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James B. Speta

Joseph D. Kearney

Marquette University Law School, joseph.kearney@marquette.edu

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May a Private Party Sue in Federal Court to Enforce an FCC Regulation?

by James B. Speta and Joseph D. Kearney

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James B. Speta is professor of law at the Northwestern University School of Law. He can be reached at j-speta@northwestern.edu or 312-503-8470.

Joseph D. Kearney is dean and professor of law at Marquette University Law School. He can be reached at joseph.kearney@marquette.edu or 414-288-1955.

ISSUE

May a pay phone provider sue in federal district court to enforce FCC regulations requiring payment of certain fees by other carriers to pay phone providers?

FACTS

Respondent Metrophones Telecommunications, Inc., is the owner of pay phones (known in telecommunications jargon and in the briefs as a Pay Phone Service Provider or PSP). Petitioner Global Crossing Telecommunications, Inc., is a long-distance telecommunications company (an Interexchange Carrier or IXC). Metrophones sued Global Crossing (and several other carriers no longer in the case) in federal district court, alleging that Global Crossing had failed to pay Metrophones monies that were due under FCC regulations governing so-called coinless pay phone calls.

Coinless pay phone calls are calls made using access codes or 800 numbers to access carriers (including long-distance carriers) other than the default carrier associated with the pay phone.

Metrophones alleged that its lawsuit arose under the Communications Act, which gives persons injured by a common carrier's violation of the Act the right to sue for damages in federal district court. 47 U.S.C. §§ 206-207. In the district court, Metrophones alleged that there were two different violations of the Act that supported its right to sue. At first, Metrophones argued that a provision of the act that requires the FCC to promulgate regulations ensuring that pay phone companies receive compensation for every coinless call (47 U.S.C. § 276) also gave rise to a cause of action to recover sums that should have been paid under the regulations. A decision of the Ninth Circuit, *Greene v.*

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GLOBAL CROSSING
TELECOMMUNICATIONS, INC. v.
METROPHONES
TELECOMMUNICATIONS, INC.
DOCKET No. 05-705

ARGUMENT DATE:
OCTOBER 10, 2006
FROM: THE NINTH CIRCUIT

Case at a Glance

The Communications Act provides that individuals who have been damaged by violations of the Act may bring an action in federal court for damages. In this case, the Ninth Circuit held that a pay phone owner had a right to sue in federal court to recover payments that it alleged were due under the FCC's regulations, which require companies providing calling card or prepaid calling services to compensate pay phone providers when the companies' customers use pay phones to place calls (so-called "coinless calls"). The D.C. Circuit had previously reached the opposite conclusion.

Sprint Communications Co., 340 F.2d 1047 (9th Cir. 2003), which was issued while the suit brought by Metrophones was in the district court, held that this statutory provision in section 276 did not itself create a right to sue. Metrophones then amended its complaint to allege that the defendants' failure to pay monies due under the FCC regulations amounted to an unjust and unreasonable practice and thus violated the Communications Act's core requirement that all carrier charges, practices, classifications, or regulations "in connection with" communication service shall be "just and reasonable." 47 U.S.C. § 201(b).

The Ninth Circuit agreed with Metrophones on the question now before the Supreme Court: specifically, that the suit had been properly brought in federal court. The Ninth Circuit's decision in the case now before the Court was made on an interlocutory appeal (by permission of both the district court and the Ninth Circuit itself), and so it does not address the ultimate question of whether Global Crossing in fact owes the monies that Metrophones seeks to recover.

