MAJOR COURT DECISIONS, 2009

Comcast Corp. v. FCC, 579 F.3d 1 (D.C. Cir. 2009)

Issue: Whether the thirty percent subscriber limit cap for cable television operators adopted by the Federal Communications Commission ("Commission" or "FCC") is arbitrary and capricious in violation of the Administrative Procedure Act.

Holding: The court concluded that the FCC's rule was arbitrary and capricious, and thus vacated the rule. The court determined that the FCC did not account for Direct Broadcast Satellite ("DBS") companies when mandating a thirty percent subscriber limit cap for cable operators as the court had previously directed the Commission to do.

History: Under section 533(f)(2)(A) of the Cable Television Consumer Protection and Competition Act of 1992 ("*1992 Cable Act*"), the FCC is directed to promulgate "rules and regulations . . . [to] ensure that no cable operator or group of cable operators can unfairly impede . . . the flow of video programming from the video programmer to the consumer." Furthermore, section 533(f)(2)(E) directs the FCC to ensure that its "rules and regulations reflect the dynamic nature of the communications marketplace." Using its statutory authority, the Commission enacted rules that set a subscriber limit cap of thirty percent.

After the passage of the *1992 Cable Act*, many cable operators argued that the subscriber limit provision violated the First Amendment of the U.S. Constitution as a content-based speech restriction. In *Time Warner Entertainment Co. v. United States* (*"Time Warner I"*), 211 F.3d 1313 (D.C. Cir. 2000), the court upheld the provision because the limit was not "unnecessary or unnecessarily overburdensome" on the First Amendment right to free speech.

The Commission had described in the *Fourth Report and Order and Further Notice of Proposed Rulemaking* ("*Fourth Report*") that adopted a revised version of the thirty percent cap and established the limit through their "open field" analysis, the standard to be used to determine whether a network would "have access to alternative [video programming distributors] of sufficient size to allow it to successfully enter the market, if it were denied carriage by one or more of the largest cable operators." Under this approach, the FCC assigned values to three variables: first, "the number of viewers a network must reach to be economically viable"; second, the "total number of subscribers"; and third, the "percentage of viewers an average cable network reaches once a cable operator chooses to carry it."

In 2001, Time Warner petitioned for a review of a modified version of the cap which maintained a level of thirty percent. In *Time Warner Entertainment Co. v. FCC*, (*"Time Warner II"*), 240 F.3d 1126 (D.C. Cir. 2001), the court granted the petition on the basis that evidence did not exist of cable operators not permitting carriage of video programmers. Furthermore, the court found that the record did not support a finding that two or more cable service providers "unfairly imped[ed]" consumer access to video programming, under section 533(f)(2)(A). The court directed the Commission to take into consideration the effect of DBS companies' increasing ability to determine the economic viability of cable networks. The Commission then adopted the thirty percent subscriber limit at issue, to prevent an individual cable operator from causing a programming network to fail "by simply refusing to carry [it]. . . ."

Under *Time Warner II*, the court indicated that the subscriber limit could not be set at less than sixty percent. In determining the thirty percent subscriber limit the *Fourth Report* adopted, the FCC calculated the minimum subscriber number a programming network would need to reach in order to achieve a seventy percent chance of survival for five years. The final calculation for a network to be viable was held to require an open field of seventy percent, significantly higher than the forty percent level determined in 1999. Accordingly, the Commission determined that a cable operator should not be able to serve more than thirty percent of all subscribers. However, the FCC believed that adjusting the subscriber limit to account for competition from DBS companies would be overly complicated and also found that DBS competition was insignificant because customers were reluctant to switch from cable service to DBS.

Discussion: First, the court dismissed the Commission's claim that Comcast had not show an actual or imminent injury. The court found that Comcast had standing based on Comcast's claim that the thirty percent subscriber cap restricted the company's economic growth.

The court observed that an agency rule is to be vacated only if it "was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" In order to uphold the thirty percent subscriber cap, the court would have to find that the Commission had studied the relevant data and explained its action in a satisfactory manner.

