
MAJOR COURT DECISIONS, 2008

Alliance for Community Media v. FCC, 529 F.3d 763 (6th Cir. 2008)

Issue: Whether the Federal Communications Commission (“Commission” or “FCC”) had the authority to adopt an *Order* interpreting a provision of the Communications Act of 1934 and whether the contents of the *Order* merited judicial deference pursuant to *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984), or if the Commission’s rulemaking activity in promulgating the *Order* was arbitrary, capricious, or an abuse of discretion.

Holding: The United States Court of Appeals for the Sixth Circuit denied petitioners’ review of the *Order*, finding that the Commission was authorized to draft rules implementing a section of the Communications Act that contained no reference to the FCC but did provide for a judicial review remedy. Furthermore, the court gave judicial deference to FCC’s construction since the term “unreasonably” in the statute was found to be ambiguous. Next, the court held that the four rules articulated in section 621, were reasonable and permissible statutory construction. Finally, the court found that the FCC did not act arbitrarily or capriciously in drafting this rule.

History: Local Franchising Authorities (“LFAs”) and the Commission have both sought to exert their influence in regulating cable. In 1984, Congress passed the Cable Communications Policy of 1984 as an amendment to the Communications Act. By inserting Title VI provisions into the Communications Act, the legislation was intended to establish a national policy clarifying the regulation of cable television. The Commission was granted exclusive jurisdiction over cable services while the LFAs had the authority to award cable franchises. In 1992, Congress again intervened by enacting the Cable Television Consumer Protection and Competition Act, revising section 621(a)(1) of Title VI to specify that an LFA may grant “one or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise.” Congress provided for a judicial remedy by allowing applicants to bring an action before federal or state court within 120 days after receiving a final, adverse decision from an LFA.

Subsequently, the FCC initiated a rulemaking, inviting comment on two issues: whether the franchising process’ goals of “enhanced cable competition and accelerated broadband deployment” were being unreasonably obstructed, and what constitutes an “unreasonable refusal to award an additional competitive franchise under section 621(a)(1).” After receiving and reviewing comments filed by new entrants, incumbent cable operators, LFAs, and consumer

groups, the FCC adopted the *Order* which not only established the FCC's rule making authority to implement provisions of the Communications Act, but also established five rules meant to clarify the meaning of the word "unreasonable" within section 621(a)(1). The rules regarded time restrictions on competitive application decisions, build-out mandates, franchise fees, public, educational and governmental ("PEG") channel access, and an LFA's inability to refuse a franchise based on issues unrelated to cable services.

Discussion: Petitioners contended that Congress never delegated power to the FCC to interpret section 621(a)(1). The court examined section 201(b), an amendment to the Communications Act, which provided that the Commission could prescribe rules as necessary and in the public interest to carry out the Act. The FCC has jurisdictional authority to formulate rules interpreting section 621(a)(1). Petitioners further asserted that Congress intended the courts to serve as the only other body with jurisdiction over section 621(a)(1). The court reasoned that the courts retain their jurisdiction to hear appeals involving denials of franchise applications, but that the LFAs are better suited to deal with what is reasonable in terms of franchise distribution.

After determining that the Commission had underlying authority to issue the *Order*, the court turned its attention to whether the contents of the *Order* merited judicial deference to administrative interpretations pursuant to *Chevron USA v. Natural Resources Defense Council*, 461 U.S. 956 (1983). *Chevron* articulated a two-step inquiry to determine if judicial deference is warranted. First, the court must ask whether the statute is silent or ambiguous on the issue at hand. If so, the court must determine whether the agency's answer is based on a permissible construction of the statute. The court reasoned that the language of section 621(a)(1) is ambiguous since it is capable of many meanings. In order to give meaning to the phrase "unreasonable denial," a specific factual scenario is required.

The court next addressed the reasonableness of each of the *Order's* rules. Petitioners urged the court to reject the time frame within which LFAs must rule on the applicant's proposals as "impermissible construction of the statute" since the statute is silent on the issue. Under *Chevron*, Congress is presumed to have left to the Commission's discretion questions that it did not directly address. Petitioners next argued that the Commission's restrictions on build-out requirements are unreasonable. The court rejected this notion by holding that this limitation on the authority of LFAs was reasonable. The third rule indicates that incidental charges unrelated to the provision of cable services made to new competitive entrants are subject to the statutory 5% franchise fee cap. The court examined three district courts' independent yet similarly decided interpretations of "incidental to" in determining that the interpretation and rule represent reasonable constructions of the statute. In deciding the fourth rule

regarding PEG requirements the court assessed the petitioners' argument that the Commission distinguished between PEG facilities and PEG equipment. The petitioner argued that the statutory language "capital costs" excludes equipment, but the court considered the Commission's assurance that the definition of capital costs could encompass equipment if it relates to the construction of facilities.

