech clause. The court further held that the FCC failed to show that its regulations directly and materially advanced the FCC’s asserted interests in privacy and increased competition, and finally, these regulations were not narrowly tailored to further those asserted interests.

Discussion: In the context of a speech restriction imposed to protect privacy by keeping certain in-

* Thanks to Karen Hennigan for contributing these summaries.

formation confidential, the government must show that the dissemination of the information desired to be kept private would inflict specific and significant harm on individuals. Examples of such harm include undue embarrassment or ridicule, intimidation or harassment, or misappropriation of sensitive personal information for the purposes of assuming another's identity.

The FCC failed to show that its regulations directly and materially advanced the FCC's asserted interests in privacy and increased competition. There was no evidence regarding how and to whom carriers would disclose CPNI to outside parties, and no analysis of how allowing existing carriers to market new services with CPNI would impede competition for those services. Further, the FCC failed to adequately consider a less restrictive "opt-out" approach, in which approval would be inferred from the customer-carrier relationship unless the customer specifically requested that his or her CPNI be restricted. The availability of less burdensome alternatives to accomplish the FCC's stated purpose for restricting commercial speech signals that the fit between the legislature's ends and the means chosen to accomplish these ends may be too imprecise to withstand First Amendment scrutiny.

U.S. WEST v. FCC 177 F.3d 1057 (D.C. Cir. 1999)

Issue: Whether the FCC reasonably interpreted §271 of the Telecommunications Act of 1996 which generally bars Bell operating companies (BOCs) from providing long-distance service originating in a region in which it provided local service, to ban agreements under which BOCs were to market provider's services to their customers.

Holding: The court denied the Bell operating companies' petition for review of the FCC order banning agreements under which the BOCs were to market provider's services to their customers, and held that the FCC had reasonably interpreted §271 of the Act.

Discussion: In May 1998 two of the BOCs, US West and Ameritech, announced deals with Quest Communications Corporation under which each BOC would market Quest's long distance to its customers. Each BOC employed a special label for the resulting package, each offered the customer "one-stop shopping" for both local and long dis-

tance, with all customer support (sign-up and servicing) through the BOCs own toll-free number. Quest was to compensate each BOC with a fixed fee for every customer obtained. The order at issue was handed down by the Commission as a result of adjudicative proceedings which followed administrative complaints filed by competitors of Quest in the long-distance market.

In its decision to deny the BOCs petition, the court considered the FCC's finding that marketing arrangements would give BOCs greatly advantageous positions in the market for local and long distance service once they became explicitly entitled to provide long distance service, concluding that the FCC reasonably interpreted § 271. The court found that marketing qualified as a provision of service forbidden by this provision. Otherwise, by offering one-stop shopping for local and long distance under their own brand name and with their own customer care, BOCs could build up goodwill as full-service providers, positioning themselves in these markets before § 271 actually allows them to enter.

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION AND NATIONAL ASSOCIATION OF BROADCASTERS v. FCC 184 F.3d 872 (D.C. Cir. 1999)

Issue: Whether an order in which the FCC announced that it would not enforce the fairness doctrine, which required broadcast licensees to provide reasonable opportunity for presentation of contrasting viewpoints, operates to directly rescind the personal attack and the political editorial rules.

Holding: The court remanded the case for the FCC to further explain its decision not to repeal or modify the personal attack rule or the political editorial rule. The court held that the order at issue, abrogating the fairness doctrine, did not directly rescind or compel the demise of the personal attack rule or the political editorial rule. The court further stated that the FCC bears the burden of explanation on review of its decision not to repeal these rules.

Discussion: After the FCC deadlocked on its proposal to repeal the personal attack and political editorial rules, broadcasting organizations petitioned for review of the FCC decision not to repeal these rules. The personal attack rule requires broadcasters to give notice and response opportu-

nity to those attacked during the presentation of views on controversial public issues, and the political editorial rule affords political candidates notice of and opportunity to respond to editorials opposing them or endorsing another candidate.

