

Plaintiffs Comments:

DC Circuit confirmed its decision is not a remand of AT&T's sole defense of fraudulent use:

From: Al [mailto:ajdmm@optonline.net]

Sent: Tuesday, June 09, 2015 10:10 AM

To: martha_tomich@cadc.uscourts.gov

Subject: Martha --Now we understand why D.C Circuit Decision by law is not a remand...

Ms. Tomich

Thank you for your time and other DC Circuit staff for their time. I now have the answers and understand explicitly as to why our DC Circuit case 03-1431, by Communications Act law, is **not a remand** and all open issues have been determined.

Agreed it was incumbent upon AT&T that if it didn't like the DC Circuit Decision that it wasn't a remand, it had the opportunity to appeal and chose not to. Agreed all the answers as to why it is not a remand and the case has been decided against AT&T are all right in the DC Circuits Decision.

If it was a remand it would explicitly state it was a remand. If it does not state that it is a remand then it is not a remand. If there is no remand then the specific question referred has been determined as answered:

DC Circuit pg. 5 para 2.

DC Circuit pg. 5 para 2: The specific question referred to the FCC was "whether section 2.1.8 permits an aggregator to transfer traffic under a plan without transferring the plan itself in the same transaction."

That question was reviewed by the DC Circuit so there were no open issues and there is no remand, as the FCC did not appeal the DC Circuit Decision.

AT&T believed that obligations were still open issues as it based its argument on this sentence:

"We also do not decide precisely which obligations should have been transferred in this case, as this question was neither addressed by the Commission nor adequately presented to us."

It was not a remand because this obligations issue was **not addressed by the Commission** because simply the referral to the FCC did not request the FCC to address obligations allocation as it was not an issue. The referring District Court already had a handle on which obligations should have been transferred under 2.1.8. The only issue the FCC was to decide is 2.2.4 fraudulent use as AT&T conceded obligations allocation under 2.1.8 was never an issue.

The obvious fact that the FCC did not issue another decision tells you the FCC's position is that it's not a remand.

AT&T also believed that due to this sentence there were open issues DC Circuit on page 11 fn2

“How this enumeration affects the requirement that new customer assume “*all* obligations of the former Customer” (emphasis added) is **beyond the scope of our opinion.**”

Judge Roberts added emphasis on the wrong word “all” when the word “former” should have been emphasized. The DC Circuit decision states that this obligation allocation is **“beyond the scope of our opinion”** because DC was limited to reviewing **only what was referred to and interpreted by the FCC.** Therefore since it was not within DC's scope to review it, then certainly it was not within DC's scope to address it or remand it.

Since the Commission was not afforded the opportunity from the District Court referral to interpret obligations the DC Circuit is **precluded from addressing this issue** and thus can't remand it as it was never before the FCC as stated within DC Circuit Decision pg. 10 fn1.

The Communications Act **precludes us from addressing only those issues which the Commission has been afforded no opportunity to pass.**” 47 U.S.C. Section 405(a). It does not prevent us from considering “whether the **original question** was correctly decided,” MCI v FCC, 10 F3d 842, 845 (D.C. Circ. 1993), or whether the FCC “relied upon faulty logic.” Nat'l Ass'n for Better Broadcasting v. FCC 830 F2d 270, 275 D.C. Cir. 1987). The analysis recounted above speaks to the soundness of the Commission's ruling on **the question initially presented,** and not to any novel legal or factual claims.”

The DC Circuit could only address the original 2.2.4 issue and whether 2.1.8 allows traffic only to transfer.

Where it states on page 11 last line: “The petition for review is granted.” That simply means that only what was referred to the FCC 2.2.4 and can traffic only transfer without the plan was reviewed by the DC Circuit. The obligations allocation under 2.1.8 had already been stated by AT&T as customer plan obligations don't transfer in order to assert its 2.2.4 fraudulent use defense under 2.2.4. The DC Circuit did not review obligations allocation as it was not referred to the FCC and therefore not reviewed and therefore can't remand what the FCC was not afforded the opportunity to address and thus no remand.

The FCC also agrees that the DC Circuit was not a remand. The FCC in its 2007 Order determined the Judge Bassler obligation allocation referral 2.1.8 was not within the scope of the original case 2.2.4 and thus the FCC banned all of AT&T's 2.1.8 defenses and effectively the Judge Bassler 2006 referral is outside the scope of the case and makes the case moot.

Plaintiffs have been arguing about obligations allocation for 9 years before the FCC when if plaintiffs had just understood the case was not a remand that by definition means all open issues have been resolved. As they say better late than never!

AL Inga