Petitioners next contended that the Commission's rulemaking activity was arbitrary and capricious. The court considered whether the Commission had relied on factors Congress would not have intended or offered an explanation for its decision that ran counter to evidence before the Commission. The Commission reviewed over 400 comments which cumulatively articulated the variety of methods retained by LFAs that contributed to excessive delay in granting new franchises. Therefore, the evidence before the Commission was enough to support its rulemaking.

Summarized by Jennifer Childs

CBS Corp. v. FCC, 535 F.3d 167 (3d Cir. 2008)

Issue: Whether the Federal Communications Commission ("FCC") acted arbitrarily and capriciously in determining that CBS Co.'s ("CBS") broadcast of a fleeting image of nudity during the Super Bowl XXXVIII Halftime Show was actionably indecent, and whether the FCC properly found that CBS violated the indecency provisions of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999 under three theories of liability: traditional respondeat superior doctrine, an alternative theory of vicarious liability based on CBS's duties as a broadband licensee, and the "willfulness" standard of the forfeiture statute.

Holding: The United States Court of Appeals for the Third Circuit held that the FCC's policy to exempt fleeting or isolated material from the scope of actionable indecency was still in effect.

CBS was not held liable under respondeat superior doctrine for the performers' actions because the performers were independent contractors rather than employees. The First Amendment precluded CBS from being strictly liable for its contractors' actions based on its duties as a broadcast licensee. Additionally, the court held that further clarification was needed from the FCC to establish if CBS is directly liable for a forfeiture penalty under 47 U.S.C. §503(b)(1)(B) for failing to take adequate precautionary measures to prevent potential indecency during the Halftime Show. Thus, the court vacated the orders of the FCC and remanded for further proceedings consistent with its opinion.

History: In response to CBS's live broadcast on February 1, 2004 of the Super Bowl XXXVIII Halftime Show, which included Justin Timberlake tearing

away part of Janet Jackson's costume, revealing her bare breast on camera for less than one second, the FCC issued a *Notice of Apparent Liability* on September 22, 2004, finding that CBS had apparently violated federal law and FCC rules which restricted the broadcast of indecent material. CBS subsequently submitted its *Opposition* to the *Notice of Apparent Liability* on November 5, 2004.

After concluding that the Halftime Show broadcast was indecent because it depicted a sexual organ and violated "contemporary standards for the broadcast medium," the FCC issued a forfeiture order of \$500,000 over CBS's *Opposition* on March 15, 2006. Additionally, the FCC determined that CBS's actions in broadcasting the Halftime Show were "willful" and thus sanctionable for a monetary forfeiture under 47 U.S.C. § 503(b)(1).

CBS submitted a Petition for Reconsideration under 47 C.F.R. § 1.106 arguing against the FCC findings. In its *Reconsideration Order*, the FCC rejected the statutory and constitutional challenges CBS presented in the petition and reaffirmed its imposition of a \$550,000 forfeiture. CBS filed a subsequent petition for review challenging the FCC's orders.

Discussion: Although the FCC possesses the authority to regulate indecent broadcast content under 18 U.S.C. § 1464, it has been very restrained in exercising this authority. Its longstanding policy was to exempt fleeting or isolated material from the scope of actionable indecency, which was still in effect at the time of the Halftime Show incident. However, the FCC alleged that its fleeting policy applied only to expletives and not to images. The court determined that the FCC's alleged distinction between words and images was a departure from its prior policy, because the FCC had consistently applied identical standards when reviewing complaints of potential indecencies for both.

Responding to an incident at the 2003 Golden Globe Awards involving the broadcast of fleeting expletives the FCC changed its policy in March 2004. Although it established that licensees could be held liable for broadcasting fleeting material, the FCC stated that this new policy would not be applied retroactively. The FCC cannot change its policies without supplying notice and a reasoned explanation to the public. Thus, because CBS broadcast this Super Bowl Halftime Show before the policy change, the FCC's prior policy exempting fleeting or isolated material from the scope of actionable indecency was still in effect.