CASE ANALYSIS

The Communications Act of 1934, in its basic provisions, is a classic regulated-industries statute, envisioning federal supervision of most of a communications carrier's operations. The act requires interstate common carriers to file with the Federal Communications Commission tariffs that show all of the carrier's charges for and practices relating to its services. 47 U.S.C. § 203. The carriers' "charges, practices, classifications, [and] regulations" must be "just and reasonable" (47 U.S.C. § 201(b)) and cannot be discriminatory (§ 202(a)). The Federal Communications Commission is empowered to

review tariffs (§ 203). The FCC is also empowered to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of" the act. § 201(b). The Court has recently reiterated the breadth of this grant to the commission in *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), when the Court held that the commission's rule-making authority under section 201(b) extended to implementing all provisions in Title II of the act, even those added after section 201(b).

A recurring problem in modern telecommunications law is the interaction between this traditional, regulated-industries statute and developing competition in communications markets. This case occupies a corner of that more general conflict, but one that Congress itself has visited. In particular, on two occasions, Congress has amended the act to address competitive practices with respect to pay phone services. The 1980s saw the growth of independent pay phone providers—that is, pay phone providers that were not themselves the local exchange carrier in an area. With the advent of competition in long-distance markets following the break up of the Bell System (in 1984), many independent pay phone providers entered into relationships with long-distance or other carriers. In some cases, these pay phone providers blocked access codes to other, unaffiliated carriers, because if customers "dialed around" the pay phone provider's own service, the pay phone provider would not receive any compensation for the call. This led to Congress's first intervention, the Telephone Operator Consumer Services Improvement Act of 1990 or "TOCSIA" (codified at 47 U.S.C. § 226), which forbade the blocking of such access codes and numbers. The statute correlatively directed

the FCC to consider adopting rules requiring the compensation of pay phone providers for such coinless, dial-around calls, whereupon the FCC adopted a flat per-pay phone compensation scheme. Pay phone providers were unhappy with this scheme.

In the Telecommunications Act of 1996, Congress again acted. This time, it both directed that subsidies to pay phone services should end and required the FCC to adopt rules that ensured that "all pay phone service providers are fairly compensated for each and every completed intrastate and interstate call using their pay phone." 47 U.S.C. § 276. The FCC then adopted rules that essentially require the carrier that provides the calling card or prepaid card service to compensate the pay phone provider for each coinless, dial-around call placed from a pay phone. (This may or may not be the company that actually sold the card to the consumer, but this complication is not important to the issues in this case.) Under the FCC rules, the price has changed over time: it started at 35 cents/call; the briefs agree that at the time relevant here, the price was 24 cents/call. The FCC regulations allow carriers to negotiate with pay phone service providers for different rates, but in the absence of an agreement, the FCC rules set the price.

The FCC has addressed the manner in which pay phone service providers should recover from carriers that did not pay, as some did not. In a proceeding that concluded in 2003, the FCC stated that a carrier's failure to pay the mandated sums to pay phone providers "constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the [Communications] Act." The FCC further opined that, as a result, pay

phone providers could sue in federal district court to enforce their right to receive payment under the regulations.

The broadest argument of Global Crossing, the defendant, is that the Communications Act provides a right to sue in district court (a so-called “private right of action”) only for violations of the act itself, and not for violations of the FCC’s regulations, even where those regulations are enacted pursuant to the act. The argument flows from the text of section 206 of the Act, which provides for damages for violations of “this chapter.” Global Crossing notes that one other provision of the Communications Act, as well as provisions of other statutes, expressly creates causes of actions for violations of the statute and violations of the implementing regulations. Thus, the argument proceeds that Congress knows how to create a cause of action for violations of regulations, and did not do so in this case.

Global Crossing maintains that even if it has violated the FCC’s regulations (which of course it does not expressly concede), it has not violated any provision of the Communications Act itself. As to section 201(b), Global Crossing argues that payments to pay phone providers are not “practices” relating to interstate telecommunications services. Global Crossing notes that section 201(b) does not mention pay phone services; it also argues that its failure to pay is not unjust or unreasonable. As to section 276, Global Crossing argues that the statute alone does not require carriers to pay any charges to pay phone providers; payment could come from the customers themselves or other sources.