Comcast argued that the FCC failed to consider the growing influence of DBS operators. Under *Time Warner II,* the court asserted the increasing importance of DBS as integral to the Commission's consideration in determining a subscriber limit in accordance with the market. The court determined that the Commission utilized only one of the three variables in the "open field" analysis—the total number of subscribers—and failed to take competition from DBS operators into consideration. In addition, Comcast argued that the Commission's use of a dataset that ended in 2001 did not account for the market growth of DBS companies from eighteen percent to thirty-three percent in the six year period prior to the Commission's enactment of the subscriber cap rules. The Commission attempted to validate the exclusion of DBS penetration in determining penetration rate by asserting that the data would not have been influential in changing the final penetration rate.

The FCC attempted to address the court's prior order in *Time Warner II* that it consider the influence of DBS competition. The FCC provided four reasons why cable subscribers would be reluctant to switch to DBS. First, the Commission asserted that switching from a cable service to a DBS provider would be costly. The court rejected this argument, citing Comcast's evidence that "almost 50% of all DBS customers formerly subscribed to cable." Second, the FCC argued that while cable operators offer telephone and Internet access, DBS providers do not, and therefore customers are not likely to switch services. The court found the Commission failed to provide evidence showing that a substantial number of customers do not subscribe to DBS for this reason. Third, the FCC stated that consumers can only determine the quality of video programming upon viewing. The court rejected this argument because consumers can determine the quality of video programming through media advertisements and the Internet. Finally, the Commission asserted that a new network will be unable to attain financing without a contract with a cable operator that serves more than thirty percent of the market. The court found this argument unpersuasive because DBS providers had already achieved a market penetration of greater than thirty percent.

The court concluded that the increased competition among video providers, as well as the increase in cable networks, supported the position that competition in the video programming marketplace was increasing. The court found that the Commission failed to "examine[] the relevant data and articulate[] a satisfactory explanation for its action," and held that the FCC acted arbitrarily and capriciously in concluding that a thirty percent cap was necessary to avoid a threat to programming competition.

Summarized by Vineetha Pillai

Ad Hoc Telecommunications Users Committee v. FCC, 572 F.3d 903 (D.C. Cir. 2009)

Issue: Whether the Federal Communications Commission ("Commission" or "FCC") orders granting AT&T, Embarq, and Frontier partial forbearance from dominant carrier pricing regulations for their special access broadband lines was arbitrary and capricious under the Administrative Procedure Act

("APA").

Holding: The United States Court of Appeals for the District of Columbia Circuit denied the petition for review, holding that the FCC's decision to grant forbearance to the Incumbent Local Exchange Carriers ("ILECs") was reasonable and in the public interest. The court found the FCC's decision to strip away the dominant-carrier price regulations, but retain common-carrier price regulations, to be just and not unreasonably discriminatory against the ILEC's competitors in the market.

History: Communications law traditionally regulated phone services and cable services under different standards. Title II of the Communications Act of 1934 governed wireline phone service and common-carrier regulations. Title VI governed cable services, which granted an exemption from common carrier regulation. However, modern residential broadband services no longer fit within these classifications, as both telephone and cable operators are capable of providing broadband access. The FCC removed common carrier regulations from residential broadband service provided by Digital Subscriber Line ("DSL") through telephone companies or provided by cable modem service through cable operators.

Business customers, however, typically can only access broadband through a "dedicated high-capacity special access line owned by an ILEC." Since only one ILEC typically controls the special access line to a particular business, concerns arose that an ILEC may act unfairly in overcharging rates or discriminating against third party broadband services attempting to lease the special access lines. The FCC determined that Title II common-carrier regulations generally still apply to special access lines owned by ILECs, unless the FCC grants forbearance from such regulations. With Title II regulations in effect, dominant carriers are then subject to additional pricing regulations, including price caps and rate-of-return policies.

In 1996, Congress passed the Telecommunications Act, including section 706 to direct the FCC's regulation of both the residential and business broadband markets. Congress provided that the Commission should seek to increase competition and reduce regulation in the broadband marketplace. To achieve that goal, section 706, along with section 10 of the Communications Act, gives the FCC the tool of forbearance, which it must utilize if enforcement "is unnecessary to ensure that rates and practices are just, reasonable, and not unreasonably discriminatory," and if it will enhance competition in the marketplace.

