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UNITED STATES COURT OF APPEALS  
FOR DISTRICT OF COLUMBIA

# TRANSCRIPT OF PROCEEDINGS

MAR - 3 2003

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RECEIVED

AT&T CORP.,

Petitioner

Appellee.

v.

No. 01-1485

FEDERAL COMMUNICATIONS  
COMMISSION and UNITED STATES  
OF AMERICA

Appellants.

UNITED STATES COURT OF APPEALS  
FOR DISTRICT OF COLUMBIA CIRCUIT  
FILED  
MAR 3 2003  
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Pages 69

Washington, D.C.

1 UNITED STATES COURT OF APPEALS  
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3  
4 ----- X  
5 AT&T CORP., :  
6 Petitioner :  
7 v. : No. 01-1485  
8 FEDERAL COMMUNICATIONS :  
9 COMMISSION and UNITED STATES :  
10 OF AMERICA :  
11 Respondents. :  
12 ----- X

11 Wednesday, February 19, 2003  
12 Washington, D.C.

13 The above-entitled matter came on for oral argument  
14 pursuant to notice.

15 BEFORE:

16 CIRCUIT JUDGES TATEL and GARLAND and SENIOR  
17 CIRCUIT JUDGE WILLIAMS

18 APPEARANCES:

19 ON BEHALF OF THE PETITIONER:

20 DANIEL MERON, ESQ.

21 ON BEHALF OF THE RESPONDENTS:

22 RICHARD K. WELCH, ESQ.  
23  
24  
25

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P R O C E E D I N G S

1  
2 THE CLERK: Case number 01-1485, AT&T Corporation  
3 versus Federal Communications Commission, et al. Mr. Meron  
4 for the petition, Mr. Welch for respondents.

5  
6 ORAL ARGUMENT OF DANIEL MERON, ESQ.

7 ON BEHALF OF THE PETITIONER

8  
9  
10 MR. MERON: May it please the Court, Daniel Meron  
11 for petitioner, AT&T Corp. Despite the broad disagreement  
12 between the parties in their brief, it seems to me that the  
13 FCC agrees with two principals that I think greatly simplify  
14 the jurisdictional question in this case.

15 First, the FCC agrees that if the Section 504  
16 collection action would have been an inadequate forum for AT&T  
17 to obtain review of the forfeiture order, then two things  
18 follow. One, even under Pleasant Broadcasting, review is  
19 available to this Court under 402. And two, AT&T's payment of  
20 the forfeiture is considered, as a matter of law, under duress  
21 and it did not obtain its rights to obtain review.

22 And the second thing the FCC agrees with is that if  
23 AT&T had withheld payment --

24 THE COURT: Could you talk a little louder? I'm  
25 sorry, I'm having --

1 MR. MERON: Yes, I'm sorry. If AT&T had withheld  
2 payment, provoked a collection, and provoked a collection  
3 action, it would not have been able in the District Court  
4 collection action, to litigate its defense that the underlying  
5 regulation is invalid.

6 THE COURT: Well, if we held that they couldn't come  
7 directly, then it would seem to me wrong to hold that you also  
8 couldn't raise it in the District Court. So we can't really  
9 start with that. I appreciate the government is going to have  
10 some difficulty answering that point, but with respect to this  
11 question, imagine you could raise it in the District Court,  
12 because you weren't allowed to raise it here.

13 MR. MERON: Well --

14 THE COURT: What's wrong with a, I mean --

15 MR. MERON: There are two answers to that.

16 THE COURT: Yes.

17 MR. MERON: There's kind of a formal answer and a  
18 more practical answer. The more practical answer is what you  
19 would be deciding in this case is that AT&T, you would be  
20 cutting off review of the D.C. Circuit by subverting AT&T's  
21 position.

22 THE COURT: You will be, direct review. You would  
23 get indirect review.

24 MR. MERON: Correct. However, your decision would  
25 not, as I think your question assumes, mean that AT&T would

1 have automatically a right to go to, to raise the issue of the  
2 District Court --

3 THE COURT: Right, in other words it would be --

4 MR. MERON: -- because the FCC controls the forum  
5 there. It gets to sue.

6 THE COURT: Yes. Yes. Well, put it --

7 MR. MERON: It would sue the Eighth or Ninth  
8 Circuits, right?

9 THE COURT: I'm sorry?

10 MR. MERON: I mean, what --

11 THE COURT: Well, it could use in a different  
12 circuit. Right, that's right. But I can't really protect our  
13 own circuit with respect to that question.

14 MR. MERON: Well, and then as a --

15 THE COURT: And that is, it seems like, and I'm not  
16 saying this is the answer, but it seems like it would be a  
17 reasonable jurisdictional structure for Congress to say, all  
18 right, sort of like the FCC. The FCC can decide it wants to  
19 stop a merger. But you can't appeal unless they actually try  
20 to stop the merger by going into the District Court and  
21 getting, seeking a stay of the merger.

22 So the fact that the ALJ at the FCC decided that you  
23 violated the antitrust laws, tough. You know. You can't do  
24 anything about it. On the record is an ALJ decision that the  
25 FCC, and maybe a Commission decision, that you violated

1 antitrust laws, but you can't do anything unless they actually  
2 try to do something to you. And the preserves a sort of  
3 prosecutorial discretion, like maybe the Commission could  
4 decide, well, maybe we made a mistake here, and we better not  
5 go against AT&T. They've got such fine lawyers, they could  
6 beat us.

7           And maybe under that theory, then, they should be  
8 able to wait until they actually do something that hurts you.  
9 And until they collect, they haven't done anything that hurts  
10 you.

11           MR. MERON: Well, the problem is that under, 2342  
12 says that the Court of Appeals shall have exclusive  
13 jurisdiction to determine the validity of any FCC rule or  
14 order.

15           And what the Eighth Circuit has held, any and all,  
16 what the Ninth Circuit held in the Dunifer case, and what many  
17 circuits typify by the GTE versus Morrison case that we cited  
18 say, is that for that reason, when you are in District Court,  
19 and even if FCC is coming after you, whether it's a  
20 forfeiture, like in the Eighth Circuit, or an action for an  
21 injunction, which was the issue in the Ninth Circuit, the  
22 party may not challenge in that District Court, the validity  
23 of the underlying regulation, because review is exclusive to  
24 the Court of Appeals.

25           THE COURT: Well, but I guess I --

1 THE COURT: That's surely a misinterpretation. I  
2 mean, surely any and all is wrong, right? I mean, it doesn't  
3 follow from the exclusive jurisdiction, exclusive original  
4 jurisdiction for one set of orders, that when the issue comes  
5 up in the 504 context, that the Court would be barred from  
6 entertaining it. I know that both parties here agree on this  
7 proposition, but it strikes me as flatly wrong.

8 MR. MERON: Well, Judge Williams, it is not just the  
9 Eighth Circuit. It's the Eighth Circuit and the Ninth  
10 Circuit. Both have held in actions when the government comes  
11 after you that the 402 language, and the language of 2342  
12 speaks to determining the validity of. It doesn't speak in  
13 terms of who brings the action, or in other words, it may have  
14 been a different question, for example.

15 THE COURT: I don't see how this answers it. All it  
16 says is, exclusive jurisdiction to determine the validity of  
17 all final orders made reviewable by Section 402(a). That's  
18 what you're looking at, right?

19 MR. MERON: Yes.

20 THE COURT: Then our question is, well, is this  
21 reviewable under 402(a), and if we decide that it's not,  
22 because there is another system of a statute here, then the  
23 word exclusive, this section doesn't really apply.

24 And if we were to decide that it is not reviewable  
25 by Section 402(a), because Congress has established a

1 different system, then you could raise it there.

2 MR. MERON: Okay. I think, Judge Garland, we're  
3 focusing on a different order. When AT&T is challenging the  
4 validity of the underlying regulation, okay, the order that  
5 it's challenging there is not the forfeiture order. It's the  
6 order of the problem, again, of the underlying regulation.  
7 There's no question that the order that promulgated the  
8 underlying regulation is an order reviewable under 402. In  
9 fact, our pending petition for review is still before this  
10 Court.

11 That's the order, that's what the Eighth Circuit was  
12 focusing on. Yes, the forfeiture order itself, otherwise  
13 might not have been reviewable. That's the 504 order. But  
14 the 40 -- the order that we're seeking to obtain review of in,  
15 when it was applied against us, is the order promulgating the  
16 regulations. That order is reviewable under 402, and that's  
17 what lead the Eighth Circuit and the Ninth Circuit to say, no,  
18 you can't litigate that in the District Court. Now --

19 THE COURT: You have to win, do you have to win that  
20 argument to win this case?

21 MR. MERON: No. No, we don't. I think that's --

22 THE COURT: I didn't think so.

23 MR. MERON: Well, I thought it was the simplest,  
24 because I think, as Judge Garland said, as a matter of due  
25 process you've got to have some place where you can obtain

1 review of this --

2 THE COURT: But do you, but do you need -- what's  
3 your, if you don't need that argument, what's your best  
4 argument?

