The following is a compendium of major communications law decisions handed down by courts of the United States from October 1997 through March 1998.

**American Family Life Assurance Company of Columbus v. FCC**

129 F.3d 625 (D.C. Cir. 1997)

**Issue:**

Petition for review of FCC order holding that American Family Life Assurance Company of Columbus' ("AFLAC") refusal to sell time to federal candidates unless they agreed to a forum selection clause in the agreement governing political broadcasts violated the Communications Act.

**Holding:**

Due to the selling of all of AFLAC's interests in the television stations, the issue before the court is moot and this mootness warrants vacatur of the FCC order.

**Bell Atlantic Telephone Companies v. FCC**

1997 WL 783993 (D.C. Cir. 1997)

**Issue:**

Petitioner seeks review of an FCC order which construed Section 272(e)(4) of the Telecommunications Act of 1996 ("1996 Act") as meaning that a Bell Operating Company ("BOC") may provide any inter-Local Access and Transport Area ("interLATA") services it is otherwise authorized to provide, so long as it does so on a non-discriminatory basis.

**Holding:**

Petition denied. The Court held that the Commission's interpretation of the ambiguous statute was reasonable and consistent with both the statute's legislative history and its purpose.

**Discussion:**

The issue arose from the tension created between Section 272(e)(4) and Section 272(a)(2) of the 1996 Act. The former, allowing a BOC to provide "any" interLATA services to its affiliate as long as it meets the nondiscrimination requirement, clearly runs afoul of the latter, which states that a BOC may only originate in-region interLATA service through a separate affiliate. The Commission, in recognizing this tension, stated that Section 272(e)(4) was not intended to undercut Section 272(a)(2), but "merely required nondiscrimination for any interLATA services that a BOC was otherwise authorized to provide."

In holding this interpretation of the Act reasonable, the court used the two-step *Chevron* test. In the first step, the court found that the statute itself was ambiguous, thus giving the agency's interpretation of the statute considerable deference. In the second step, the court found that the Commission's interpretation of the statute was consistent with the statute's purpose: "preventing the BOCs from entering the interLATA origination market except through affiliates until the sunset of Section 272(a)(2)."

**C.F. Communications Corporation v. FCC**


**Issue:**

Petitioners seek review of FCC decision permitting local telephone companies (local exchange companies or "LECs") to assess End User Common Line ("EUCL") charges on an independent payphone provider.

**Holding:**

Because the FCC does not sufficiently explain why the difference between C.F. Communication's ("CFC") "smart" payphones and LEC-owned "dumb" payphones justifies its decision to assess EUCL charges on the CFC payphones but not the LEC ones and because the FCC's interpretation of its rules was clearly erroneous, the court vacated the FCC's Order which allowed LECs to assess EUCL charges on an independent payphone provider, and remanded the proceedings.
Discussion:

The court found that first, the FCC’s determination that CFC was an “end user” and thus subject to the EUCL charge was erroneous due to its misguided interpretation of the word “premises” in its categorization of CFC. Second, the Commission’s finding that CFC payphones were not public, and therefore not exempt from the EUCL charge, delineates an improper reliance on the definition of “public telephone” as set out in the FCC’s own rules and does not provide sufficient justification for the distinction drawn between CFC’s payphones and LEC-owned payphones. Third, the Commission erred when it classified CFC’s payphones as semi-public and subject to EUCL charges merely because they were capable of some private use due to their connection to regular subscriber business lines.

_Iowa Utilities Board v. FCC_

No. 96-3321 (8th Cir., Jan. 22, 1998)

Issue:

Whether the Federal Communication Commission (“FCC”), by asserting its authority to establish prices that incumbent local exchange carriers (“LECs”) may charge their competitors for access to the local telephone network facilities, violated the U.S. Court of Appeals’ mandate that state commissions have the exclusive authority to determine the applicable rates. Accordingly, the court vacated the TELRIC-based pricing rules established by the FCC. One month later, however, the FCC denied Ameritech’s application to provide in-region interLATA services in Michigan. In an advisory opinion, the Commission reasserted its authority to establish the prices for the local competition provisions by imposing them as conditions for entry by the BOCs into the in-region, interLATA telecommunications business. In short, the FCC announced that it would not grant a Section 271 application unless the rates were based on TELRIC principles.

The FCC justified its action on the grounds that, if the FCC did not act, the courts would be left to determine the definition of “cost-based pricing” under Section 252(d) of the 1996 Act. Because this could be a lengthy process, the FCC decided that it necessarily must be the one to interpret the meaning of “cost-based pricing” because it is the agency responsible for determining whether applicants comply with Section 252(d). The Eighth Circuit, however, rejected this argument and held that the FCC could apply state’s pricing schemes, which are effective upon issuance, prior to court review. Further, the court held that expediency is not a sufficient basis for an agency to disregard a federal court’s mandate. Unless the Supreme Court reverses the Eighth Circuit or Congress grants the FCC the authority to regulate intrastate pricing of local competition provisions, the FCC does not have authority to mandate TELRIC pricing schemes. Accordingly, the court granted mandamus to enforce its mandate and ordered the FCC to cease and desist from attempting to give effect to its interpretation of the requirements of Section 252(d).