The FCC traditionally imposed both common-carrier and dominant-carrier regulation on ILECs for their special access lines for businesses. In 2004, Verizon became the first ILEC to petition the FCC by seeking forbearance from the regulations. One year later, this request was deemed granted after the Commission could not break a tied vote. In 2006, AT&T, Embarq, and Frontier also sought forbearance, claiming that the costs of both dominant-carrier and common-carrier price regulations impeded their ability to compete in the broadband service market.

The FCC granted AT&T, Frontier, and Embarq partial forbearance in 2007, exempting the ILECs from dominant-carrier regulations, while maintaining Title II common-carrier regulations. In response to the ruling, several competitors and a trade association ("petitioners") contested the FCC's decision, arguing that the Commission should have denied forbearance to the ILECs and upheld the dominant-carrier price regulations.

Discussion: The court reviewed whether the FCC's decision was arbitrary and capricious under the APA, a deferential standard, especially in consideration of the Telecommunication Act's language granting the FCC broad authority to decide how to best regulate or deregulate broadband markets.

The petitioners argued that in granting the partial forbearance, the FCC should have examined the impact of deregulation in local markets, rather than focusing too broadly on the nationwide broadband market. Because ILECs still control most business broadband connections, nationwide competition among service providers who may lease the access lines is presumably irrelevant. The court rejected this claim and cited the "rapidly changing state" of the marketplace and the high level of discretion Congress had given to the FCC pursuant to section 706 of the Telecommunications Act that allows the Commission to examine the larger broadband marketplace not confined to smaller geographic divisions.

Second, the court examined the petitioners' argument that the FCC's grant of forbearance would allow ILECs to exercise discriminatory control over competitors in the broadband market regarding the use of their special access lines to businesses. However, the court noted that the FCC specifically recognized the potential for an abuse of power in local markets. As a result, the FCC maintained Title II common-carrier restrictions, which mandate that ILECs "provide interstate telecommunications services upon reasonable request and prohibit [the ILECs] from acting in an unjust or unreasonable manner . . . ."

Third, the petitioners claimed that ILECs may escape their Title II obligations and discriminate against them. Rejecting this claim, the court notes that the competitive broadband service providers who lease the ILECs' special access lines still have procedural protections under 47 U.S.C. § 208. The statute establishes a "fast-track process" to challenge the fairness of ILECs leasing rates, mandating a maximum of five months to resolve the dispute.

Fourth, the court noted that the FCC's forbearance grant was also limited in that the Commission declined to exempt ILECs from price regulations governing their Time Division Multiplexing ("TDM")-based special access services. This distinction allows competitors another avenue of redress if ILECs choose to discriminate. By using price controlled TDM-based services, competitors can compete against the ILECs in providing special access services to businesses. The court reasoned that by providing dominant-carrier forbearance, competitive carriers now have an greater ability to deploy their own special access lines and increase competition by lowering their dependence on ILECs.

Finally, the court noted that a Special Access Rulemaking Proceeding that seeks to address general concerns about discriminatory practices regarding the use of special access lines still remains open at the Commission. Affected parties can voice their opinions and continue to shape broadband policy to ensure that the FCC makes changes based on market conditions and policy interests in this area. The court viewed the Commission's decision as reasonable and not arbitrary nor capricious, and thus denied the petition for review.

Summarized by Rahul Bhanot

National Cable & Telecommunications Association v. FCC, 567 F.3d 659 (D.C. Cir. 2009)

Issue: Whether the *2007 Exclusive Service Contracts Order* ("*2007 Order*") adopted by the Federal Communications Commission ("Commission" or "FCC") that banned exclusivity agreements between cable companies and owners of multiple dwelling units ("MDUs") exceeded the Commission's statutory authority under section 628 of the Communications Act and violated provisions of the Administrative Procedure Act ("APA").

Holding: The court held that the statutory language and the legislative history of section 628 supports the Commission's ban of exclusivity contracts between cable companies and MDU owners. The court also held that because the Commission's actions merely "impaired the future value of past bargains" and did not retroactively change a rule, the Order did not violate the APA.

