SIGNIFICANT COURT DECISIONS, 2007–2008

American Bird Conservancy, Inc. v. FCC, 516 F.3d 1027 (D.C. Cir. 2008)

Issue: Whether the Federal Communications Commission ("Commission") complied with the requirements of the Migratory Bird Treaty Act ("MBTA"), the National Environmental Policy Act ("NEPA"), and the Endangered Species Act ("ESA") in an order denying in part, dismissing in part, and deferring in part a petition seeking to protect migratory birds from collisions with communications towers in the Gulf Coast region.

Holding: The United States Court of Appeals for the District of Columbia vacated the *Order*. The court found that the Commission appropriately deferred consideration of its compliance with MBTA to an ongoing nationwide proceeding in a separate docket. Nonetheless, the court held that the Commission neither satisfied its obligations under NEPA and ESA to adequately establish the communications towers' potential environmental impact, nor provided adequate public notice of pending tower applications.

History: On August 26, 2002, the American Bird Conservancy and the Forest Conservation Council ("Petitioners") requested that the Commission inquire into the effects of "tower kill" on migratory bird populations in the Gulf Coast region. Specifically, Petitioners requested that the Commission: (1) comply with MBTA to reduce or eliminate migratory bird mortality rates at Gulf Cost tower sites; (2) prepare an environmental impact statement under NEPA analyzing the potential effects the towers could have on migratory birds; (3) consult with the United States Fish and Wildlife Services ("FWS") in accordance with ESA to determine the towers' potential impact on bird species; and (4) provide public notice of Gulf Coast tower applications before granting them.

While Petitioners' request was pending, the Commission initiated a nationwide proceeding in a separate docket to determine the effects of communications towers on migratory birds throughout the United States. On August 20, 2003, the Commission issued a *Notice of Inquiry* to compile factual evidence and investigate possible legal ramifications concerning this issue. *In re* Effects of Communications Towers on Migratory Birds, *Notice of Inquiry*, 18 F.C.C.R. 16,938 (Aug. 8, 2003). In April 2005, Petitioners filed a petition for a writ of mandamus in the United States Court of Appeals for the District of Columbia seeking to compel the Commission to act on their request. After five days of oral argument, the Commission issued the *Order* in which the migratory bird issue would be analyzed under a separate docket examining the towers' impact

at a nationwide level. *In re* Petition by Forest Conservation Council, American Bird Conservancy, and Friends of the Earth for National Environmental Policy Act Compliance, *Memorandum Opinion and Order*, 21 F.C.C.R. 4462 (Apr. 11, 2006). Accordingly, the Court of Appeals dismissed the mandamus case as moot.

In May 2006, Petitioners sought review of the *Order*. The court found Petitioners had standing as members of organizations that engage in recreational birdwatching and research on birds in the Gulf Coast region.

Discussion: MBTA makes it unlawful to "pursue, hunt, take, capture [or] kill" any migratory bird. 16 U.S.C. § 703 (2000). Petitioners contended that the Commission unlawfully "takes" migratory birds when birds die in collisions with Commission-licensed towers. The Commission responded in the *Order* that it was examining its obligation under MBTA to reduce or eliminate the number of migratory birds colliding with towers under a nationwide proceeding in a separate docket. The court reasoned that the Commission acted reasonably when it deferred consideration of the issue because the nationwide proceeding was designed to collect additional relevant information regarding an event that occurs throughout the United States.

Under NEPA, in major federal actions that significantly affect the environment, a federal agency must prepare an environmental impact statement that studies adverse environmental effects of the agency's proposed actions and examines potential alternatives. NEPA provides that federal actions impacting the environment can be divided into three categories: (1) those that require an environmental impact statement; (2) those that require a less rigorous environmental assessment; and (3) those that are "categorically excluded" and do not require an environmental impact statement or an environmental assessment. 40 C.F.R. § 1507.3(b)(2) (2006).

