RECENT DEVELOPMENTS— TELECOMMUNICATIONS

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION INC. V. GULF POWER CO.

534 U.S. 327 (2002)

The Supreme Court ruled that the Pole Attachments Act applies to cable television systems' utility pole attachments that provide commingled cable television and high-speed Internet access services, and to attachments used by wireless telecommunications providers.

In 1978, Congress enacted the Pole Attachments Act, which requires the Federal Communications Commission (FCC) to regulate the rates, terms, and conditions for pole attachments. The Act defines a "pole attachment" as "any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility." The Telecommunications Act of 1996 expanded the definition to include "any attachment by a . . . provider of telecommunications service."

The FCC interpreted the Pole Attachments Act, as amended by the Telecommunications Act of 1996, to cover pole attachments used for both commingled services and wireless telecommunications services. Certain pole-owning utilities challenged both interpretations and the challenges were consolidated in the Eleventh Circuit, which struck down the FCC's interpretation. The Eleventh Circuit excluded attachments used for commingled services from the scope of the Act because neither of the only two specific rate formulas mentioned in the Act covers commingled services. One rate formula applies to cables used solely to provide cable service, and the other to telecommunications services. The court excluded attachments used solely for wireless communications because it interpreted the definition of pole attachment to be restricted to attachments used in part for wire communication.

The Supreme Court reversed, stating that both types qualify as "attachments" under the amended Act. As for attachments used for commingled services, the Court found that the phrase "any attachment by a cable system" used in the definition of "pole attachment" is dispositive, because the additional use of the attachments for high-speed Internet access does not mean that the cable ceases to be an attachment "by a cable television system." In doing so, the Court rejected the utility pole owner's argument that the Act should be interpreted to regulate the type of wire being attached rather than the identity of the party seeking attachment. Furthermore, the Court stated that even if the statute is ambiguous, the FCC's interpretation of the statute would stand as a reasonable interpretation under the deferential standard of review set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984).

As for attachments used for wireless telecommunications services, the Court noted that the amended Act requires the FCC to regulate "any attachment by a ... provider of telecommunications service." Since a provider of wireless telecommunications service is a "provider of telecommunications service," its attachments literally fall under the Act. Therefore, the Court held that the FCC's decision to assert jurisdiction over these attachments is reasonable and entitled to the Court's deference.

WORLDCOM, INC. V. FEDERAL COMMUNICATIONS COMMISSION

288 F.3d 429 (D.C. Cir. 2002)

The D.C. Circuit ruled on whether the FCC could create an exception to the reciprocal compensation requirement under the 1996 Telecommunications Act, 47 U.S.C. § 251(b)(5), for calls made to internet service providers (ISPs) located within the caller's local calling area.

WorldCom consists of competitive local exchange carriers (LECs) that deliver calls to ISPs, and thus stands to lose reciprocal compensation payments if § 252(b)(5) does not apply to local calls made to ISPs. In an earlier order, the FCC applied its "end-to-end" analysis and excluded ISP calls from the reach of § 251(b)(5) on the theory that they were not "local." On review, the D.C. Circuit held that the order failed to adequately explain why the traditional "end-to-end" jurisdictional analysis was relevant to deciding whether ISP calls fit the local call or the long-distance call model and vacated and remanded the order. On remand, the FCC again reached the conclusion that the compensation between two LECs involved in delivering internet-bound traffic to an ISP should be governed by the reciprocal compensation provision of § 251(b)(5), basing its decision on the language of § 251(g).

WorldCom challenged the remand order, alleging that the FCC erred in finding that section 251(g) authorized the Commission to exclude such calls from § 251(b)(5). The D.C. Circuit agreed and remanded the order, holding that § 251(g) provides only for continued enforcement of certain pre-Act regulatory interconnection restrictions stemming from the initial breakup of the Bell system (and subsequent regulations), but did not contemplate nor even apply to services entirely between competing LECs. The court noted that the Commission could not point to any pre-Act, federally created obligation for LECs to interconnect with each other for ISP-bound calls. Furthermore, the court noted, § 251(g) applies specifically to services provided to interexchange carriers (IXCs) and ISPs. LECs' services to other LECs, even if en route to an ISP, are not "to" either an IXC or to an ISP for the purposes of the statute. The court declined to rule on Worldcom's other attacks on various interim provisions adopted by the Commission, however, as it is unclear what legal basis those interim provisions will stand on in the absence of the § 251(g) justification. The court declined to vacate the order on the grounds that there is a significant likelihood that the Commission has the authority to create such provisions on separate legal grounds.

FCC RULES CABLE ISPS NOT REQUIRED TO SHARE NETWORK

On March 14, 2002 the Federal Communications Commission ("FCC") made a Declaratory Ruling that cable modem service will be classified and regulated as an "information service." The decision not to classify cable modem service as a "telecommunications service" means that cable modem service will not be subject to regulation under the Telecommunications Act of 1996. As a result of this ruling, cable companies will only have to share their networks when required by the government. Telephone companies, in contrast, are subject to regulation that forces sharing of local networks.

This decision is designed to promote widespread deployment of broadband services by encouraging greater investment and innovation in a competitive market through minimized regulation. The FCC also hopes to address the discrepancy in Broadband availability between urban and rural Americans. Ultimately, the FCC decision aims to promote better quality, lower prices, and more choices for consumers of Broadband services.

Under the Telecommunications Act of 1996, Regional Bell Operating Companies (RBOCs) right to offer long-distance telephone and data service is contingent on proof that they provide adequate access to their local networks to competing telephone companies. RBOCs argue this requirement discourages their expansion of broadband capability and may be further disadvantaged by the FCC's latest ruling, as their broadband service lags far behind cable providers, who control approximately two-thirds of the broadband market.

Telephone companies and consumer groups have filed suit in federal court challenging the ruling. While cable broadband providers clearly support the FCC's ruling, RBOCs argue that it will only maintain the cable industry's control of the broadband market. Interestingly, the FCC's elimination of the requirement that cable companies share their networks with competitors is similar to the requirement that the Tauzin-Dingell bill would do away with for RBOCs in the Digital Subscriber Line ("DSL") market.

Amid much controversy, proponents of the decision claim that hearty competition between cable-modem, digital subscriber line, and satellite-delivered broadband Internet services justifies the FCC's policy of regulatory restraint. Critics of the FCC's decision voice concern about ever increasing media consolidation, arguing that the free environment making the Internet valuable in the first place will be denegrated by an environment controlled by major monopolists. Commentators on both sides of the debate, however, agree that increased broadband deployment is perhaps the key element necessary to propel the economy into expansion.