The court also examined whether the FCC correctly determined CBS's liability for Jackson's and Timberlake's Halftime performance under three theories of liability. Under the traditional respondeat superior doctrine, the court considered the factors established in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), to determine whether Jackson or Timberlake qualified as employees of CBS or independent contractors. The court determined

that the FCC erred in finding Jackson and Timberlake as employees by considering exclusively the “right of control” factor and not other factors, such as the skill required of the hired party, whether the hiring party has the right to assign additional projects, and the method of payment. In balancing such factors, the court held that Jackson and Timberlake were independent contractors rather than CBS employees.

The second theory of liability presented by the FCC was that CBS may be held liable for its independent contractors based on its duties as a broadcast licensee. These duties include the non-delegable duties to avoid the broadcast of indecent material and to operate in the public interest. Although such duties are defined by statute under 18 U.S.C. § 1464 and by corresponding agency rule, 47 C.F.R. §73.3999(b), the First Amendment precludes CBS from being held strictly liable for an indecent broadcast. Because these provisions sanction and therefore could infringe upon of free speech, a First Amendment analysis requires that the FCC prove scienter when it seeks to hold a broadcaster liable for indecent material. Thus, because the FCC’s non-delegable duty theory essentially equates to strict liability for speech or expression of independent contractors, the court also rejected this theory of liability.

Finally, the FCC argued that CBS was directly liable for a forfeiture penalty under 47 U.S.C. §503(b)(1)(B) for failing to take adequate measures to prevent potential indecency during the Halftime Show, thus constituting a “willful” violation of the indecency provision. CBS contended that it took precautionary measures via its script and wardrobe reviews and additionally, implemented a standard-industry-practice audio delay. The FCC disputed the adequacy of these efforts by contending that CBS should have instituted a video delay mechanism to guard against potential displays of indecency. Because the FCC needed to demonstrate at a minimum that CBS acted recklessly when it failed to implement a video delay mechanism, the court was unable to decide whether CBS’s actions in the Halftime broadcast were willful. The FCC has appealed the decision to the Supreme Court.

Summarized by Rose Acoraci

***In re Core Commc’ns, Inc.*, 531 F.3d 849 (D.C. Cir. 2008)**

Issue: Whether to issue a writ of mandamus that would force the Federal Communications Commission (“Commission”) to issue an *Order* explaining the legal authority behind its rules on the intercarrier compensation scheme for telecommunications traffic bound for Internet service providers (“ISPs”).

Holding: The United States Court of Appeals for the District of Columbia Circuit granted a writ of mandamus forcing the Commission to respond to the

remand issued by the court in 2002 that required the Commission to justify their rules on intercarrier compensation.

History: Prior to the availability of broadband Internet access, “dial-up” connections were the primary means of accessing the Internet. When using a dial up connection, the consumer used a telephone line—likely provided by an incumbent local exchange carrier (“ILEC”)—placed a call to the ISP’s local phone number who in turn connected the consumer to the Internet. Usually, however, the ISP did not have a relationship the ILEC, but instead used a competitive local exchange carrier (“CLEC”) to connect its calls. Thus, when a consumer placed a call through an ILEC to an ISP, the call had to be transferred to the CLEC. The dispute in the case involved the allocation of fees from the call.

The governing law, section 251(b)(5) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, calls for a reciprocal compensation arrangement. Under this arrangement, ILECs would be required to compensate CLECs for the calls they make on behalf of the ILECs to the ISPs, but the Commission determined that section 251(b)(5) was only applicable to traffic beginning and ending in a local area. In a *Declaratory Ruling*, the Commission determined that ISP traffic was not local traffic, but instead interstate traffic and governed by 47 U.S.C. § 201. Under section 201, interstate traffic is not subject to the reciprocal compensation requirement.

In *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000), the D.C. Circuit Court of Appeals rejected the Commission’s explanation that ISP-bound traffic was non-local. Specifically, the court vacated and remanded the *Declaratory Ruling* mandating that the Commission come up with another reason to support its conclusion that ISP calls were non-local. In response, the Commission issued its *ISP Remand Order* and again determined that ISP calls were not “subject to the reciprocal compensation obligations of § 251(b)(5).” This time the Commission based its rationale on 47 U.S.C § 251(g). Under the Commission’s reasoning, § 251(g) excluded ISP calls from the reciprocal compensation requirement of § 251(b)(5) because such calls constituted “information access” and were thus regulated by the Commission under its 47 U.S.C. § 201 authority. Recognizing the need to create a workable intercarrier compensation regime, the Commission issued a *Notice of Proposed Rulemaking* at the same time it issued the *ISP Remand Order* that suggested a bill-and-keep regime. However, this regime was not instituted immediately, and instead, the Commission adopted an interim method of compensation, which was supposed to last for three years.

