
MAJOR COURT DECISIONS, 2009

M2Z Networks, Inc. v. Federal Communications Commission, 558 F.3d 554 (D.C. Cir. 2009)

Issue: Whether the Federal Communications Commission (“FCC”) properly denied M2Z Networks, Inc.’s (“M2Z”) application for a nationwide, 15-year exclusive license for the 2155-2175 MHz spectrum and its petition for forbearance of applicable rules on the license application in *In re Applications for License and Authority to Operate in the 2155-2175 MHz Band* (“Order”).

Holding: The court both affirmed the FCC’s dismissal of M2Z’s license application and affirmed the FCC’s denial of M2Z’s petition for forbearance.

History: On May 2, 2006, M2Z filed an application with the FCC for a license to the entire AWS-3 spectrum band. The AWS-3 (advanced wireless services) band consists of 130 MHz of spectrum designated for providing wireless Internet access and other voice and high-speed data services. M2Z’s plan—which it claimed necessitated an exclusive, nationwide license—was to deliver basic wireless broadband access to most of the country free of charge. In addition to the license application, M2Z petitioned the FCC for forbearance of any rule or regulation that might impede the grant of the application. On August 31, 2007, after inviting both third-party petitions to deny M2Z’s application and additional license applications for the AWS-3 band, the FCC dismissed all of the applications along with M2Z’s petition for forbearance on the basis that public comment should be heard before the assigning of licenses.

Discussion: In reviewing whether the FCC was reasonable in denying M2Z’s request for forbearance, the district court set out the standard for the procedural advantage. According to the court, the FCC’s forbearance from applying a provision or regulation required that the *forbearance* be consistent with the public interest; M2Z’s petition had conflated the issue by instead arguing that its AWS-3 license *application* was in the public interest. Considering whether to forbear from certain rules and considering whether to grant license applications, the Court explained, require different determinations, and one does not simply imply the other, as M2Z had argued. The Court continued, stating that the denial of applications for purposes of seeking public comment, and the consequent dismissal of M2Z’s petition for forbearance, were in the public interest, as a more complete record of filings was required to allow the FCC to consider all relevant factors in licensing.

M2Z further contended that the FCC’s cursory discussion of whether forbearance would promote competitive market conditions conflicted with 47 U.S.C. § 160(b), which requires a more thorough analysis. However, the Court

disagreed, supporting the FCC's 160(b) analysis as statutorily adequate. Next, M2Z claimed the FCC had not carried its burden under 47 U.S.C. § 157, which requires the opposition to potential licenses that provide new technology to carry the burden of proving that the proposed license is inconsistent with the public interest. Distinguishing between situations in which the FCC makes a public interest determination and situations in which the FCC weighs evidence presented by third parties in the light of the public interest, the Court clarified the responsibilities delegated by § 157. In the former instance, the Court said, the FCC cannot have the burden of such proof shifted against it, and in the latter, the third party carries the burden even though the FCC weighs the third-party evidence.

The court also rejected M2Z's last argument that the FCC failed to address all of M2Z's public interest evidence. M2Z claimed that the FCC was required to make a public finding on all evidence because 47 U.S.C. § 309 requires such findings when a competitive auction format is not used. The Court disagreed, finding no requirement that the FCC, in such a determination, address *all* evidence and instead found the FCC's more limited address of the evidence was sufficient. Describing M2Z's arguments as creative but lacking "serious legal merit," the Court affirmed the FCC *Order* dismissing M2Z's license application and petition for forbearance in all respects.

Summarized Alejandro Valencia

National Cable & Telecommunications Association v. Federal Communication Commission, 555 F.3d 996 (D.C. Cir. 2009)

Issue: Whether the 2007 *Order* adopted by the Federal Communications Commission ("Commission" or "FCC") violates the First Amendment to the Constitution, or is arbitrary in violation of the Administrative Procedure Act, or both.

Holding: Due to the fact that in the 2007 *Order* the Commission returned to a limited opt-in consent requirement in response to the increasing activity of data brokers, and because it gave sufficient reasons for singling out the relationships between carriers and third-party marketing partners, the court held that the Commission provided a reasoned analysis required when making its determination.

History: According to § 222(h)(1) of the Telecommunications Act of 1996 ("the 1996 Act"), "customer proprietary network information" includes information relating to the "quantity, technical configuration, type, destination, location and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier." More generally, this information

encompasses customers' individual calling plans and special features, the pricing and terms of their contracts for those services, as well as specifics about who they call and when. Carriers use "customer information" in a variety of ways. Some carriers may use the information in order to market specific services or upgrades to their existing customers, while other carriers, specifically smaller ones and new market entrants, enter into agreements with joint venturers or independent contractors to conduct targeted marketing.