5 MR. MERON: Well, the argument would be --

6 THE COURT: It's the statutory argument, right?

7 MR. MERON: Right. The statutory argument is the  
8 text. The text, it seems to me, supports jurisdiction. First  
9 you start with 402. 402, in conjunction with 2342 says that  
10 this Court has jurisdiction to review any final order issued  
11 by the FCC.

12 This order is clearly final. There is nothing left  
13 for the FCC to do. It concretely determines rights and  
14 liabilities. It has collateral consequences in future  
15 proceedings. So it's clearly final. So in 402 and 2342,  
16 there is jurisdiction.

17 Then you turn to the question, well, does 504 remove  
18 that jurisdiction, and the answer is no as a textual matter,  
19 because 504 doesn't apply to situations where the party has  
20 paid the forfeiture. And the last sentence of Pleasant  
21 Broadcasting said that. It said, where the parties paid the  
22 forfeiture, the 504 collection is unavailable, so you can come  
23 in under 402.

24 And so it seems to me at the end of the day, the  
25 only textual argument, textual argument that the FCC makes in

1 its brief against jurisdiction in this Court, is an  
2 implication by silence, by comparing the review available for  
3 formal procedures under 503(b)(3), where Congress did mention  
4 402, but any such implication by silence is far too weak to  
5 constitute the clear evidence that's required to show an  
6 implicit reveal of the jurisdictional provision.

7 So here you have a situation where the language  
8 clearly shows that there is jurisdiction here, where, at  
9 least, you've got a final order. And a final order was, you  
10 do have a final order, because AT&T paid the forfeiture and  
11 has the consequences. Because whether you start from 402 or  
12 whether you start from the unavailability --

13 THE COURT: What about, I appreciate Thunder Basin  
14 is not directly on point, because that involves, actually, an  
15 appeal to this Court through the administrative proceeding,  
16 but wasn't in that case the same kind of problem, but in  
17 reverse, that the District Court, if you read the statute  
18 literally, would have jurisdiction to issue a declaratory  
19 judgment, or whatever, but that the statutory scheme was set  
20 up in such a way as to funnel review through the  
21 administrative agency directly to this Court.

22 And what the Court said there was that when such  
23 scheme like that exists, Congress doesn't want it disrupted by  
24 going through a different route. And by analogy, it's really  
25 only just the reverse, the same as here; that is, they set up

1 an enforcement scheme with respect to forfeiture orders, and  
2 they've made it possible, then, before you are hurt, to go  
3 through the District Court, and you can still attack the  
4 regulation as you are, directly, when there is no forfeiture  
5 order, and no forfeiture issue. So --

6 MR. MERON: I'm sorry, we could attack it at the  
7 District Court, you mean?

8 THE COURT: No, no, here in this Court. You already  
9 have a separate attack on the regulation, right, in a  
10 separate, in a separate petition for review?

11 MR. MERON: Although it didn't raise this issue, I  
12 don't believe, because this was --

13 THE COURT: Well, you could have. You could have  
14 raised this issue, couldn't you?

15 MR. MERON: I actually think, Judge Garland, if  
16 three years ago when AT&T had filed that petition, if they had  
17 come in and said the regulation read literally would appear to  
18 allow the FCC to find liability even when you are fully  
19 complied with the verification procedures, they would have  
20 said there was a lack of ripeness.

21 THE COURT: You would say that -- all right, all  
22 right.

23 MR. MERON: Maybe we would have applied it that way.

24 THE COURT: I appreciate it. All right. So lets  
25 say we said -- I think that's a good point, but of course, if

1 we said you can't get in because of lack of ripeness, and then  
2 suddenly it became ripe, you would not have been out of time.  
3 We say this over and over again in our ripeness decisions.

4 MR. MERON: I think you still have to wait for an  
5 order. In other words, I don't think you could come in --

6 THE COURT: That is, if, well, it's interesting,  
7 if --

8 MR. MERON: I don't think you could come in two  
9 years later --

10 THE COURT: If the only reason, if we said not ripe  
11 because it doesn't look like they really mean to do this, an  
12 actually there is some question here that they are trying to  
13 still argue, whether they really, although in this case it  
14 seems they really do mean to, but if we said it's not ripe  
15 because they haven't interpreted this in a way that makes it  
16 clear that that's what they meant, we would usually say that  
17 when it does become ripe, we often say in our opinions, you  
18 know, of course, if it does become ripe, then you can come.

19 And at that point, you would have an agency  
20 interpretation, as well as a regulation, and you could bring  
21 your action directly with us.

22 MR. MERON: Judge Garland, I've always understood  
23 this Court's statements that when you've said that to mean  
24 that you could wait until it's enforced against you, and then  
25 challenge it when it's enforced, which is what we are trying

1 to do; not that you could, two years later, file a petition  
2 for --

3 THE COURT: Well, those are always in circumstances  
4 where we don't have this problem of a District Court, of a  
5 special statute about enforcement in the District Court.

6 THE COURT: But it's an interesting point. I mean,  
7 maybe under Judge Garland's theory you are here legitimately,  
8 regardless of your own argument. That is to say, the issue  
9 has become ripe, and you have, it became ripe in the order to  
10 which you object, and you have challenged it, timely.

11 MR. MERON: Judge Garland --

12 THE COURT: In other words your, now, what the  
13 consequence of that would be is an interesting question, but  
14 you're raising your legal issue in a ripe, in a now ripe  
15 attack on the regulation as interpreted by the Commission. So  
16 maybe you have two theories for being here.

17 MR. MERON: Right. That's my third theory then,  
18 yes.

19 THE COURT: Third?

20 THE COURT: What's the first one?

21 MR. MERON: Well, I think the first one is the  
22 textual argument based on 402 and 504.

23 THE COURT: Then what's the second one?

24 MR. MERON: The second argument is that even if we,  
25 you otherwise could be the Court of Appeals, you can be where

1 you're challenging the validity of the reg. That's a narrower  
2 theory. And my third, the third argument, I mean, our main  
3 textual argument would mean that you could pay the forfeiture  
4 and come here, even where your defense is not that the reg is  
5 invalid. The more limited one is at least you should be able  
6 to do that when the regulation is invalid.

7 Judge Garland, I'm not, and I don't understand what  
8 disruption this would do to the FCC here: It seems to me in  
9 all respects, and we've said this in our brief, and they don't  
10 dispute any of this in their reply brief, in all respects it  
11 makes things easier for the FCC.

12 Number one, it saves the cost of having to bring a  
13 collection action. Number two is, they get the money up  
14 front. Number three is, they get, they don't have to have de  
15 novo review of the facts. They get a more differential  
16 standard on the facts.

17 THE COURT: I think that's a fair point and  
18 obviously something to ask them. The question is whether they  
19 should have an opportunity to decide, well, maybe they've  
20 screwed up here, and the solution is to just not get this done  
21 in Court, and to just not ever bring the forfeiture action.

22 To put the question the other way is, how are you  
23 hurt if they never actually try to collect?

24 MR. MERON: Well, if you, if they never try to  
25 collect, but you could raise your defense, the invalidity of

1 the reg, where they do seek to collect, which is of course not  
2 the rule in the other circuits, then arguably you are not  
3 hurt. But it's very common in administrative law to get the  
4 right to choose between complying with the regulation and  
5 taking one type of review, or not complying and provoking an  
6 enforcement action and seeking another. And it often occurs  
7 that those happen in different courts.

8 So it's not as if there is a background principal of  
9 administrative law that says, parties may not choose to take  
10 compliance decisions that affect the forum. I mean, the rule,  
11 if anything, is to the contrary. So I don't think we have to  
12 show that we would have definitely been hurt the other way,  
13 but I think you should at least take cognizance of the fact,  
14 Judge Garland, that at the time AT&T paid this forfeiture, the  
15 only Court of Appeals decision that I'm aware of in this  
16 issue, said it would not have been able to challenge the  
17 validity of the reg in the District Court.

18 THE COURT: No, I understand why you are doing it,  
19 but obviously that's not going to bind us, that decision.

20 MR. MERON: I understand that.

21 THE COURT: So we have to, if that's wrong, as Judge  
22 Williams is suggesting, then maybe everything comes out  
23 differently.

24 MR. MERON: It seems to me, but it's not just that  
25 the Eighth Circuit says so. That seems to be what the text

1 says as well of 2342. But even if, even if that is wrong, as  
2 I said in response to the question from Judge Tatel, I believe  
3 that the text here shows there is jurisdiction anyway. If I  
4 may turn to the merits?

5 THE COURT: Yes.

6 MR. MERON: The Section 258 says that it shall be  
7 unlawful for a long distance carrier to submit a change in the  
8 carriers line, unless it has complied with such verification  
9 procedures as the FCC shall prescribe. And 258(b) then says  
10 that a carrier that violates the verification procedures shall  
11 be liable.