_Melcher v. FCC_

No. 93-1110 (D.C. Cir., Feb. 6, 1998)

Issue:

Whether the FCC may bar local exchange carriers (“LECs”), including rural LECs, from obtaining Local Multi-point Distribution Service (“LMDS”) licenses in the same geographic areas in which they provide telephone service for three years from the initial LMDS auction.
**Holding:**

The FCC may bar all LECs from obtaining LMDS licenses in jurisdictions where they provide telephone service for three years from the date of the initial LMDS licensing auction.

**Discussion:**

LMDS is "a new wireless mode of communication that supports video, voice, and data services." In order to foster a competitive environment for LMDS, the FCC decided that LECs should be banned from obtaining LMDS licenses in jurisdictions where they provide telephone service for the first three years from the new licensing.

The LECs maintain that the FCC's decision is arbitrary and should be set aside by the court. The court concluded that the FCC adequately articulated that it based the decision on balancing the detriment to the LECs against the benefit of creating a competitive market. The LECs also challenge the validity of the FCC's decision based on the lack of facts to demonstrate that the three year bar will achieve the FCC's desired effect. Future events are, by definition, impossible to predict and the court must defer to the FCC.

The rural LECs attempted to gain an exemption from the ban by distinguishing themselves from other LECs. Specifically, the rural LECs argued that the restriction violates 47 U.S.C. 309(j)(3)-(4) ("Section 309(j)"). The court concluded that prohibiting a rural LEC from ever obtaining a LMDS license would violate Section 309(j), but, in the case at hand, the FCC merely imposed a three year restriction designed to promote competition. Neither the plain language nor the intent of Section 309(j) should be construed to forbid the FCC from placing any restrictions on rural LECs. The court also dismissed the rural LECs contention that the FCC's decision was arbitrary for the same reasons it denied this argument with respect to other LECs discussed above.

Finally, several parties seek review of the FCC's decision to deny waivers from the rules that "governed the use of the spectrum now designated for LMDS." The FCC believes that these waivers were sought as "a means of getting the 28 GHz band reassigned." The court decided that the FCC's decision to deny the waivers was "highly sound."

**Issue:**

Whether provisions of the Telecommunications Act of 1996 ("1996 Act") imposing restrictions on Bell Operating Companies ("BOCs") constitute punishment and thus an unconstitutional bill of attainder.

**Holding:**

The court held that the provisions constituted punishment and thus constituted an unconstitutional bill of attainder.

**Discussion:**

The challenged provisions are found in Sections 271-275 of the Act, which apply solely to Bell Operating Companies ("BOCs"). Section 271 restricts the entry of a BOC into the long distance market, and as long as the BOCs are restricted under Section 271, they also are prohibited under Section 273 from manufacturing and providing telecommunications equipment. Section 272 requires the BOCs to establish a separate affiliate for particular lines of business, and Section 274 prohibits the BOCs from engaging in electronic publishing through use of its basic telephone service for a period of four years. Additionally, Section 275 forbids the BOCs from engaging in alarm monitoring services for a period of five years from February 8, 1996.

The first argument addressed by the court was that these provisions constitute a bill of attainder. The court notes that a statute is considered an unconstitutional bill of attainder when it "(1) identifies a specific individual or group (2) inflicts punishment on that individual or group (3) without the benefit of a judicial trial." Here the issue that arises out of these requirements, is whether Sections 271-275 constitute punishment or are merely economic regulation.

Under all three tests proffered by the court: (1) the historical test, involving a comparison of the punishment at hand to the type of sanctions historically found to constitute legislative punishment; (2) the functional test, which analyzes...
whether the challenged law viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes; (3) and the motivational test, inquiring into the legislative record and whether it demonstrates a congressional intent to punishment, the court found evidence of intent to punish the BOCs for their former parent AT&T’s “transgressions” in the past or for crimes it is presumed the BOCs will commit in the future.

Southwestern Bell Telephone Co. v. FCC
No. 97-3446 (8th Cir. 1998)

Issues:

(1) Whether the FCC has the authority to order Southwestern Bell Telephone Co. (“Southwestern”) to refund certain service charges paid by Western Union and whether the Court has the authority to review the FCC’s actions; (2) whether the FCC abused its discretion by ordering Southwestern to refund service charges paid by Western Union to cover voice-grade performance investment (“VGP”) and facilities interface equipment (“FACIF”) costs; and (3) whether the FCC acted in an arbitrary or capricious manner by ordering Southwestern to refund service charges paid by Western Union to cover costs associated with supplying station apparatus and large private branch exchange equipment for two wire metallic and voice-grade services, and for the central office equipment used to provide two-wire metallic service.