Global Crossing contends that the FCC’s statement that a carrier’s fail-

ure to pay constitutes a violation of the act is irrelevant, despite the usual rule that an agency’s interpretation of the statute is entitled to substantial deference from the courts. First, Global Crossing argues that only the courts can determine whether a cause of action exists. Second, Global Crossing argues that the FCC did not adequately explain its reasoning. And, third, Global Crossing argues that even if the FCC is entitled to deference, its interpretation of section 201(b) is wrong, and that failure to comply with the regulations cannot be an unjust and unreasonable practice relating to communications services within the meaning of the Act.

In large part, Global Crossing frames these arguments by stating that the issue is whether the Court will “imply” a cause of action, under section 201(b), for violation of the commission’s rules even though the statute appears to limit lawsuits to those based on violations of the statute. This framing allows Global Crossing to locate its arguments within the broader debate over “implied rights of action.” In earlier decades, the Supreme Court was willing to give private parties the right to sue to enforce provisions of federal statute, even if those statutes did not themselves mention lawsuits by private parties. For example, the Supreme Court recognized rights to sue to enforce the anti-fraud provisions of the securities laws and the anti-discrimination provisions of Title IX, even though the statutes did not mention private litigation. In the past 20 years, by contrast, the Supreme Court has been entirely unwilling to imply such private rights of action when the statute is silent and has largely resisted any attempt to expand the previously implied private rights of action (although it has not reversed the specific types of lawsuits it previously sanctioned).

The argument for Metrophones begins by attacking Global Crossing’s framing of the issue, by emphasizing that the Communications Act does create a private right of action for violations of the statute. Congress created an *express* cause of action, the argument observes; there is no need to imply one. Metrophones notes that the FCC specifically stated that the failure to pay compensation that is due under the rules is itself a violation of two sections of the statute, section 276’s requirement of compensation to pay phone providers and section 201(b)’s prohibition on unjust and unreasonable practices. Metrophones argues that the FCC is simply interpreting the terms of the substantive provisions of the statute and not encroaching on any traditional power of the courts to determine their own jurisdiction. And, the argument goes, once the FCC says that violation of its regulation is a violation of the statute, then Congress’s determination that private parties may sue for violations of the statute is dispositive.

On the merits of the FCC’s interpretation, Metrophones notes that carriers including Global Crossing had an opportunity previously to challenge the FCC’s pay phone rules and to challenge the FCC’s statement that violations of the regulation constituted a violation of the statute through the typical route of a direct challenge to the regulations. Indeed, the FCC’s pay phone rules themselves have been subjected to judicial review (and survived in relevant part). Metrophones of course argues that the FCC’s interpretation was substantively correct: that it is an unjust and unreasonable practice to refuse to pay money owed under the commission’s rules (the section 201(b) argument), and that it is a violation of the requirement that pay phone providers be compen-

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sated for every coinless call (the section 276 argument).

The United States, in an amicus brief signed by the Solicitor General and the FCC, supports Metrophones. The government largely repeats the arguments made by Metrophones although it does not focus on section 276 to the same extent. The United States' brief also argues that, if the Court adopts Global Crossing's argument, the enforcement scheme of the Communications Act will be radically changed. The government notes that sections 206-208 of the Communications Act not only govern private rights of action in federal district court but also complaints to the FCC. If these sections were interpreted in a way that foreclosed a private lawsuit in federal court, private parties would also lose the right to bring an administrative complaint before the FCC. In the main, then, FCC regulations could only be enforced by penalty or forfeiture proceedings initiated by the agency itself, which, the United States says, "could have effects in regulatory areas far beyond pay phone compensation disputes and has the potential to restrict dramatically private enforcement of the Communications Act."