12 Here, AT&T put in evidence, it showed that it fully  
13 complied with the procedures. It asked all the questions it  
14 was required to ask. It got the answers that were  
15 appropriate. And it had that all verified by an independent  
16 third party. And no one claims that any of those procedures  
17 were not followed. In fact --

18 THE COURT: That's on your reading of the regulatory  
19 statement of the procedures.

20 MR. MERON: Well, I mean, the --

21 THE COURT: Right?

22 MR. MERON: Well, I mean the --

23 THE COURT: I mean, at least as I understand the  
24 FCC's reading of the procedures, when they say the subscriber,  
25 they talk about the subscriber's consent, they mean the right

1 person.

2 MR. MERON: Well, my response is that, first of all,  
3 it seems to me that that is not a fair reading of the  
4 regulation because, in fact, what the order --

5 THE COURT: Well, I was a little surprised at that.  
6 You didn't, you didn't, at least I don't see your brief  
7 raising the issue that the FCC's interpretation of its  
8 regulation is an invalid interpretation, independently of the  
9 statute.

10 MR. MERON: Well, there's two things. The  
11 regulation, the FCC relied on footnote 13 of the  
12 reconsideration order, was the regulation which said that in  
13 addition to complying with verification procedures, you must  
14 in addition obtain authorization. So but the regulation says  
15 that authorization is a separate requirement of, in addition  
16 to compliance with the verification procedures. And that's  
17 the regulation that the FCC relied on.

18 Now, if what the FCC is now saying is that the  
19 verification procedures fairly understood itself build in this  
20 notion of an actual consent, that you have to be, you're  
21 responsible to ensure that the person you are speaking to is,  
22 in fact, the actual subscriber, then it suffers from the same  
23 invalidity as the other regulation. I mean, then it just  
24 means that through the back hand door of defining procedures,  
25 what they've done is, in fact --

1 THE COURT: Well, but is that because you think it's  
2 an unreasonable interpretation of the regulation, or that the  
3 regulation violates the statute by asking for, by demanding  
4 actual subscriber consent.

5 MR. MERON: I think it does both, Your Honor. I  
6 think it's a reasonable interpretation of the statute.

7 THE COURT: You do? You think the agency  
8 interpretation of its own regulation here requiring actual  
9 subscriber consent is unreasonable?

10 MR. MERON: No. I think we are talking about  
11 different regulations. I think 1120(a)(1)(i), I think it read  
12 literally does say that you have to get authorization in  
13 addition to verification procedure.

14 THE COURT: Right. Okay.

15 MR. MERON: And I think that, and I understand the  
16 standard for review of the reasonableness of agencies  
17 construction of its own interpretations is so deferential  
18 which is why we focused on the other argument that even if  
19 that's what it means, it's invalid.

20 THE COURT: It's invalid under the statute.

21 MR. MERON: Right.

22 THE COURT: Okay.

23 MR. MERON: Because, I mean, 258, I mean, Congress  
24 knows how to say, you have to obtain actual consent. It has  
25 said that three different places in the communications act.

1 Here what it did is it required the FCC to establish  
2 verification procedures, and the responsibility for long  
3 distance carriers to comply with them.

4 THE COURT: What was the footnote that you referred  
5 to in the --

6 MR. MERON: I'm sorry, footnote 13. This is on JA-  
7 192. This is footnote 13 of the reconsideration. Now --

8 THE COURT: No, I'm sorry, the footnote is a cite.  
9 I see, it's the text at footnote 13.

10 MR. MERON: Well, at footnote 13, when they say our  
11 regs require that you have authorization, the cite that's  
12 given there is to 64-1120. At the time it was 1100. They've  
13 changed the codification.

14 THE COURT: Yes.

15 MR. MERON: And that, and (a)(1)(i), and what  
16 (a)(1)(i) says is, you have to obtain authorization in  
17 addition to compliance with the verification procedures. So  
18 our, in our view, making carriers liable, even where they've  
19 complied with all the procedural aspects, they've taken all  
20 the steps they can to verify. They've asked all the right  
21 questions. Then to say that in addition to that, even if  
22 there is no way, and that's the other part that's very  
23 remarkable here. FCC doesn't deny that AT&T lacks inherently  
24 the information that would enable it to know if someone is not  
25 telling them the truth or misstating their identity.

1 THE COURT: Well, but they are saying, look,  
2 someone's got to be responsible for this, and you're making  
3 the phone calls. So AT&T is making the phone calls. I mean,  
4 no one else could be considered possibly responsible for what  
5 happened here, right?

6 MR. MERON: Well, I mean, the person who answered  
7 the phone and gave that information. As a matter of  
8 commercial law, Judge Tatel, normally a party who contracts  
9 with someone with apparent authority to conduct a transaction,  
10 the result of that is a binding contract. AT&T provided the  
11 actual service, based on apparent authority of the individual.

12 THE COURT: So they should prosecute the person who  
13 answered the phone?

14 MR. MERON: Well, it's not a prosecution. The  
15 question is whether the result is, when AT&T has done all of  
16 those procedures, does that mean the person that gets it for  
17 free, the service?

18 THE COURT: Well, are there other steps that could  
19 be taken, like looking in the telephone books and seeing if  
20 it's the same person?

21 THE COURT: Right.

22 THE COURT: For example, if, in my house, you, you  
23 know, one of my children answered the phone and said, I'm the  
24 subscriber, is that all that's required?

25 MR. MERON: But that wouldn't help you because --

1 THE COURT: Would that help you? If your  
2 telemarketer called and your verifier called, and my child  
3 said, I'm authorized, would that be sufficient? Do you  
4 believe that, I mean, that satisfies the verification  
5 procedures?

6 MR. MERON: But your child wouldn't be the one  
7 listed in the phone book.

8 THE COURT: Right. Let's leave the phone book aside  
9 for one moment.

10 MR. MERON: Okay, I'm sorry.

11 THE COURT: Because that will be my next question.

12 MR. MERON: Okay.

13 THE COURT: I've turned over all my cards in advance  
14 so you can think about what I'm going to ask you.

15 MR. MERON: Okay, sorry.

16 THE COURT: Imagine your telemarketer called. My  
17 child answered the phone and said, I am the person responsible  
18 for the account. I authorize you to switch to AT&T. The  
19 telemarketer says, that's great. I'm going to put on my  
20 verifier, to verify our call. She says exactly the same  
21 thing. Is that it? The procedure, are you now absolved from  
22 liability?

23 MR. MERON: Under our reading, yes.

24 THE COURT: Now, even if the telephone book says  
25 that I'm, it lists me, rather than my child, as the telephone

1 number, as the person at that telephone number?

2 MR. MERON: Yes, for two reasons, or maybe for  
3 three. Number one is, director listings are very out of date,  
4 very quickly. I mean, they are not reliable. They change all  
5 the time. People change their phone numbers. And number two  
6 is, it is very common to have multiple people in a household  
7 with different last names.

8 THE COURT: Well, I agree, but that would suggest,  
9 the first thing you are verifying, in order to have a real  
10 verification, a verifier should look it up and say, well, in  
11 the phone book it says X. Are you sure you are authorized?  
12 Or what makes you authorized if the phone book says  
13 Mr. Garland is listed? Why shouldn't the verifier have to ask  
14 that question?

15 MR. MERON: Your Honor, there is no evidence  
16 whatsoever that any of this information would have been  
17 accessible to the verifier in real time.

18 THE COURT: Well, that's a different question.  
19 That's a question of what the procedures are, whether  
20 following procedures would have yielded a result. You have a  
21 section of the brief --

22 MR. MERON: But the FCC --

23 THE COURT: -- where you suggest there is nothing  
24 more you could have done. But there are other things you  
25 could have done.

1 MR. MERON: But not to solve the situation. I mean,  
2 let's say the phone book says your name is, it lists as  
3 subscribers, Mr. Smith. And the person says, I am Mr. Smith.  
4 How are you supposed to know that that's not true? Their  
5 letter says, it wasn't Mr. Smith. I wasn't the one. Under  
6 the FCC's view, you've committed a slam.

7 And the FCC has never identified a single additional  
8 procedure. And as I read the statute, what Congress is doing  
9 here is, it understand that there is an inherent lack of  
10 information. And so there is a question of what reasonable,  
11 how much cost are you going to assume to be reasonable?

12 And what Congress basically said is, we're going to  
13 tell the FCC, you figure that out. You decide what's a  
14 reasonable cost. For example, this proposal, and we say in  
15 our brief, by the way, you should know, Judge Garland, of  
16 creating a national data base, that's not something I just  
17 invented. There is a proposal before the FCC to do that.  
18 It's been pending for years. If the FCC wants --

19 THE COURT: I take it the local telephone companies  
20 don't want to give up their data, is that right?

21 MR. MERON: Oh, I don't think that that's the  
22 problem. I think it's just very expensive. I mean, I don't  
23 think it's a proprietary information. I think it's -- well,  
24 it may be partly that, though the directory listings have to  
25 be made available, this is kind of complicated, through other

1 provisions.

2 THE COURT: Yes, but you're telling me that this is  
3 beyond director listings. These are the people who actually  
4 pay, and maybe the local telephone companies don't want you to  
5 know.

