

The Biggest Telecom Cases So Far In 2016

By Jenna Ebersole

Law360, Washington (July 8, 2016, 10:29 PM ET) -- The third time was the charm for the Federal Communications Commission in the D.C. Circuit's review of its net neutrality rules, and experts said the decision will almost certainly be the most important telecom legal development in 2016. Here, Law360 looks back at net neutrality and other key cases so far this year in telecommunications.

U.S. Telecom Association v. FCC et al.

Chairman Tom Wheeler's FCC obtained a critical and potentially enduring victory in June when the D.C. Circuit upheld its Open Internet Order adopted last year and designed to bar the unequal treatment of web traffic by broadband providers. Although the order could face further challenge in court or under a new administration, the court's decision deferred to the FCC, experts said.

"Net neutrality was a big win for the commission," Michael Lazarus of Telecommunications Law Professionals PLLC said. "It will turn out to be one of the hallmarks of Wheeler's chairmanship, and if that would have been vacated or remanded by the D.C. Circuit, it really could have dictated the next six months, or the last six months, of Wheeler's chairmanship."

The FCC wrote a detailed order that the court declined to second-guess, he added.

"The D.C. Circuit really viewed this as the commission's decision, and it wasn't going to overrule the commission," he said.

Samuel L. Feder of Jenner & Block LLP said he sees the win as the most significant telecom case for many years, and while a Republican administration may seek to overturn it, a Democratic president's FCC would probably stay the course, and it is likely to survive further court challenge.

"I think it could conceivably get reviewed, but I don't think it's going to get overturned," he said.

The consolidated case is *U.S. Telecom Association v. Federal Communications Commission et al.*, case number 15-1063, in the U.S. Court of Appeals for the District of Columbia Circuit.

Prometheus Radio Project v. FCC et al.

On an issue that has been before the Third Circuit continuously over several years, the court in May struck down an FCC attempt to curtail TV stations' ability to make joint sales agreements to avoid a ban

on owning more than one station in a local market. The panel said the FCC's move was inappropriate without a review of the underlying media ownership rules.

Wheeler has proposed reviving the joint sales agreement ban as part of completing a review of the rules. Congress mandated a review every four years, but nearly a decade has passed, the panel said.

The decision wasn't surprising given the continued challenge for the FCC to develop rules, Paul A. Werner of Sheppard Mullin Richter & Hampton LLP said.

"This has been a long-running issue at the commission dating back many, many years of trying to get media ownership rules that are sensible and lawful in place, and it's run into continuous challenges on appeal," he said. "Once again, the commission's rules were struck down, so it's just back to the drawing board again."

Many of the rules are antiquated and backward-looking, he added, given vast changes in the media world.

"I think it just gets to be harder and harder for the FCC to come up with something that makes sense and fits with kind of the current media landscape," he said.

Feder said he found most surprising the level of anger directed at the FCC in the decision.

"Agencies sit on stuff all the time, so it is somewhat egregious, but I guess I've become numb to it, so I think the fact that the Third Circuit was sort of taking them to task was impressive," he said.

The case is Prometheus Radio Project v. Federal Communications Commission et al., case numbers 15-3863, 15-3864, 15-3865 and 15-3866, before the U.S. Court of Appeals for the Third Circuit.

Global Tel*Link et al. v. FCC et al.

The FCC hit another snag on a separate issue in March when the D.C. Circuit voted to lift regulations capping rates for calls from prisons and jails until it decides the validity of the order implementing them.

The court granted a stay, saying only that the providers making the request — Securus Technologies Inc., Global Tel*Link and Telmate LLC — had "satisfied the stringent requirements for a stay pending court review." The decision came mere weeks after a different panel had temporarily frozen interstate caps.

Republican FCC Commissioner Ajit Pai said in a statement that it was the latest example of agency orders hitting significant resistance in other government branches.

Feder said although it's unwise to predict a case's outcome based on a stay, it's also somewhat surprising that one was granted.

"Since it seems like the harm was largely economic, in those circumstances you don't usually see courts granting stays," he said.

The move potentially means that "it doesn't look good for the FCC" in the case, he added.

The consolidated case is Global Tel*Link et al. v. Federal Communications Commission et al., case number 15-1461, in the U.S. Court of Appeals for the District of Columbia Circuit.

The Videohouse Inc. et al. v. FCC et al.

The FCC did find victory in another dispute over whether a court should grant a stay, when the D.C. Circuit refused in March to delay the commission's experimental incentive auction as it considers a challenge by low-power television stations over their eligibility to participate.

The court found the stations had not met the requirements for a stay of the auction, which is ongoing and involves television broadcast stations voluntarily selling their low-band spectrum to the FCC in exchange for a share of the proceeds when the spectrum is auctioned off to wireless providers.

Feder said the outcome wasn't necessarily unexpected, but it's also critical that the auction process wasn't slowed.

"There's been so much general anxiety around the auction, I thought it was a nice positive thing for the FCC to get that," he said. "I think the auction's going to take a while but that's because of the auction, not because of these external things."

The decision was important to ensure the auction moved forward, Werner also said.

"That moving forward is significant from the standpoint that this is really kind of interest of progress and getting spectrum out there and made available and being put to use," he said.

The case is The Videohouse Inc. et al. v. FCC et al., case number 16-1060, in the U.S. Court of Appeals for the District of Columbia Circuit.

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