SIGNIFICANCE

As noted, the Ninth Circuit in this case upheld the right of a pay phone provider to sue in federal district court to enforce its right to payment under the FCC regulations while the D.C. Circuit reached the opposite conclusion. See *APCC Servs., Inc. v. Sprint Communs. Co.*, 418 F.3d 1238 (D.C. Cir. 2005), petition for cert. pending, No. 05-766 (filed Dec. 12, 2005). The Court could restrict itself to this narrowly phrased question, or it could more broadly tackle the issue of private enforcement of FCC (or even other agency) regulations.

If the Court were to adopt Global Crossing's broadest argument, this could lead to a significant decrease in private enforcement of the Communications Act, whether by federal lawsuits or through administrative complaints. The FCC's rules would then, in all likelihood, be enforceable only by the FCC, which would mean either a significant increase in FCC enforcement activities or unremedied violations. And much FCC enforcement would result in penalties payable not to the injured party, but to the U.S. Treasury. As competition is developing in telecommunications markets, the FCC is actually seeking to move in the other direction, toward less rule making and administrative enforcement and toward more private party—driven resolution of conflicts under the act (as has been typical in most industries, but not "regulated industries" such as common carriers and public utilities). (There is the potential that the FCC could claim the statutory power to craft its own private, administrative enforcement regime, but this claim would be subject to the vigorous challenge that Congress delimited the available remedies, thus foreclosing the FCC's ability to use its "inherent" Communications Act authority to create a new remedy.) Moreover, very broad language from the Court to the effect that an agency's regulations are not encompassed within a private right of action for statutory violations could have implications going beyond the Communications Act to other regulatory regimes.

It is possible that the Court could go in entirely the opposite direction, holding that all violations of FCC regulations are the same as violations of the Act—as the FCC's authority to act flows from the statute and under standard administrative law doctrine, an FCC rule that is consistent with the statute

has the same force of law as the statute itself. This broadest view of the FCC's authority is not pressed on the Court by either Metrophones or the United States, which both argue that the cause of action is triggered by the FCC's specific finding that violation of this regulation is an unjust and unreasonable practice. But if the crux of the "unreasonableness" is the violation of the regulation (and not the simple failure to pay the pay phone provider adequate compensation), then it should follow that violations of other regulations are also unjust and unreasonable practices—whether or not the FCC has made a specific finding. And, again, broad language by the Court here might spill over to other statutes and regulations.

The Court could resolve the case on fairly narrow grounds, avoiding the global issue of private rights to sue on FCC (or other agency) regulations by focusing on section 276, the provision through which Congress required the FCC to set compensation rules for pay phone providers. The Court could read that statute as determining the issue, in either direction, thus making this case solely about resolving the circuit split between the D.C. and Ninth Circuit over pay phone providers' right to sue carriers that do not pay monies (allegedly) owed under the FCC's rules.

Administrative law aficionados may notice a lurking issue in this case, which is somewhat similar to one also pending in *Watters v. Wachovia Bank*, No. 05-1342. In *Watters*, the question is what level of deference (if any) to accord to an agency's statement that its regulations preempt state law, where that statement is made in the explanatory section of an agency's decision as opposed to the regulations that the agency actually adopts. In this case, the FCC's statement that violations

of its pay phone compensation regulations also constituted a violation of the statute similarly was not codified in regulations. It is unlikely, however, that the Court would grapple with the issue in this case, in which none of the briefs address it.

**ATTORNEYS FOR THE
PARTIES**

**For Petitioner Global Crossing
Telecommunications, Inc.** (Jeffrey
L. Fisher (206) 622-3150)

**For Respondent Metrophones
Telecommunications, Inc.** (Roy T.
Englert Jr. (202) 775-4500)

AMICUS BRIEFS

**In Support of Petitioner Global
Crossing Telecommunications, Inc.**
AT&T and Verizon (Aaron M.
Panner (202) 326-7900)
Sprint Communications
Company LP (David P. Murray
(202) 303-1000)

**In Support of Respondent
Metrophones Telecommunications,
Inc.**
United States (Paul D. Clement,
Solicitor General (202) 514-2217)