6 MR. MERON: They may not, but that's all questions  
7 that the FCC has to grapple with to defer a census. And it  
8 hasn't grappled with it. And then --

9 THE COURT: Let me ask you one more question, just  
10 so I understand the consequences. 258(b) also requires that  
11 the carrier, long distance carrier, repay the, turn over any  
12 collected charges to the customer's preferred carrier, right?

13 MR. MERON: Yes.

14 THE COURT: Which if you are right about the  
15 interpretation, AT&T wouldn't have to do that either here.

16 MR. MERON: That's right.

17 THE COURT: So not only would you escape forfeiture,  
18 but you would have made a profit off of this slam, right?

19 MR. MERON: Well, you've provided the service. This  
20 is not a situation where you make money and didn't provide a  
21 service. You provided a service under circumstances where it  
22 would be, there was reasonably appeared to be apparent  
23 authority by the person who conducted the transaction.

24 THE COURT: The prior phone company, I take it,  
25 would be disabled from charging for that period, is that

1 right?

2 MR. MERON: Well, it didn't provide any service, so  
3 I would think that it --

4 THE COURT: That's a different question.

5 MR. MERON: No, I mean, that's why.

6 THE COURT: It would be disabled from charging.

7 THE COURT: Maybe the answer is that everybody is  
8 doing this, so it comes out in the wash, right?

9 MR. MERON: Well, in fact, not everyone is doing it.  
10 I mean AT&T does it less frequently than anybody else, I mean,  
11 and three times less frequently than the second best carrier.

12 THE COURT: Yes, the argument of the other telephone  
13 company is, they would have made a profit which you are  
14 depriving them of. That's their argument. I mean, there is a  
15 loss there.

16 MR. MERON: But, I mean, they also didn't provide a  
17 service. I mean, and there is --

18 THE COURT: Yes, but under that theory, everybody,  
19 you know, they should just transfer everything to you.

20 There's a reason why they are against slamming, and why  
21 everybody is against slamming. And it may be (a) depriving  
22 one company of the relationship, and it may be (b) that you  
23 charge more than somebody else does. I'm not saying you do.

24 MR. MERON: Right.

25 THE COURT: I don't know whether you do or not.

1 I'll look if you want, but I don't know. You rightly point  
2 out footnote 13 and the text associated with it, but suppose  
3 the FCC said, well look, let's look at (2)(i), verification of  
4 that authorization. Is, suppose they said that authorization.  
5 It's got, that's only meaningful if there was some underlying  
6 authorization to be verified.

7 MR. MERON: Well --

8 THE COURT: And if it's the wrong person, there is  
9 no such authorization to be verified.

10 MR. MERON: But I guess it comes down to the  
11 question, what does verification procedure reasonably mean?  
12 It seems to me what a verification procedure was what FCC,  
13 what the Congress required, is a step or method taken,  
14 designed to obtain a certain result. But it's not a guarantee  
15 of the result.

16 In the same way, for example, that I don't, you  
17 know, a school doesn't violate a requirement to test its  
18 athletes for drugs, just because in two instances a false  
19 negative was returned. That doesn't mean you failed to  
20 administer a test. It just means that the test has a certain  
21 inherent unreliability to it that you couldn't have done  
22 anything about.

23 And here, if I may, even if AT&T did violate 258, it  
24 certainly didn't do it willfully. In the order below, the FCC  
25 said willfully meant strictly liable or inadvertently. And

1 the FCC makes no attempt to defend that holding. And it seems  
2 to me that --

3 THE COURT: What about repeatedly?

4 MR. MERON: Well, but the FCC --

5 THE COURT: Even if you are wrong about it.

6 MR. MERON: -- first of all, a number of things  
7 about repeatedly. First of all, the FCC's order didn't rely  
8 on repeatedly. AT&T came to the FCC and it said, we lack the  
9 scienter. There was no way we knew or could have known.

10 The FCC said, it doesn't matter because the  
11 standard is inadvertence or strict liability. They never  
12 said, here, even if you're right, AT&T, in one instance might  
13 require willfully, that there were two. That wasn't the basis  
14 for the order. Had it been the basis, we would probably have  
15 come in with a recon petition to address repeatedly. That's  
16 not what the basis of the order was, and so you can't affirm  
17 on that basis.

18 Here, and even if it was the basis of the order,  
19 Judge Tatel, first of all, this is the interpretation to which  
20 the United States versus Mead, Chevron, it doesn't quality for  
21 Chevron deference, because in United States versus Mead, the  
22 Supreme Court held that a classification ruling by customs  
23 doesn't get Chevron deference where it's then applied in a  
24 District Court procedure, proceedings, which is not confined  
25 to the administrative record.

1 THE COURT: Yes, but this is an adjudication, isn't  
2 it? You're saying it's not formal enough of an adjudication?

3 MR. MERON: Because where you don't pay, it then  
4 becomes a de novo trial. And that's what, the focus in Mead  
5 was that the existence of a proceeding in the Court of  
6 International Trade that's not confined to the administrative  
7 record, Justice Sutor said, it's hard to imagine a procedure  
8 less consistent with Chevron than that kind of proceeding.

9 THE COURT: Doesn't the statute define repeated as  
10 more than once?

11 MR. MERON: The statute defines repeatedly for  
12 purposes of Section 312 to mean more than once.

13 THE COURT: Not if --

14 MR. MERON: Not for a 503. And the actual  
15 legislative history shows that that's very deliberate. There  
16 was a Senate bill which said, for purposes of this act, there  
17 was a House bill that said, for purposes of this section, and  
18 the conference committee went with the House which said, for  
19 purposes of this section. And we have to assume, I think,  
20 that Congress understands the difference between saying, for  
21 purposes of this section and for purposes of this act,  
22 otherwise, I think there is very little left of textual  
23 interpretation.

24 And here, the dictionary definition of repeatedly,  
25 every dictionary I've looked at gives us a synonym constantly.

1 it's a word that denotes a ratio of incidents over time. You  
2 know, twice, two typographical errors in a year's worth of  
3 typing would not reasonable lead one to say that that person  
4 repeatedly --

5 THE COURT: Are there more than two here, or only  
6 two that you are trying to seek review of? Weren't there more  
7 than two that they found you liable for?

8 MR. MERON: Well, they found a total liability of 11  
9 out of over 10 million transactions in the course of an entire  
10 year.

11 THE COURT: Is the question whether 11 out of 10  
12 million is repeatedly, not just whether two out of 10 million,  
13 right?

14 MR. MERON: Right. But the FCC's theory of this  
15 case is that two violations, even if they are wholly  
16 unavoidable --

17 THE COURT: Is that in the order anywhere?

18 MR. MERON: No, of course not. That's why I said,  
19 it wasn't the basis for the order. But assuming it was the  
20 basis for the order, it would be unreasonable, because the  
21 FCC's interpretation is that two wholly unavoidable violations  
22 would be enough.

23 And the effect of that, Judge Tatel, is to take a  
24 provision that's clearly designed to identify which, among a  
25 class of regulated entities, is deserving of a quasi-criminal

1 penalty, and converts it into a regulatory tax, because there  
2 is not going to be a single carrier of any size whatsoever  
3 that throughout the course of an entire year won't have at  
4 least two wholly inadvertent and even unavoidable incidents.  
5 And according to the FCC, that's enough to impose a quasi-  
6 criminal penalty.

7           And it seems to me, in addition, Judge Tatel, every  
8 interpretation of repeatedly that the FCC has thus far given,  
9 has been given at the time when the FCC has been harboring a  
10 misimpression as to what willfully means. I mean, in this  
11 thing, willfully means, strictly liable or inadvertently.

12           If this Court agrees with us and willfully means  
13 something much more deliberate than that, then the FCC how has  
14 to grapple in the first instance with what a reasonable  
15 interpretation of repeatedly might mean in the conjunction  
16 with willfully. If you think willfully is an incredibly low  
17 threshold, repeatedly might require, you know, obviously even  
18 less. And so even if this were an instance of indeference,

19           THE COURT: Do you have anymore questions?

20           THE COURT: No.

21           THE COURT: Okay. Thank you. You are out of time.  
22  
23  
24  
25

## 1 ORAL ARGUMENT OF RICHARD K. WELCH, ESQ.

## 2 ON BEHALF OF THE RESPONDENTS

3

4

5

6 MR. WELCH: Good morning, may it please the Court,  
7 Richard Welch for the FCC and the United States. On the  
8 jurisdictional issue, let me go right out of the shoot to the  
9 issue that seems to have peaked Judge Garland's interest, and  
10 that is this claim by AT&T that they cannot seek review of our  
11 rules. It's just, it's incorrect.

12

13

14 First of all, as you've noted, there is a petition  
15 for review of the rulemaking orders pending before the Court.

16

17

18

19

20 THE COURT: Aside from that, imagine that they  
21 hadn't thought of this; that is, they hadn't thought that any  
22 agency could possibly take the position you're taking, and  
23 therefore had missed the 60-day window.