After issuing a notice of proposed rulemaking ("NPRM") proposing to reveal or modify the two challenged rules, having concluded that the rules might no longer be in the public interest, the FCC ultimately issued a joint statement of commissioners who, in a deadlocked vote, supported retention of the two rules. The court remanded, stating that the FCC did not adequately explain why the public would benefit from the rules, which raised significant policy and constitutional doubts due to their interference with the editorial judgments of journalists and the entanglement of the government in the media's day to day operations. The court also expressed concerns that in its statement, the FCC did not dispel concerns previously raised by the FCC itself.

UNITED STATES V. POPA 187 F.3d 672 (D.C. Cir.1999)

Issue: Whether a criminal statute prohibiting the making of anonymous phone calls made with the intent to annoy, abuse, threaten, or harass, violated the First Amendment, when applied to a defendant for making calls to a United States Attorney containing racial epithets and complaining about alleged assaults by police officers.

Holding: The court reversed the defendant's conviction on First Amendment grounds. According to the court, the criminal statute, as applied to the defendant's conduct, violates the First Amendment in inasmuch as the statute could have been drawn more narrowly, without a loss of utility to the government, by excluding from its scope those who intended to engage in public or political discourse.

Discussion: The defendant Popa is a political refugee from Romania who has resided in the U.S. since 1986. Popa was convicted in the United States District Court for the District of Columbia under 47 U.S.C. § 223(a)(1)(C) which is punishable by a fine and up to two years imprisonment. The district court applied intermediate scrutiny, holding that the statute was constitutional on its face because it "regulates potentially expressive conduct to serve the compelling interest of pro-

tecting people from often frightening and annoying telephone harassment".

On appeal, the government claimed that since Popa neither argued to the district court nor testified at trial that his speech was political in nature, the court should review the case only for plain error. The Court of Appeals reviewed the claim *de novo*, finding that Popa had properly preserved the issue for appeal, and finding that the statute, as applied to Popa does not survive intermediate scrutiny. Ultimately, the Court of Appeals found that the punishment of those who use the telephone to communicate a political message is obviously not essential to the furtherance of the government's interest in protecting innocent individuals from non-communicative uses of the telephone.

BOEHNER V. McDERMOTT 191 F.3d 463

Issue: Whether the section of the Electronic Communications Privacy Act which forbids disclosure of illegally intercepted communication, and the corresponding Florida statute, violate the First Amendment, as applied to a Congressman who delivered to newspapers a tape recording of cellular telephone conversations intercepted illegally, when the conversation related to matters of public concern.

Holding: The Court of Appeals found that these statutes do not violate the First Amendment in this context because the statutes forbid the publication of information obtained at an earlier time in an illicit fashion.

Discussion: John A. Boehner, a Republican member of the House of Representatives, representing the Eighth District of Ohio brought this action against James A. McDermott, a Democratic member of the House representing the Seventh District of Washington. On December 21, 1996, Boehner participated in a conference call with members of the Republican Party leadership, discussing strategy regarding an expected Ethics Subcommittee announcement of then-Speaker of the House Newt Gingrich's agreement to accept a reprimand and to pay a fine in exchange for the committee's promise not to hold a hearing. The conversation was scanned and recorded by two Florida residents, who delivered the tape to Rep. McDermott, then the ranking Democratic member of the House Ethics Committee. McDermott

gave copies of the tapes to the New York Times, the Atlanta Journal-Constitution, and Roll Call. The tapes, revealing Gingrich engaged in conduct that may have violated the agreement, had great value for the three newspapers.

The Petitioner invokes the civil liability provisions of the Electronic Communications Privacy Act, claiming that McDermott had illegally disclosed the contents of the conference call, knowing it to have been illegally intercepted, and seeking statutory damages of \$10,000. The Court of Appeals considered McDermott's First Amendment defense, and applied the O'Brien analysis for statutes containing generally applicable, content neutral prohibitions on conduct that create incidental burdens on speech. According to the court, the statutory scheme served a substantial governmental interest in preserving personal privacy, and promoted rather than infringed freedom of speech. Furthermore, any incidental restriction on speech imposed by the statutes are no greater than what is essential to furthering that governmental interest.

SOUTHWESTERN BELL TELEPHONE COMPANY v. FCC (8th Cir. Dec. 27, 1999)

Issue: Whether or not "shared transport" is a "network element" as defined in section 153(29) of the Telecommunications Act of 1996, and if so, whether or not it must be provided on an "unbundled basis," pursuant to section 251(C)(3) of the Act.