In accordance with Commission regulations concerning NEPA implementation, communications towers are "categorically excluded" from an environmental analysis because towers are "deemed individually and cumulatively to have no significant effect on the quality of the human environment." 47 C.F.R. § 1.1306(a) (2006). However, interested persons can request an analysis from the Commission under NEPA even for "categorically excluded" actions by filing a petition that details a justification to consider the environmental impact. *Id.* § 1.1307(c). After receiving notification of a request for an analysis, the Commission must require the tower applicant to prepare an environmental assessment if it determines the actions "may have a significant environmental impact." *Id.* § 1.1308(b). The environmental assessment, in turn, provides the Commission with the basis to determine the necessity of an environmental impact statement. *Id.* § 1.1314(a).

In the *Order*, the Commission maintained that an environmental impact statement was not required due to a lack of specific evidence concerning the towers' impact on the human environment and a lack of consensus among scientists regarding the towers' effect on migratory birds.

The court rejected both of these arguments, finding that the *Order* applied a far too stringent application of NEPA's standard for requiring an environmental impact statement. The court reasoned that the *Order's* demand for definitive evidence and a scientific consensus was inconsistent with Commission regulations and NEPA. The scientific consensus that the *Order* required contradicted NEPA's standard that the actions may have an environmental impact. Additionally, a precondition of a scientific certainty contravened NEPA's requirement that federal agencies predict the environmental impact of a proposed action before the full effects are known.

NEPA states that the Commission had a duty to produce an environmental assessment if the actions in question "may" have a significant environmental impact. Because the record demonstrated that the towers "may" have an impact on the environment, the court found that the threshold to prepare an environmental assessment had been met. Accordingly, the court determined that the Commission had a duty to at least complete an environmental assessment before rejecting Petitioners request for an environmental impact statement, and vacated the NEPA part of the *Order*.

The ESA requires federal agencies to ensure that their actions are not likely to jeopardize the existence of endangered or threatened species, or destroy or adversely affect critical habitats. 16 U.S.C. § 1536(a)(2) (2000). Federal agencies also have a duty to participate in formal consultation with the FWS if their actions "may affect" endangered or threatened species or critical habitats. 50 C.F.R. § 402.14(a)–(b) (2006).

Petitioners requested that the Commission formally consult with the FWS to determine the towers' cumulative effects on endangered and threatened species. The Commission declined, commenting that the evidence showed that towers did not have a cumulative environmental effect distinct from their individual impact on the environment. The court found this explanation inadequate. The Commission did not explain in the *Order* how Petitioners could have demonstrated a sufficient environmental impact under the ESA to compel an FWS consultation. Finding the Commission's standard for producing sufficient evidence too strict, the court vacated the ESA part of the *Order*.

The Council of Environmental Quality's regulations require federal agencies to make diligent efforts to notify the public during NEPA procedures. 40 C.F.R. § 1506.6(a) (2006). Petitioners requested that the Commission provide adequate notice of proposed tower applications to allow the opportunity to seek environmental review before any actions commenced. However, the Commis-

sion provided public notice only after approving the tower applications. The court found that, in doing so, the Commission was preventing public participation in NEPA procedures, and therefore vacated the notice part of the *Order*.

With the exception of the deferral of compliance with the MBTA, the United States Court of Appeals for the District of Columbia vacated the *Order* and remanded the case to the Commission in accordance with the requirements of NEPA and ESA. The court noted that the Commission could resolve Petitioners' request either separately or as part of the nationwide proceeding.

Summarized by Alan Kaminer

Qwest Services Corporation v. FCC, 509 F.3d 531 (D.C. Cir. 2007)

Issue: Whether the FCC's *Order*, *In re* Regulation of Prepaid Calling Card Services, 21 F.C.C.R. 7290 (June 1, 2006), determining that phone calls made from two different types of pre-paid calling cards offer "telecommunications services," thereby subjecting the providers of those cards to access charges, Universal Service Fund contributions, and other obligations under the Communications Act, should be applied retroactively from the release date of the *Order* to Internet Protocol ("IP")-transport cards but not menu-driven cards.