History: The Commission considered prohibiting exclusivity agreements in its *2003 Inside Wiring Order* ("*2003 Order*"), but ultimately decided sufficient evidence did not exist to demonstrate that such agreements were anticompetitive. In that decision, the Commission explicitly noted that "[b]ecause we are not banning or capping exclusive contracts, we also decline to address arguments pertaining to the Commission's authority to do so."

The FCC's *2007 Order* specifically addressed exclusivity agreements between cable companies and MDU owners. In the *2007 Order*, the Commission examined the effect of exclusivity agreements on competition among multichannel video programming distributors ("MVPDs"). The FCC determined that more Americans were living in MDUs, with a large percentage of minority populations making up this demographic. The *2007 Order* balanced the harms and benefits of exclusivity agreements to consumers and found that "exclusivity clauses inhibit competition . . . [and] deny MDU residents the benefits of increased competition, including lower prices and the availability of more channels with more diverse content, as well as access to alternative providers of broadband facilities and the triple play of communications services their facilities support." The Commission found that such agreements discourage new entry, inhibit competition, limit consumer choice, slow broadband deployment, and therefore should be prohibited under section 628, which regulates unjust practices and fair dealing in the MVPD marketplace. Petitioners, a cable industry group and a real estate industry group, challenged the Commission's authority to ban exclusivity agreements under section 628 and argued that the ban violated the APA.

Discussion: Congress passed section 628 to encourage competition between cable companies. Section 628(b) made it unlawful for cable companies "to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."

The court found that petitioners narrowly read the legislative history of the statute as having the specific purpose of increasing competition between cable companies for programming. Petitioners argued that the FCC overstepped its authority under the statute by regulating something other than programming; namely, exclusivity agreements. These contractual agreements between cable companies and MDU owners were an aspect of a cable company's ability to *service* customers; they did not affect a consumers' choice of programming, the petitioners argued. In response, the Commission admitted that Congress' main goal in passing the statute was to increase competition between cable companies for programming.

However, the Commission argued that section 628's text, structure, and legislative history could be permissibly read to allow the FCC to regulate "reasonably comparable" anticompetitive practices by cable companies. One example of such an anticompetitive practice was an exclusive agreement between a MDU owner and a cable operator that prohibited other cable operators from servicing the building.

The court upheld the Commission's interpretation of section 628(b) under the deferential standard set forth by the Supreme Court in *Chevron U.S.A. v Natural Resource Defense Council,* 467 U.S. 837 (1984). The Commission satisfied the deferential standard because it considered the effect of retroactivity, and found that it was in the public interest to prohibit such contracts from continuing in existence. Applying the *Chevron* test, the court found that the

Commission's interpretation of the statute was not "unambiguously foreclosed" by its text, structure, or history. Furthermore, the court found that because exclusivity agreements have the "purpose and effect of hindering delivery of . . . programming," the Commission's interpretation of section 628 was well within its administrative discretion.

The court then addressed the petitioners' argument that the *2007 Order* violated the APA because although the Commission addressed exclusivity contracts, the FCC did not ban them in the *2003 Order*. Petitioners claimed that because competition had only increased since the *2003 Order*, the Commission's decision to ban exclusivity agreements at this stage violated the arbitrary and capricious standard of the APA. The court disagreed, holding that "an agency is free to change its mind so long as it supplies a reasoned analysis," and that the Commission showed such a thorough analysis of its regulatory shift.

Finally, petitioners claimed that applying the FCC's decision to exclusivity agreements currently in force, instead of limiting the *2007 Order* to future exclusivity agreements, was barred by the APA's requirement that agency rules be prospective only. The court held that the actual effect of the decision was indeed a "future effect" because it only altered an expectancy interest in the future viability of such a contract rather than making "past actions illegal or otherwise sanctionable." Additionally, the court found that the Commission's *2007 Order* sufficiently considered the harms and benefits of applying the ban retroactively and determined that the public interest supported applying the ban to existing contracts.

Summarized by Gerald O'Hara