Holding: The court held that the FCC's was correct in its decision in its Third Order on Reconsideration, *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Third Order on Reconsideration and Futher Notice of Proposed Rulemaking*, 12 FCC Rcd. 12460 (1997), declaring "shared transport" to be a "network element." However, the court vacated that portion of the Third Order on Reconsideration which requires that "shared transport" be made available on an "unbundled basis" pursuant to section 251(c)(3), and remanded for further consideration by the FCC.

Discussion: These cases came to the court on remand from the Supreme Court following vacation of the 8th Circuit's original judgment (*reported at* 153 F.3d 597). The cases were remanded to the 8th Circuit for further reconsideration in light of the Supreme Court's decision in *AT&T Corp. v. Iowa*

Utilities Board, 119 S.Ct. 721 (1999). The 8th Circuit reissued its previous opinion, reported at 153 F.3d 597, except for part II B thereof.

RT COMMUNICATIONS, INC. v. FCC — F.3d — (Jan. 13, 2000 10th Cir.)

Issue: Whether the FCC's Orders preempting reasonably interpreted § 253 (b) of the Telecommunications Act when it preempted a Wyoming telecommunications statute finding that the statute was not "competitively neutral".

Holding: The FCC reasonably interpreted § 253 (b), finding that the Wyoming statute could not be saved under this provision because it was not competitively neutral.

Discussion: In order to induce the development of telecommunications infrastructure in rural areas, the Wyoming Telecommunications Act of 1995 provided small incumbent telephone companies with a ten year period of protection from competition until had substantially recovered its investment for upgraded services in that particular area. The court agreed with the FCC's finding that the statute was not competitively neutral, because it awards certain incumbent LECs the ultimate competitive advantage- preservation of monopoly status, and simultaneously saddles potential new entrants with the ultimate competitive disadvantage- an insurmountable barrier to entry.

The court looked to *Cablevision of Boston, Inc., v. Public Improvement Commission*, 184 F.3d 88 (1st Cir. 1999), which states that § 253 (c) imposes at most a negative restriction on local authorities' choices regarding the management of their rights of way. Accordingly, the statute would not require local authorities to purposefully seek out opportunities to level the telecommunications playing field. If, however, a local authority decides to regulate for its own reasons, § 253 (c) requires that it do so in a way that avoids creating unnecessary competitive inequities among telecommunications providers.

IN RE NEXTWAVE PERSONAL COMMUNICATIONS, INC.; FCC v. NEXTWAVE PERSONAL COMMUNICATIONS, INC. 200 F.3d 43 (2d Cir. 1999)

Issue: Whether the district and bankruptcy courts exceeded their jurisdiction by in effect in-

tervening in the allocation of radio spectrum licenses and misconstrued the nature of the Appellee's financial obligations under the FCC's spectrum auction rules.

Holding: The court of appeals reversed the judgment of the district court. The court held that the bankruptcy and district courts had no power to interfere with the FCC's system for allocating spectrum licenses and that, in any event, the courts erred in determining that NextWave's payment obligation was constructively fraudulent. The court reversed the judgment of the district court affirming the five orders of the bankruptcy court and remanded for further proceeding.

Discussion: The decisions and orders of the bankruptcy court, affirmed by the district court in judgment from which the FCC appeals, held that the FCC's grant to NextWave Personal Communi-

cations, Inc. of sixty-three radio spectrum licenses for which NextWave had been the high bidder at the FCC's 1995-96 "C-block" auction was a constructively fraudulent conveyance for purposes of 11 U.S.C. § 544. The bankruptcy court, therefore avoided \$3.7 billion of NextWave's \$4.74 billion obligation to the FCC, allowing NextWave to keep its Licenses while it reorganized in bankruptcy.

The Second Circuit held that the bankruptcy court had no such authority to interfere with the FCC's system for allocating spectrum licenses. The court also found that the bankruptcy court wrongly concluded that the Licenses were fraudulently conveyed by failing to defer to the FCC's interpretation of its own regulations when determining the point at which NextWave's obligations were incurred for § 544 purposes.