Holding: The United States Court of Appeals for the District of Columbia Circuit held that there was no manifest injustice in applying the *Order* retroactively to IP-transport cards. The court further held that nothing in the record justified the Commission's decision to foreclose retroactive application of the *Order's* statutory interpretation to menu-driven cards in the calculation of a provider's liability for access charges. Therefore, the court vacated the *Order* as it purported to bar such an application to the menu-driven cards.

History: Under the Communications Act of 1934, as amended by the Telecommunications Act of 1996, providers of telecommunications services are regulated as common carriers, whereas providers of information services are not. In 2003, AT&T petitioned the Federal Communications Commission ("Commission") for a declaratory ruling finding that its "enhanced" pre-paid calling cards were "jurisdictionally interstate" and provided information services. AT&T then subsequently amended its petition to include menu-driven cards and IP-transport cards for the FCC's consideration.

In 2005, the Commission released an order in response to that petition. The Commission determined that the "enhanced" cards in the original petition were telecommunication services and that the calls made with them are intrastate when they originate and end in the same state, regardless of the call's actual route. However, the Commission declined to extend its declaratory ruling to menu-driven and IP-transport cards. Instead, the Commission opened a new

docket to resolve those questions and requested comment on the proper classification of menu-driven and IP-transport cards.

The Commission released its declaratory ruling on June 30, 2006, holding that IP-transport and menu-driven cards "are telecommunications services" and thus subject to regulation as such. The Commission stated that the declaratory ruling was "a form of adjudication" and recognized that "[g]enerally adjudicatory decisions are applied retroactively." They then applied the general rule to IP-transport cards but not menu-driven cards "to avoid manifest injustice."

The Petitioners, iBasis and Qwest, did not challenge the substantive merits of this decision; rather, they attacked the Commission's decision as to the retroactive applicability of that decision. iBasis contested the decision to make the *Order* retroactive as to IP-transport cards, and Qwest contested the decision to make it prospective only as to menu-driven cards. AT&T and Verizon intervened in opposition to Qwest.

Discussion: iBasis argued that the *Order* announced a rule rather than an adjudicatory decision and thus it could not be applied retroactively. In the alternative, iBasis argued that even if the *Order* was an adjudication, its retroactive application to the IP-transport cards used before the release of the *Order* works a manifest injustice. The court rejected both of these contentions. First, the court determined that although the process that resulted in this *Order* began as a rulemaking process, the Commission split the proceeding into a dual one, half adjudicatory and half rulemaking. As such, the *Order* as applied to IP-transport cards was adjudicatory and thus applied retroactively. Secondly, the court held that the *Order* did not work manifest injustice. The court then cited the Commission's determination that the IP-transport cards offer no other capability than the ability to make a telephone call, a process that the Commission has always treated as a telecommunications service. Furthermore, the Commission had already held, prior to the release of the *Order* at issue, that IP-transport of traditional long-distance calls did not change the regulatory classification of the service at issue.

The court next determined the retroactive application of the ruling to menu-driven calling cards. First, the Commission determined whether Qwest had standing to challenge the *Order* on this basis. The court discussed the fact that the Commission's opinion on retroactivity is not the final word, and that disputes over the collection of tariff charges often proceed before state agencies or in federal district court, not in front of the Commission. However, the court held that Qwest's continuing dispute with Verizon created sufficient injuries to sustain Qwest's standing in the present case.

The court then considered whether the FCC's prospective application of the *Order* was in error. In issuing the *Order*, the Commission believed that retroactivity would work a manifest injustice for four reasons: (1) a baseline lack of

clarity in the law; (2) a further obfuscation of the applicable law supposedly wrought by the Commission's NPRM; (3) the intervention and clarifying force of the Supreme Court's decision in *Brand X*; and (4) the possible reliance of menu-driven prepaid calling card providers on all uncertainty. The court found the Commission's arguments unpersuasive. The Commission offered no plausible grounds to overcome the presumption of retroactivity and offered no other reason for precluding retroactive application of statutory interpretation. Therefore, the court vacated the *Order* with regard to the prospective-only applicability to menu-based calling cards.