In its *1998 Order*, the Commission interpreted § 222 as establishing two categories of uses of customer information. First, uses to which customers implicitly consent simply by subscribing to a carrier's service. Second, uses that the carrier would have to obtain express customer approval. Additionally, in order to define implicit customer approval, the Commission adopted the "total service approach," which distinguished local telephone service, interexchange (primarily long distance calling service), and commercial mobile radio services (primarily mobile or cellular phone service) from each other. The *1998 Order* revealed that carriers could in fact infer customer approval within the confines of existing service and that implicit approval extended to customer information sharing with carriers' affiliates who provide one another service type within the existing service relationship between the customer and carrier. However, the Commission decided that if carriers wished to use or disclose customer information outside of the existing relationship that the customer had to consent affirmatively and explicitly in advance.

In *U.S. West, Inc. v. FCC*, the court of appeals held that the Commission's *1998 Order* consisted of an unconstitutional restriction on the carriers' First Amendment right to speak to their customers. The court went on to explain that the Commission failed to show "that an opt-in strategy would not sufficiently protect consumer privacy." In response to this decision, the Commission initiated a new rulemaking proceeding and issued its *2002 Order* that modified its regulations. The *2002 Order* only required opt-out approval for sharing of customer information between carriers and its affiliates for communications-related purposes. Furthermore, the *2002 Order* permitted carriers to share customer information with joint venture partners or independent contractors for marketing communications-related services. However, the Commission identified that these third parties were not eligible as "carriers" under the 1996 Act and, as a result, were not subject to the confidentiality requirements set forth in § 222. Consequently, the Commission ordered carriers and their joint venture partners or independent contractors to enter into confidentiality agreements to safeguard customer information, in addition to the opt-out notices sent to customers. No challenges were filed against the *2002 Order*.

In 2005, the Electronic Privacy Information Center petitioned for further rulemaking to modify the Commission's customer information sharing rules.

Specifically, the petition remarked upon the increasing number of “data brokers,” which are organizations that sell private information about individuals online, and expressed grave concern about how simply these organizations are able to attain information from carriers and other entities. In response to these concerns, the Commission commenced a new rulemaking proceeding, received comments, and issued its *2007 Order*.

Two months prior to the adoption of the *2007 Order*, Congress passed the Telephone Privacy and Protection Act of 2006. This statute imposed criminal consequences for pretexting, unauthorized access to consumer accounts online, selling or transferring customer information, and knowing purchase or receipt of fraudulently obtained customer information.

In the *2007 Order*, the Commission required carriers to “obtain opt-in consent from a customer before disclosing that customer’s [information] to a carrier’s joint venture partner or independent contractor for the purpose of marketing communications-related services to that customer.” During the rulemaking process, the Commission learned that consumers were less agreeable to the sharing of their private information with third parties without their express prior authorization. Therefore, it concluded that before carriers could share customer information with joint venture partners or independent contractors, the customers had to consent expressly to such sharing.

Discussion: Petitioners question that if the First Amendment did not bar Congress from requiring carriers to obtain their customers’ consent, how would the First Amendment bar the Commission from implementing § 222 by requiring customer consent? In response, petitioners aver that “both the First Amendment and the Administrative Procedure Act . . . require that the Commission . . . support its assertions with evidence before it may restrict the communication of truthful, lawfully obtained information between carriers and their marketing partners, and the ways that carriers may communicate with their existing customers.” Essentially, they argue that the opt-in requirement is more restrictive than the opt-out system that it replaced.

The court notes that in some First Amendment cases the Supreme Court demanded an evidentiary showing in support of a state’s law, while in others the Supreme Court has found “various unprovable assumptions” sufficient to support the constitutionality of state and federal laws regulating business. However, because petitioners concede the constitutionality of § 222, they also concede at least two factual predicates underlying the statute and the *2007 Order*: First, the government has a substantial interest in protecting the privacy of customer information, and second, requiring customer approval advances that interest. The test presented by the court for the regulation of commercial speech is set forth in *Central Hudson*: the speech must “at least concern lawful activity and not be misleading”; the “governmental interest [must be] substan-

tial”; the regulation must “directly advance[] the governmental interest asserted”; and the regulation must not be “more extensive than is necessary to serve that interest.”

First, the court examines whether there is a “substantial government interest.” It determined, as the Tenth Circuit thought in *U.S. West*, that the interest in protecting the privacy of customer privacy is confined to preventing embarrassment. The court explains that privacy deals with determining for oneself when, how and to whom personal information will be disclosed to others.

Second, the court examines whether the *2007 Order* “directly advances” the identified governmental interest. The fact that petitioners agree that § 222 complies with the First Amendment essentially resolves the issue. According to the court, the privacy of customer information cannot be preserved unless there are restrictions on the carrier’s disclosure of it. Petitioners argue that the Commission violated the First Amendment by implementing the congressional requirement with an opt-in system. Petitioners aver that the record does not identify that joint venturers or independent contractors have disclosed customer information to others. However, the court elucidates that this argument distracts from the fact that carrier’s sharing of customer information with joint venturers or independent contractors without the customer’s consent is, in and of itself, an invasion of customer’s privacy, which is the precise harm that the regulation targets. Accordingly, the Commission reasonably concluded that an opt-in consent requirement directly and materially advanced the interest in protecting customer privacy and in ensuring customer control over the information.