In 2002, the *ISP Remand Order* was rejected in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), on the basis that section 251(g) did not support the removal of ISP traffic from the reciprocity compensation requirement. *In*

re *Core Commc'ns*, 531 F.3d at 853. Nevertheless, because the court believed other legal authority supported the interim method of compensation prescribed by the order it only remanded the *Order* and did not vacate it. As a result, the interim compensation regime remained in place.

In 2003, Core Communications (“Core”), a CLEC, sought forbearance from four of the interim provisions of the *ISP Remand Order* because of their detrimental effect on Core. The Commission granted in part and denied in part the petition; the Commission’s finding was later affirmed. In 2004, Core petitioned for a writ of mandamus because the Commission had yet to respond to the remand issued in *WorldCom* two years prior. During the adjudication of this petition, the Commission argued that they had recently taken up the intercarrier compensation issue and sought to replace the interim rules with permanent rules. Persuaded by this assertion, the court forewent issuing the mandamus and instead denied Core’s petition “without prejudice to refiling in the event of significant additional delay.”

In April 2006, the Commission had yet to respond to the *WorldCom* remand or issue permanent compensation rules. Thus, Core filed their second forbearance petition with the Commission. The FCC rejected this petition, and Core appealed. Core subsequently filed its second mandamus petition in October 2007, asking the court to “compel the FCC to enter an order . . . responding to [the] *WorldCom* remand with an explanation of the legal basis for the rules that exclude ISP-bound calls from the reciprocal compensation requirement of § 251(b)(5).” Core also requested that if the Commission did not issue an order, the current interim rules would be vacated.

Discussion: Core sought a writ of mandamus under the All Writs Act to compel the Commission to act. Such a writ is appropriate to compel agency action that has been unlawfully withheld or unduly delayed. The court noted that issuing a writ of mandamus is an extraordinary remedy and only appropriate “for the most transparent violations of a clear duty to act.” The Commission had a clear duty to respond to its remand order issued in *WorldCom*, but the court had to determine if the Commission’s delay was unreasonable. According to the court, to be unreasonable, an agency’s “delay [must be] so egregious as to require a mandamus.”

To make this determination, the court first outlined the six factors described in *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 709 (8th Cir. 1984) (“*TRAC*”). However, the court noted that because of the unique procedural posture of the *Core* case, which effectively insulated the Commission’s decisions from further review and prevented Core from challenging the current intercarrier compensation rules absent a mandamus action, the *TRAC* factors alone would not be dispositive. Therefore, in addition to the six *TRAC* factors the court also examined two precedents similar to the case at hand in which the

court ordered an agency to act after the agency refused to respond to a previous court ruling. See *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026 (D.C. Cir. 1983); *Radio-Television News Directors Ass'n v. FCC*, 229 F.3d 269 (D.C. Cir. 2000).

Based on *Potomac Electric Power Co.* and *Radio Television* coupled with the *TRAC* factors, the court concluded that issuing a writ of mandamus was appropriate. Specifically, the court found that the first *TRAC* factor that a “rule of reason” governs the time an agency takes to make a decision, and the fifth *TRAC* factor, which looks to the interests prejudiced by delay, was decidedly in Core’s favor. These factors paired with the court’s precedents requiring agency action in similar circumstances, justified the court’s decision.

The Commission argued that the court should not issue the writ because of rulemaking proceeding on intercarrier compensation, but the court found this argument unpersuasive. The Commission also contended that they had recently made an important first step in intercarrier compensation reform, and the Chairman stated he would do everything possible to respond to the remand issued in *WorldCom* within six months. However, the court found these arguments unavailing as well. Finally, the court stated it could not wait for the decision Core’s appeal of the Commission’s denial of forbearance, because this would not address the retroactive relief available to Core nor would it address the Commission’s failure to comply with the mandate to provide a legal basis for their rules.

In deciding the case, the court issued a writ of mandamus stating that the Commission had six months to provide legal authority for the interim rules. If no authority was provided, the court would presume that no such authority existed and the interim rules would be vacated. The court required the Commission to form a “final, appealable order that explains the legal authority for the Commission’s interim intercarrier compensation rules that exclude ISP-bound traffic from the reciprocal compensation requirement of § 251(b)(5).” The Commission responded to the writ on November 4, 2008, one day before its deadline, but the text of the order has not been made public as of the date of this publication.

Summarized by Sara Connor