Holding:

The FCC acted within its authority when ordering Southwestern to refund certain service charges paid by Western Union, and this Court has the authority to review the FCC’s actions. The FCC did not abuse its discretion by ordering Southwestern to refund service charges paid by Western Union to cover VGP and FACIF costs. The FCC did not act in an arbitrary or capricious manner by ordering Southwestern to refund service charges paid by Western Union to cover costs associated with supplying station apparatus and large private branch exchange equipment for two-wire metallic and voice-grade services, and for the central office equipment used to provide two-wire metallic service.

Discussion:

In 1988, a DC Circuit court determined that the FCC had “failed to adequately explain” its decision to reject Western Union’s contention that Southwestern had improperly allocated many service charges to Western Union and remanded the matter to the FCC for further consideration. Upon reconsideration, the FCC determined that Southwestern failed to justify the allocation of these expenses to Western Union and ordered Southwestern to pay a refund. Southwestern petitioned this court for review of the FCC’s actions.

Southwestern maintains that, in ordering Southwestern to refund the money, the FCC violated two procedural provisions of 47 U.S.C. §204(a). First, Southwestern argues that Section 204(a)(2)(A) imposes a 5 month time limitation of the FCC’s ability to suspend a tariff. Although the FCC did not issue its final ruling until 12 years after the tariff was imposed, the Court concluded that the statute was not meant to act as a statute of limitations on the FCC. Second, Southwestern argues that Section 204(a)(1) requires the FCC to suspend a tariff before it may require a refund. The Court decided that the purpose of this Section was to limit the costs that might be incurred if a tariff (which would ultimately be struck down) were allowed to continue until the FCC issued its final ruling. The suspension provision in Section 204(a)(1) is not mandatory.

The FCC challenges the authority of this Court to review its decision regarding Southwestern as the decision may still be reviewed by the FCC upon the application of Southwestern. The FCC maintains that all administrative remedies must be exhausted before a court may review the FCC’s decision. The Court concluded, however, that a court may review a non-final decision if an unreasonable time delay would render the administrative remedy inadequate.

In a Section 204(a) investigation, the carrier bears the burden of proving the reasonableness of its charges. The FCC ordered the refunds because Southwestern failed to meet this burden. Specifically, the FCC determined that Southwestern failed to prove that it reasonably allocated to Western Union the costs for VGP and FACIF, the costs for supplying station apparatus and large private branch exchange equipment for two wire metallic and voice-grade services, and the costs for
the central office equipment used to provide two-
wire metallic service. The FCC also noted that
Southwestern could still collect the charges if the
merely presented concrete data to support the al-
location of the charges.

A court may only overrule a FCC determination
if it concludes that the FCC’s action was “arbi-
trary, capricious, an abuse of discretion, or other-
wise not in accordance with the law.” In making
its decision, the FCC reviewed all data submitted
by Southwestern. The FCC found that Southwest-
er failed to meet its burden and ordered the re-
fund. The Court concluded that the FCC did not
abuse its discretion and its order was “far from be-
ing arbitrary and capricious.”

United States v. Microsoft

Issue:

Whether Microsoft was in civil contempt of an
antitrust consent decree based on its requirement
that the original equipment manufacturers (“OEMS”) of personal computers (“PCs”) include
Microsoft’s Internet Explorer (“IE”) with the lat-
est version of its operating system, Windows 95.

Holding:

The court cannot hold by clear and convincing
evidence that Microsoft violated a clear and un-
ambiguous prohibition found in the consent de-
cree.

Discussion:

The parties had a consent decree in place which
resolved a complaint by the government
against Microsoft for an unlawful monopoly and
restraint of trade in the market for PC operating
system software. The government now contends
that Microsoft has violated a provision of this
agreement which prohibits Microsoft from “re-
quiring original equipment manufacturers (“OEMS”) of PCs to commit to licensing other
Microsoft products in order to obtain licenses to
install Microsoft’s PC operating system products.”
The government charges that Microsoft coerces
OEMs to license and distribute its Internet Ex-
plorer (“IE”) by including in its licensing agree-
ment with the OEMs a requirement that, in order
to acquire the right to Windows 95, they must ac-
ccept this IE, which is a web browser giving PC
users access to the Internet. The government la-
bles this a “tying” arrangement, by which
Microsoft exploits its monopoly on the market
and also violates the terms of the consent decree.

The court found that first, Microsoft would not
be held in civil contempt in light of the demon-
strated ambiguity of a provision of the consent de-
cree which expressly allowed it to develop inte-
grated products. Second, the court would impose
a preliminary injunction to prevent Microsoft
from conditioning license agreements for operat-
ing a system on agreements to license and dis-
tribute Internet browser pending a trial on the merits of the claim in which, to prevail, the gov-
ernment must show that Microsoft has condi-
tioned its Windows 95 licensing agreements upon
OEM’s commitment to license an “other prod-
uct,” namely the Internet Explorer. Finally, the
court would not strike non-disclosure agreements
(“NDAs”) in a developer’s license agreements and
other contracts despite the government’s claim
that NDAs would impede the court’s ability to en-
force an antitrust consent decree because there is
no evidence that NDAs are meant for any purpose
besides requiring that Microsoft be given notice
and an opportunity to object before confidential
information, valuable to commercial adversaries,
is disclosed.