Summarized by Joseph Carlson

Sprint Nextel Corp. v. FCC, 508 F.3d 1129 (D.C. Cir. 2007).

Issue: Whether the Federal Communications Commission's ("FCC") failure to adopt an order granting or denying the Verizon telephone company's ("Verizon") petition for forbearance from regulatory requirements affecting its broadband service has the effect of denying the petition, and whether a grant of a petition for forbearance as a result of the Commissioner's deadlock constitutes judicially reviewable agency action.

Holding: The United States Court of Appeals for the D.C. Circuit held that a deadlocked Commission vote constitutes neither an order nor an agency action, thereby making the grant of Verizon's petition for forbearance unreviewable.

History: Verizon filed a petition to exempt its broadband services from several regulatory requirements in Title II of the Communications Act of 1934 ("Communications Act" or "the Act"). On this issue, the Commissioners were unable to come to a consensus before the statutory deadline. As such, the petition was deemed granted per 47 U.S.C. § 160(c). Sprint Nextel and other communications companies ("Petitioners") sought judicial review of the grant.

Discussion: The Petitioners argued that a deadlocked vote effectively denied the petition. Alternatively, they argued that a grant resulting from a failure to deny within the statutory period constituted agency action that should be found arbitrary and capricious and, therefore vacated. The court began by noting that the Administrative Procedure Act ("APA") renders final agency action subject to judicial review by the appellate courts.

In arguing that a deadlock vote has the effect of denying a petition for forbearance, Sprint cited similar provisions from both the courts and the legislature that provide for the preservation of the status quo in the event of an equal split among voters. The court, however, failed to see how the FCC acted in this matter; on the contrary, the FCC's lack of action triggered the statutory provision that deemed the petition granted. The legal effect of the statutory provi-

sion at issue here, 47 U.S.C. § 160(c), was created by Congress in the event of an FCC deadlock. Therefore, it is Congress's action that grants the petition, not the FCC's.

The court found support for its reasoning in *AT&T Corp. v. FCC*, 369 F.3d 554 (D.C. Cir. 2004), in which the D.C. Circuit addressed the expiration of regulatory safeguards for long distance telephone service providers. The statute in that case had a similar sunset provision in which the regulation would cease to exist after three years unless the FCC extended it by rule or order. 47 U.S.C. §272(f)(1) (2000). The FCC issued a public notice that it would allow the statute to sunset for Verizon, and AT&T petitioned the D.C. Circuit for review. The court in *AT&T Corp.* held that the decision to allow the sunset of the regulation was made by Congress by operation of law. *AT&T*, 369 F.3d at 559. The court in the present matter found that the same holds true for forbearance provision—when the Commission failed to act in a timely fashion, Congress's decision took effect.

The court also found that the FCC's press release announcing the grant of Verizon's petition of forbearance did not itself constitute an agency action. In comparing the press release to the public notice in *AT&T Corp.*, the court found that it merely served an informational purpose and imposed no obligations. Furthermore, the court found that the Commissioner's individual statements accompanying the press release were not reviewable as they are not FCC actions.

The fact that the FCC took no action is further accentuated by a provision in the APA that instructs courts to set aside agency actions found to be arbitrary and capricious or an abuse of discretion. It is not enough for the court merely to agree with the agency action's outcome. The court must also agree with the reasoning behind the decision or it may send the decision back to the agency to either fix the reasoning or change the outcome. In this case, regarding the forbearance provision, the court found that the FCC did not provide reasoning in support of the Commissioners' individual statements that accompanied the press release.

Lastly, the court addressed the Petitioners' concerns that failure to have judicial review of this forbearance provision will allow the FCC to evade any judicial review of future forbearance petitions by simply refraining to act on them. The Commissioners are appointed by the President with the consent of the Senate, and absent any evidence of abuse of the provision it will be assumed that FCC review of forbearance petitions is proper.

Summarized by Jonathan Campbell