24

25

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27

28

29 MR. WELCH: There are several points to make on  
30 that. First of all, there are half a dozen different ways  
31 they could get the issue before this Court. They could file  
32 for a petition for waiver, a petition for forbearance, a  
33 petition for declaratory ruling.

34

35

36 THE COURT: Whoa. What is that, these are petitions  
37 with you?

38

39

40 MR. WELCH: Absolutely. And the FCC's action in  
41 response to these various petitions would be reviewable in

1 this Court or any other Court of Appeals under Section 402.

2 THE COURT: And wouldn't the standard of review for  
3 something like waiver or review, wouldn't our standard be  
4 considerably more deferential to you than a standard for  
5 review of the original rule?

6 MR. WELCH: In certain contexts, for example, a  
7 petition for waiver. I think that is true, Your Honor, yes.

8 THE COURT: So that's really not giving them a  
9 chance to straight on attack the regulation. That's giving  
10 them a chance, only if under all the other levels of  
11 requirements that those kind of highly discretionary reviews  
12 by the agency are judged by.

13 THE COURT: Well, there are issues in this Court,  
14 and I'm not sure a petition for forbearance necessarily would  
15 be the same standard as a petition for waiver. That, I think,  
16 is --

17 THE COURT: Well, what's forbearance -- I mean, I've  
18 been here six years. I've never heard of a petition, a review  
19 of a petition for forbearance.

20 MR. WELCH: There is a --

21 THE COURT: Forbearance means to use your  
22 prosecutorial discretion not to act?

23 MR. WELCH: To basically to not to enforce this  
24 particular rule against the carriers.

25 THE COURT: So normally, that would be a Chaney

1 versus Heckler issue and be totally unreviewable. Isn't that  
2 the position you take?

3 MR. WELCH: That forbearance petitions would be  
4 unreviewable? I don't believe we have taken that position  
5 before the Court. And --

6 THE COURT: Do you know of any case in which we've  
7 reviewed a forbearance petition, a refusal to act in a  
8 forbearance petition?

9 MR. WELCH: There are cases pending before the Court  
10 right now involving the forbearance petition and the biennial  
11 review position.

12 THE COURT: What is your recommended standard of  
13 review for those cases?

14 MR. WELCH: I think it will be, it will be basically  
15 the arbitrary and capricious standard.

16 THE COURT: So your position, I just want to be sure  
17 because another panel will be considering this, and may look  
18 at this transcript. The FCC's position is, the standard of  
19 review of a forbearance petition is exactly the same as the  
20 standards of a normal appeal of the order itself?

21 MR. WELCH: Judge Garland, I have to confess, we  
22 have just filed our briefs in a couple of these cases, and I  
23 believe that is the case, but I cannot swear to it absolutely.  
24 And if I'm incorrect about that, I would certainly be happy to  
25 correct that misimpression.

1 THE COURT: But your position is that in the  
2 District Court, they would not be able to challenge the order  
3 on the ground that the regulation violates the statute?

4 MR. WELCH: I think that issue, frankly, is not  
5 entirely clear. They are saying that the FCC takes that  
6 position. It is true we have taken that position in the  
7 broadcast licensing context in other circuits. There is this  
8 case in the Eighth Circuit, the Any and All Radio case that  
9 Judge Williams alluded to, where the person that was an en  
10 ream seizure action under Section 510 of the act. It was not  
11 a 504 procedure.

12 And the person who was broadcasting in that case,  
13 their only defense to the enforcement action was a challenge  
14 to the rules themselves. And the Court, I think, was at pains  
15 to point out that the particular person could have sought a  
16 license and a waiver at the FCC.

17 THE COURT: This is where they made a violation,  
18 this is sort of like our Grid Radio case where --

19 THE COURT: Yes, it sounds exactly like Grid Radio.

20 MR. WELCH: It's similar, although Grid Radio is  
21 slightly different, because that was the different forfeiture.  
22 First of all, that was, Grid Radio was a forfeiture.

23 THE COURT: Yes, but the driving force was the  
24 notion that you've got to go get a license, or you've got to  
25 go through procedures to seek a license.

1 MR. WELCH: Correct. That is correct, Your Honor.  
2 Now, I believe Grid Radio was the 503(b)(3) forfeiture  
3 proceedings, where you had a hearing before an Administrative  
4 Law Judge at the FCC, and the statute specifically provides  
5 that 402(a) is reviewable for that sort of forfeiture in the  
6 Circuit Court of Appeals. So it was a different forfeiture  
7 procedure. Remember, we have two different procedures here.  
8 We have the notice of peril liability procedure --

9 THE COURT: The FCC is not committed to the  
10 proposition that they couldn't get review in the District  
11 Court? Is that what you're saying?

12 MR. WELCH: I think it is an open question. I think  
13 it is. And certainly they point to the Eighth Circuit  
14 precedent, and they've pointed to the Ninth Circuit precedent,  
15 Dunifer. They have not identified any circuit, any precedent  
16 in this Circuit that speaks to the issue. So I --

17 THE COURT: Well, AT&T --

18 THE COURT: What is the sense you make of all this?  
19 You are making this huge argument for exclusivity. You face  
20 Illinois Citizens on the one hand. You're now arguing before  
21 us that there's a whole host of alternative ways in which the  
22 Court issues in this case can come up straight to the Court of  
23 Appeals. So what interest is preserved by this exclusivity  
24 reading of 504, which isn't in the language of 504?

25 MR. WELCH: I think it goes to some of the issues

1 that have been identified before. Congress has decided that  
2 in this NAL process, they are going to shift the whole system  
3 to the District Court.

4 THE COURT: Well, not the whole, but at least if  
5 they tried to shift the whole, we know the Illinois Citizens  
6 Committee has frustrated that, right?

7 MR. WELCH: Well, not with respect to the subject of  
8 the forfeiture. The Illinois Citizens case was not a case  
9 where the subject of the forfeiture was seeking 402 review.

10 THE COURT: I understand that, but the legal issues  
11 can all come up in the Illinois Citizens context, right? So  
12 what exactly is achieved by this exclusivity, this super-  
13 exclusivity that you advocate?

14 MR. WELCH: I think it is basically saying to the  
15 subject of a forfeiture, you know, before you have to pay, you  
16 are entitled, as a matter of statutory right, to a trial de  
17 novo in the District Court.

18 THE COURT: Yes.

19 MR. WELCH: And you are statutorily protected from  
20 any harm if you do not pay while you pursue that right.

21 THE COURT: Yes, but what if you agree, as they do,  
22 that if the rule is the one you say it is, they violated it,  
23 but that rule is invalid. That's their position. They agree  
24 that if the rule is the one you say, if it is lawful under the  
25 statute to require strict liability, then they violated it.

1 But their defense is purely legal. Even if they  
2 went that route, you wouldn't allow, they couldn't then raise  
3 that issue in the Court of Appeals on review from the District  
4 Court, could they?

5 MR. WELCH: I'm sorry, could you please repeat that  
6 one more time, make sure I understand the question?

7 THE COURT: Imagine they did wait, like you suggest.

8 MR. WELCH: Right.

9 THE COURT: And in the District Court their defense  
10 is, we have no defense other than that the statute is, that  
11 the rule violates the statute.

12 MR. WELCH: Correct.

13 THE COURT: Okay. And imagine that they could not  
14 raise that in the District Court because of these other cases.

15 MR. WELCH: The District Court dismisses for lack of  
16 jurisdiction. Is that --

17 THE COURT: Yes.

18 MR. WELCH: Okay.

19 THE COURT: Now, in the Court of Appeals, that  
20 wouldn't be the root that the Court of Appeals could consider  
21 either, would it? It would only be able to do it through 402.

22 MR. WELCH: I think that's right.

23 THE COURT: All right, so where do we get here? I  
24 mean, you describe this as if this is a benefit for the  
25 company, that they have a root of a trial de novo. They don't

1 want a trial de novo.

2 MR. WELCH: Of course, well, of course AT&T in this  
3 case, as I understand it, is arguing four different issues on  
4 the merits. They are arguing the fact that (a) we did not  
5 violate the rules; (b) even if we did violate the rules, it  
6 was not willful or deliberate, so you can't impose a  
7 forfeiture; (c) even assuming all that, it's arbitrary and  
8 capricious to impose a forfeiture in these circumstances  
9 because of an asserted lack of information that they have; and  
10 for the challenge to the rule itself.

11 Now, it seems to me, three of those absolutely are  
12 reviewable in the District Court under trial de novo.

13 THE COURT: But their basic one that the record,  
14 their basic one is that the regulation violates the statute.  
15 You don't get to any of the others if they are right about  
16 that.

17 THE COURT: Two ways, I mean, that's their first  
18 merits argument.

19 THE COURT: That's their start. Right.

20 THE COURT: It's the one that you came to fourth.

21 MR. WELCH: It is --

22 THE COURT: The others are sort of back up  
23 arguments.

24 THE COURT: Maybe they'd be, they never would just,  
25 I mean, they wouldn't hold those back. They'd lose them if

1 they didn't raise them now.