Last, the court considers the final requirement that restrictions on commercial speech must be “no more broad or no more expansive than necessary to serve its substantial interest.” The only condition that must be demonstrated is that the regulation be proportionate to the interests sought to be advanced, which the court concludes the *2007 Order* easily meets. The Commission’s opt-in consent scheme presumes that consumers do not want their information shared unless they expressly indicate otherwise. In contrast, petitioners want an opt-out scheme, which presumes the opposite. In *Trans Union II*, this court held that an opt-out scheme is only “marginally less intrusive” than an opt-in scheme for First Amendment purposes and so upheld a nearly identical regime requiring out-in consent for the sharing of customer credit information. The court notes that here the Commission attentively considered the differences between the two approaches, and the evidence supports the Commission’s decision to prefer opt-in consent. The evidence showed that customers were less willing to have their information shared with third parties, as opposed to affiliated entities, thus the Commission reasonably concluded that customer information would be at a greater risk of disclosure once out of the control of the

carriers and in the hands of the entities not subject to § 222.

With regards to the petitioners' claim under the Administrative Procedure Act, petitioners argue that the Commission acted arbitrarily when, in light of the evidence of unauthorized disclosures by carriers, it reversed the policy of the 2002 Order and imposed greater restrictions on the carriers' sharing of customer information with third-party marketing partners. The court explains that it fails for the same reasons that the petitioners' First Amendment claim was rejected – substantial evidence supported the Commission's 2007 Order and its reasoning cannot be faulted

Summarized by Heather Cocce

Verizon California, Inc. v. FCC, 555 F.3d 270 (D.C. Cir. 2009)

Issue: Whether Verizon violated § 222(b) of the Telecommunications Act of 1996 by using information obtained from competitors through a Local Service Request (“LSR”) in an attempt to prevent its customers from switching to a different service provider before the LSR was completed.

Holding: The United States Court of Appeals for the District of Columbia Circuit denied Verizon's petition for review of the Federal Communications Commission's Order in *Bright House Networks, LLC v. Verizon Cal., Inc.* 467 U.S. 837 (1984) (“Order”). The court held that the FCC's interpretation of § 222(b) of the Telecommunications Act was reasonable and, therefore, affirmed the FCC's decision that Verizon's use of information gained through a LSR violated the Act. The FCC had ordered Verizon to cease and desist using the information for these marketing efforts.

History: In a Local Service Request, a telephone service provider is able to request that pertinent provider telephone information be transferred from a customer's previous service provider to the new provider. In an attempt to retain defecting customers, Verizon used information obtained through the LSR process to contact its customers and offer them incentives to stay with Verizon. Critically, Verizon was contacting customers before the LSR process had been completed. Three cable companies—Bright House Networks, LLC, Comcast Corporation, and Time Warner Cable Inc.—filed complaints with the FCC arguing that Verizon's efforts violated the Telecommunications Act's § 222(b), which prohibits carriers from using the propriety information of other carriers for marketing purposes. The main point of contention was the interpretation of the statute's phrase “for purposes of providing any telecommunications service,” and whether it imposed requirements on both carriers involved in a LSR transaction and only the carrier providing the information.

In defense of its actions, Verizon urged that § 222(b) only applies to carriers

submitting a LSR and not a carrier receiving it (this would result in the imposition of § 222(b) restrictions on the cable companies but not on Verizon). Additionally, Verizon argued that the standard of review set forth in *Chevron U.S.A. Inc. v. NRDC*, under which a court will defer to the FCC's interpretation as long as it does not contradict the Act's unambiguous text, should not apply with full deference because of the First Amendment issues raised by the FCC's interpretation of the statute.

Holding: In considering the FCC's finding in the *Order*, however, the court applied *Chevron* deference, stating that, despite the "oddities" in the FCC's justification of its interpretation of § 222(b), the Commission had adequately justified its decision to limit commercial speech in the interest of neutrality. The court found that the FCC's interpretation that § 222(b) requirements apply to both the *submitting* and *receiving* parties of a LSR was reasonable because § 222(b) does not explicitly state "which carrier is to provide the telecommunications service." In affirming the *Order*, the court rejected Verizon's interpretation of § 222(b), stating that such an application would lead to an "anomalous result."

The court held that § 222(b) applies to all three complainants because they are considered "telecommunications carriers" within the meaning of the Act, despite Verizon's arguments that Comcast and Bright House should be exempt because they do not hold themselves out as common carriers. The FCC had found that because each carrier had (1) self-certified themselves as common carriers, (2) entered into publicly available interconnection agreements with Verizon, and (3) obtained a state certificate of public convenience and necessity giving notice of its intent to act as a common carrier, all three companies could be considered common carriers under the Act. The court held that the totality of these factors rendered the FCC's decision reasonable. Additionally, as required by a court reviewing agency actions, the court determined the Commission's interpretation of § 222(b) was neither arbitrary nor capricious.

Summarized by Melissa Wright