2 MR. WELCH: Right.

3 THE COURT: So, you don't get anywhere with that.

4 MR. WELCH: Okay. Then let me move on.

5 THE COURT: Yes, why don't you deal with --

6 THE COURT: Before you move on too far, what about  
7 Trayco? I notice that although it's cited in the blue brief,  
8 it's not distinguished by you.

9 MR. WELCH: I'm sorry, which case?

10 THE COURT: Trayco, a case from the Federal Circuit,  
11 involving what looks like an extremely parallel situation,  
12 where if the subject of the forfeiture just sits and then, I  
13 don't know, Customs people or somebody, enforce against them,  
14 they go into District Court, they go into the Court, I'm  
15 sorry, the Court of International Trade. But the Court  
16 explicitly reads that as not precluding any other jurisdiction  
17 which is provided, such as the case where the subject of the  
18 forfeiture pays it, and then sues for the illegal exaction.

19 MR. WELCH: I'm not sure I can offer much more on  
20 that, other than we're talking about two different statutes.

21 THE COURT: Yes, but it seems to be exactly the same  
22 structure.

23 MR. WELCH: The one thing that has fascinated me  
24 about this case is that this statute was added to the  
25 communications act in 1960, 43 years ago. Not a single case

1 has been cited where the subject of a forfeiture has paid the  
2 forfeiture and then invoked 402(a) jurisdiction in the Court  
3 of Appeals.

4 THE COURT: Maybe it's the first time it's ever  
5 happened.

6 MR. WELCH: That is, it happens all the time. Last  
7 year, for example, Judge Tatel, 75 different companies paid a  
8 forfeiture at the FCC. The only one of those 75 --

9 THE COURT: Maybe they didn't think, maybe they  
10 didn't think the regulation was violative of the statute.

11 MR. WELCH: Oh, I'm not sure I'm going to go too far  
12 out on a limb, when I think may of these 75 companies do not  
13 agree with the FCC on the facts of the law.

14 THE COURT: So what's the legal principle? What is  
15 the point you are making?

16 THE COURT: Are you saying it is a case of first  
17 impression?

18 MR. WELCH: Well, the point, the point I'm trying to  
19 make is, we think that the Congress has spoken to this, and  
20 shifted it to the --

21 THE COURT: But no, the only, you said that before.  
22 The only thing that it's shifted that we know from the  
23 statute, 504, the only thing Congress has shifted anyplace, is  
24 a suit, quote, to recover a forfeiture. That's what the  
25 statute tells us. Right?

1 MR. WELCH: That's what it speaks to directly.  
2 That's right, Your Honor.

3 THE COURT: Yes, and 402(a) says, that the Courts of  
4 Appeals have jurisdictions over any final order. So obviously  
5 there is an exception to that for a final order where the  
6 forfeiture is not paid, and they go to the District Court. But  
7 that doesn't tell us anything about this case.

8 MR. WELCH: Well, perhaps I should move onto the  
9 merits, then, if you're not persuaded by my jurisdictional  
10 argument.

11 THE COURT: You don't have anything else to say  
12 about that at this point?

13 MR. WELCH: Other than the fact that, I would point  
14 to the Act IV case, which I think is an interesting case  
15 involving the first amendment and the Commission's forfeiture  
16 procedures. And I think the underlying premise of that case,  
17 of all the parties litigating it, and indeed of the majority  
18 in dissenting opinions in that case is that there was not  
19 402(a) jurisdiction in the Circuit Court.

20 As a matter of fact, the majority opinion noted that  
21 many of the forfeitures that were at issue in that case, that  
22 some of the broadcasters had actually paid the forfeiture.  
23 Some of them were awaiting a trial de novo in the District  
24 Court. But the ones that had paid, it seems to me, if they  
25 could have paid, written a check for \$500, or \$1000, which is

1 what the forfeitures were at issue there, and then immediately  
2 sought review in the Court of Appeals, they would have done so  
3 to pursue their constitutional claims.

4 THE COURT: And what, tell me just once again,  
5 what's the reason the Commission cares so much about this?  
6 Isn't it interest --

7 MR. WELCH: Well, I --

8 THE COURT: Wouldn't, you're discouraging people  
9 from simply paying.

10 MR. WELCH: In all candor, all we're trying to do is  
11 read the statute as best we can, and try to figure out what  
12 Congress meant. If you're asking me, you know, if you assert  
13 jurisdiction in this case, is it going to be a catastrophe for  
14 the FCC's enforcement proceeding? I can't stand here and tell  
15 you that it would.

16 THE COURT: Okay. Great.

17 MR. WELCH: Okay.

18 THE COURT: Do you want to go onto the merits?

19 MR. WELCH: Let me go ahead and move onto the  
20 merits.

21 THE COURT: Why don't you do the merits.

22 MR. WELCH: And I think there are two distinct  
23 issues on the merits. And I think your questions that have,  
24 show that, focus on this. The first is, was there a violation  
25 of Section 258 in the FCC's rules.

1 THE COURT: Right.

2 MR. WELCH: And if the answer to that question is  
3 yes, and I think there is really no serious question about it,  
4 then you move on.

5 THE COURT: Well, let's stop and talk about that.

6 MR. WELCH: I will come back to that in a minute.  
7 Then you move on to whether it was willful or deliberate that  
8 would authorize the FCC to --

9 THE COURT: Well, let's go back to the first issue.

10 MR. WELCH: Sure.

11 THE COURT: Okay.

12 MR. WELCH: The --

13 THE COURT: The statute says that you can't change  
14 it, quote, except in accordance with such verification  
15 procedures, right? That's what the statute says.

16 MR. WELCH: Exactly.

17 THE COURT: It doesn't say, you can't change  
18 someone's long distance service, except with permission from  
19 the subscriber.

20 MR. WELCH: Yes, right. It says, you must follow  
21 the FCC's procedures. And what were the FCC's procedures  
22 here? They require --

23 THE COURT: Well, but --

24 THE COURT: The verification procedures?

25 THE COURT: Verification procedures, it says.

1 MR. WELCH: Exactly, the verification procedures.  
2 They required the long distance company to get authorization  
3 from the subscriber. They --

4 THE COURT: I'm sorry. Which are we talking about,  
5 procedures or verification procedures?

6 MR. WELCH: The FCC's, there are two rules at issue  
7 here. 64.1100 and 64.1150. And 1100 says that you have to  
8 get authorization from the subscriber.

9 THE COURT: But that's not a verification procedure.

10 MR. WELCH: And then you go to the verification  
11 procedure which is 1150, and that says that you're supposed to  
12 verify the information of the subscriber, and your information  
13 on the sheet is supposed to go to the subscriber.

14 THE COURT: Cut to the quick here. Let me just ask  
15 you this hypothetical. If Mr. Lewis, who apparently answered  
16 the phone, had said, I am Mr. Ortega, and I am the line owner,  
17 or renter.

18 MR. WELCH: Right.

19 THE COURT: Would that be enough?

20 MR. WELCH: We think it would be enough.

21 THE COURT: It would be.

22 MR. WELCH: But obviously that's a different case.

23 THE COURT: Well, why do you say it's a different  
24 case? At JA-128 and JA-158, the verifier says that the  
25 customer, that they learned that the customer billing name

1 was, in one case, Sam Carillo, and that the authorizing party  
2 was Sam Carillo.

3 MR. WELCH: Right.

4 THE COURT: And the same thing with respect to  
5 Lewis, that the customer name was Lewis, and that the  
6 authorizing party was Lewis.

7 MR. WELCH: Well, that's, it is very thin what's on  
8 those sheets, and it's hard to know what actually took place  
9 between the verifier and the telemarketer.

10 THE COURT: It may be, but who has the burden of  
11 proof in this proceeding?

12 MR. WELCH: Well, I think, what their position is,  
13 basically, Judge Garland, if they call you up at home, and you  
14 answer the phone and they say, would you like to be an AT&T  
15 customer, and are you the subscriber, and you say yes to all  
16 of those, and then they go and they change Judge Williams'  
17 telephone number, their position is that that does not violate  
18 Section 258, and they wouldn't even be responsible for  
19 refunding money to the --

20 THE COURT: That's good, but what is your position;  
21 that is, it is from reading the FCC order, which uses the word  
22 strict liability about 20 times, it appears to be that there  
23 is nothing that could be done; that there is no procedure  
24 other than being 100 percent correct that the person is the  
25 subscriber who answers the phone and gives authorization.

1 MR. WELCH: Well, I would suggest to you, despite  
2 AT&T's claims to the contrary, and as some of your questions  
3 were suggesting, there were a number of things they could have  
4 done to have avoided this problem.

5 THE COURT: My question is, will the Commission  
6 approve any of those? The order says, it has to be strict  
7 liability. It doesn't say, there are any number of other  
8 things they could have done. It says, our slamming rules  
9 impose a strict liability standard.

10 MR. WELCH: Well, honestly, the Commission has  
11 discretion about when to impose a forfeiture or not in its  
12 enforcement discretion.

13 THE COURT: No, that's a different question.

14 MR. WELCH: But in this particular case --

15 THE COURT: Please.

16 MR. WELCH: I'm sorry.

17 THE COURT: Under Chenery, we can only uphold the  
18 agency's decision on a ground they give, not on a ground you  
19 give.

20 MR. WELCH: Correct.

21 THE COURT: Now, I understand the order as saying a  
22 strict liability standard. Now, do you understand it a  
23 different way?

24 MR. WELCH: Well, it did say strict liability  
25 standard, but it also said that AT&T quite clearly had not

1 followed the verification rules. As a matter of fact --

2 THE COURT: But that's in describing the rules as  
3 being rules that require strict liability.

4 MR. WELCH: Well, it's in describing rules that  
5 require authorization from the subscriber and verification of  
6 the subscriber's information, which AT&T did not obtain in  
7 this case. They obtained authorization and information  
8 apparently from a complete stranger.

9 THE COURT: Let me pause. Are you going to defend  
10 the strict liability decision at all? If that were the  
11 ground, let's say we read this rule, this order, as resting on  
12 strict liability and not on the other, not on a violation of  
13 the rules, or at least as being unclear, and therefore we  
14 would have to remand, would you defend, is there any way to  
15 defend the agency's position that a strict liability is the  
16 statute? That a statute requires strict liability?

17 MR. WELCH: Yes.

18 THE COURT: All right.

19 MR. WELCH: Yes.

20 THE COURT: And could you tell me how?

21 MR. WELCH: We do not believe that Section 258  
22 requires any sort of intent or knowing requirement. It  
23 basically requires you to follow the FCC's procedures. And we  
24 have determined that in order to combat this terrible problem  
25 about slamming, the --

1 THE COURT: Is it a procedure or substance to say,  
2 the only way you can win is if you are correct, regardless of  
3 what procedure you follow, it's strict liability. Is that a  
4 procedure?

5 MR. WELCH: The FCC, you are correct. The FCC in  
6 its rulemaking orders has determined that the liability, the  
7 standard is strict liability. I am not walking away from  
8 that, Judge.

9 THE COURT: All right. Well then, the only way we  
10 can uphold it, is if we say there were two alternative  
11 grounds, either of which the Commission made clear would have  
12 supported it, which is not the case. Or if somehow strict  
13 liability satisfies a statutory requirement of being a  
14 verification procedure. That seems unlikely, doesn't it? It  
15 said, except in accordance with such verification procedures  
16 as the Commission shall prescribe.

17 MR. WELCH: Well, as I understand AT&T's reading of  
18 the statute, they actually are only proscribing a subset of  
19 slams and making them unlawful; that there are certain slams  
20 that they can get away with, and have no liability at all.

21 THE COURT: We don't have to uphold everything AT&T,  
22 you know, a lot of times people come in here and ask for lots  
23 of stuff. We just have to decide whether the order is  
24 arbitrary and capricious. And as I read the order, and as you  
25 read the order, the Commission is resting on strict liability.

1           So we must decide, the only question we must decide  
2 is whether strict liability is consistent with the statute.  
3 That's the only question. I don't have to decide whether AT&T  
4 has got good verification procedures, or bad verification  
5 procedures, because the Commission didn't say, we don't care  
6 whether there's strict liability. We're upholding on an  
7 independent ground.

8           MR. WELCH: Well --

9           THE COURT: So my question is, how can you say that  
10 strict liability is the same as a verification procedure?

11          MR. WELCH: I think Congress' concern when it passed  
12 this statute, it recognized that there had been a terrible  
13 problem in the long distance industry. It recognized that the  
14 same problem could arise now in the local industry, now that  
15 we were trying to promote competition there.

16          It basically said, FCC, take your rules as they  
17 exist now, for long distance carriers, which had a strict  
18 liability standard, and expand them into this new realm of  
19 local. There's no suggestion that they cut back on our  
20 authority at all, which I think is what AT&T is arguing.

21          That basically, ironically, by trying to expand our  
22 authority, and move it into this new area, they inadvertently  
23 cut it back.

24          THE COURT: I'm sorry, but are you telling us then  
25 that in the area of long distance, the FCC has long been

1 imposing a strict liability standard?

2 MR. WELCH: Yes, sir. That is, I believe that is  
3 correct. We have been trying, we have been holding long  
4 distance carriers feet to the fire in putting the  
5 responsibility on the carrier to make sure they get  
6 authorization from the subscriber, verification of the  
7 subscriber's information. It seems to me that's a perfectly  
8 reasonable --

9 THE COURT: What's the wording of the statute under  
10 which you do that?

11 MR. WELCH: Pardon? Well, the statute only existed  
12 as to 1996. Remember, we originally had put these rules in  
13 place under our generic authority under 201 through 205 and  
14 4(i), and they had been in place for, I don't know, 10 or 15  
15 years before Congress finally put in a statutory prohibition  
16 on slamming. But the --

17 THE COURT: And have you been socking people \$40,000  
18 for every --

19 MR. WELCH: Absolutely. We have issued forfeitures  
20 far in excess of the one that was issued against AT&T.  
21 There's is actually one of the smaller ones. We have had  
22 multi-million dollar forfeitures against a number of carriers.  
23 We have had a \$3.5 million dollar consent decree with one of  
24 their largest competitors, and a \$1.5 million dollar consent  
25 decree. So in terms of what actually happened in this case,

1 we have seen far more egregious contact. I will concede that.

2 THE COURT: What's the point of having a requirement  
3 that there be authorization and verification?

4 MR. WELCH: It is to ensure that the person who is  
5 responsible for the telephone --

6 THE COURT: Right. So let me ask this question.  
7 Assuming there was authorization, but no verification, what  
8 would be the result? In other words, assume that they called  
9 my house.

10 MR. WELCH: Right.

11 THE COURT: And I said, I'm who I am and you can go  
12 ahead. And there is no verification. But it's true. They  
13 are right. Then what?

14 MR. WELCH: Well, first of all --

15 THE COURT: Do I get my phone free?

16 MR. WELCH: -- I don't think, you wouldn't be  
17 complaining to me.

18 THE COURT: Well, sure I would, because I'd like 30  
19 days of free service.

20 MR. WELCH: I think a certain amount of discretion  
21 can come into play.

22 THE COURT: All right. So if you have  
23 authorization, verification adds nothing, right? Now, if you  
24 have verification, but no authorization, what do you get?

25 MR. WELCH: Well, you don't have verification. You

1 don't have a legitimate verification, if you don't have  
2 authorization. That was sort of our ruling here.

3 THE COURT: So your ruling is verification equals  
4 authorization. That's got to be, so it not only does the FCC  
5 think this, but you think this, that verification means the  
6 same thing as authorization. It adds nothing.

7 MR. WELCH: Verification -- well, it is a check  
8 designed to ensure that they have, in fact, gotten  
9 authorization from you, the customer of record for that line,  
10 that you do, in fact, want to change your carriers.

11 THE COURT: I thought it was, I thought it was to  
12 neutralize heavy pressure tactics by the soliciting phone  
13 company.

14 MR. WELCH: Well, that may be part of it, but we've  
15 had so many problems that have come up in so many different  
16 contexts, of people being confused with telemarketers, that it  
17 is a check designed to make sure that you have, in fact,  
18 gotten the authorization that Congress is contemplating. And  
19 I think that's a perfectly reasonable interpretation of the  
20 statute.

21 THE COURT: Let me ask you about this. We talked  
22 about this a little earlier, and I'm not quite sure I  
23 understand your answer. In your brief, the Commission's brief  
24 seems to argue that we don't even have to get to this  
25 question. This goes back to the question Judge Garland was

1 asking you. Does he have to get to this question, because  
2 AT&T didn't even comply with the procedures, right?

3 MR. WELCH: That's right.

4 THE COURT: Okay. Now, I couldn't find that in the  
5 order. And --

6 MR. WELCH: In our orders? I'm sorry.

7 THE COURT: Yes, in the Commission's order.

8 MR. WELCH: Oh, well, the --

9 THE COURT: And also my question was, what is your  
10 response to what AT&T says about this in its reply brief at  
11 pages eight to nine?

12 MR. WELCH: I'm sorry. What are they --

13 THE COURT: Page eight to nine of their brief, they  
14 review their records and show that they did, in fact, comply  
15 with all the verification procedures. They just, they got the  
16 wrong guy.

17 MR. WELCH: Their records show that they talked to  
18 somebody and they have associated that person, who apparently  
19 was a stranger, with this particular telephone number of the  
20 actual subscriber.

21 THE COURT: Well, but the person did say he was  
22 authorized. Right?

23 MR. WELCH: Well, actually, we don't know what  
24 happened. We do not know. There is a piece of paper --

25 THE COURT: Who has the burden of proof? I think I

1 asked that question before. Who does have the burden of  
2 proof?

3 MR. WELCH: In this particular case, I mean, we have  
4 the burden showing that our action was justified. They have  
5 the burden, however, of getting authorization from the  
6 subscriber.

7 THE COURT: In the forfeiture proceeding, in this --

8 MR. WELCH: We have the burden, Your Honor.

9 THE COURT: So you have to show, by some  
10 preponderance, is it?

11 MR. WELCH: I believe so.

12 THE COURT: That they didn't get authorization,  
13 right?

14 MR. WELCH: And they did not.

15 THE COURT: No, I'm sorry.

16 MR. WELCH: Okay.

17 THE COURT: Assuming strict liability isn't the  
18 issue, assuming instead there is some procedure involved, and  
19 the point you're discussing with Judge Tatel, the question is,  
20 did they actually talk as they said. So the only thing in the  
21 record, apparently, are these notes to the verifier who  
22 says --

23 MR. WELCH: Right.

24 THE COURT: -- where the customer billing name  
25 matches the authorized party name. So that's the only

1 evidence in the record. So on what basis could you conclude,  
2 other than strict liability, that they didn't actually speak  
3 with somebody who said that they were the customer? What's  
4 the basis for making that conclusion?

5 MR. WELCH: I think it is, it seems as though what  
6 happened here is they talked to somebody, and they got  
7 authorization for a telephone line. And the most plausible  
8 reading is, they then switched a different telephone line. I  
9 don't know who Dwight Lewis is, and I don't know who Sam  
10 Carillo is. It's AT&T's burden to make sure that they are  
11 talking to the Pattersons --

12 THE COURT: They have down the telephone number on  
13 both of these.

14 MR. WELCH: And it's the wrong number. I mean, it's  
15 the --

16 THE COURT: Well, it's the wrong number according to  
17 somebody who didn't testify, right?

18 MR. WELCH: We have, I'm sorry?

19 THE COURT: Well, the actual line holder who is  
20 complaining here didn't testify.

21 MR. WELCH: But they filed declarations under oath  
22 at the FCC staying that we did not authorize this, and we do  
23 not know who Dwight Lewis is. We do not know who Sam Carillo  
24 is. And they signed those under oath. And AT&T did not rebut  
25 those. And, in fact, they concede now that, in fact, these

1 numbers were changed without proper authorization. That is  
2 not an issue in the case at the moment.

3 Judge Tatel, going back to your question, did the  
4 FCC find that AT&T had violated the verification rules. I  
5 think absolutely the answer is yes. If you look, for example,  
6 at the reconsideration order, which is in the joint appendix  
7 at page 192, you have roman numeral III, discussion in the  
8 first topic heading is, AT&T did not comply with the  
9 Commission's rules. I don't know how much clearer we could be  
10 than that.

11 THE COURT: Well, you could be clearer if you didn't  
12 say that the rule was, our slamming rules impose a strict  
13 liability standard. That's it.

14 MR. WELCH: Right, well --

15 THE COURT: So of course the title is going to say,  
16 they didn't comply with our rules. Your burden --

17 THE COURT: Because they got the wrong guy.

18 THE COURT: The question we have here is a different  
19 one. Is there a rule that requires something less than strict  
20 liability?

21 MR. WELCH: The first sentence of paragraph five  
22 there says, our rules require that a carrier obtain  
23 authorization from the subscriber prior to making a preferred  
24 carrier change.

25 THE COURT: That's exactly the point.

1 MR. WELCH: And they did not do that here.

2 THE COURT: But the third sentence, which is the  
3 holding says, our slamming rules impose a strict liability  
4 standard. This is the problem.

5 MR. WELCH: They failed this test because the  
6 undisputed evidence shows that both Ortega and Patterson had  
7 their long distance service switched without their  
8 authorization. Okay. All right. I take your point. Thank  
9 you. I would respectfully --

10 THE COURT: Thank you. Do you have a question,  
11 Judge Williams?

12 THE COURT: You are arguing, although it's probable  
13 that the FCC didn't actually say this, you are arguing that  
14 there was both a want of authorization, which is fatal under  
15 your rules, and that there was an ineffective verification,  
16 which under your interpretation, at least the interpretation  
17 you are giving us now, of the verification rules, would, if  
18 valid, match what Congress required?

19 MR. WELCH: I'm sorry, I'm not sure I follow that.  
20 I apologize, Judge Williams.

21 THE COURT: Well, in other words, the statute  
22 speaks of following the verification procedures.

23 MR. WELCH: Correct.

24 THE COURT: The sentence at footnote 13 speaks of  
25 not getting authorization. Right?

1 MR. WELCH: They did not get authorization.

2 THE COURT: And the rules very explicitly  
3 distinguish between authorization and verification, okay.

4 MR. WELCH: Correct.

5 THE COURT: So on its face, the Commission doesn't  
6 seem to be doing what Congress said it was supposed to do,  
7 right? Okay?

8 MR. WELCH: Well, they are also --

9 THE COURT: But if there was a way, I'm suggesting a  
10 way, which perhaps isn't taken by the Commission in this  
11 order, it seems not to be taken by the Commission in this  
12 order, in which you sort of fold them in. And the  
13 verification procedure has built into it that the, that it be  
14 with the right person.

15 MR. WELCH: Well, I think our rule does require  
16 that. The verification rule says you have to get, that you  
17 have to verify the information of the subscriber.

18 THE COURT: The person entitled to get, the person  
19 entitled to give the authorization.

20 MR. WELCH: Correct.

21 THE COURT: All right.

22 MR. WELCH: Yes.

23 THE COURT: Can I -- I'm sorry. I've gone over the  
24 time. Willful, assume for the moment that the rule here is  
25 strict liability, that that's the way we read the order.

1 MR. WELCH: Right.

2 THE COURT: How can this possibly be regarded as  
3 willful if the rule is strict liability?

4 MR. WELCH: Well, the statutory definition of  
5 willful is that you take a conscious or deliberate act,  
6 irrespective of any intent to violate the statute or the  
7 rules. That's in section --

8 THE COURT: So you don't have to intend to violate  
9 the statute.

10 MR. WELCH: Right.

11 THE COURT: And they say they didn't intend to  
12 violate the statute. They are being held strictly liable. So  
13 you can't intend to be strictly liable. I mean, that doesn't  
14 make any sense.

15 MR. WELCH: Our position is that, well, first of  
16 all, we think it was willful and repeated. But on the willful  
17 issue, they consciously changed the line, and they did not  
18 have authorization. And we think that --

19 THE COURT: You can --

20 THE COURT: Well, doesn't that ask the question of  
21 what they were conscious of?

22 THE COURT: Right.

23 MR. WELCH: Well, if they, if you --

24 THE COURT: There's no suggestion they were  
25 conscious of the error.

1 MR. WELCH: Well, if the suggestion is that they  
2 have to change the line with knowledge that it's unauthorized,  
3 isn't that the same thing as saying that you have intent to  
4 violate the statute in the rules?

5 THE COURT: Well, they don't.

6 MR. WELCH: I mean, I understand their --

7 THE COURT: No, I mean --

8 THE COURT: No, the answer is no, and that can't  
9 possibly be the law. And it's never been the law with respect  
10 to willful. Willful normally means, except under this  
11 statute, that you actually at least act recklessly in  
12 disregard, not caring about the law.

13 MR. WELCH: I concede that in other aspects of the  
14 law, there's a different definition. Yes.

15 THE COURT: And somewhere lower than that is at  
16 least knowing that you're doing something. And in this case,  
17 they don't know. All they, they know exactly what they would  
18 know, on the strict liability theory, if they were acting  
19 completely legally.

20 MR. WELCH: Well, in the communications act, in  
21 Title 5, there are other provisions involving criminal  
22 sanctions. Sections 501 and 502. They actually use the  
23 phrase, willful and knowing. So Congress knows how to put  
24 sort of a knowledge intent --

25 THE COURT: They do, but normally knowing is lower

1 than willful. Willful adds more to knowing, except in a  
2 situation of recklessness. But that involves reckless. The  
3 normal reason you have knowing and willful is because willful  
4 can include a reckless disregard of the law.

5 MR. WELCH: I can see this is a bit confusing. We  
6 use, let me see if this will help. I hope I don't regret this  
7 in a minute. We use an example at the FCC to try to  
8 distinguish between what is willful and not.

9 Radio licenses, for example, have limitations on the  
10 amount of power, the level of power you can broadcast at. If  
11 you walk past the control tower and brush up against the dial  
12 and cause it to exceed the power limitation, that was not a  
13 willful act. You do not intend to turn the dial.

14 But if your engineer, who doesn't know about the  
15 limit, reaches over and turns the dial consciously, and  
16 exceeds the limit, that is a willful act, we submit, that  
17 could be subject of a forfeiture, under this definition in  
18 320.

19 THE COURT: Intends to exceed. In your hypo he, or  
20 not hypo, but real example, he intends to exceed the limit.  
21 That is, he intends to achieve a number which is in excess of  
22 the limit.

23 MR. WELCH: He intends to turn the dial, but he did  
24 not realize that he was violating the statute when he did it.

25 THE COURT: Let's say the law, the rule is, that on,

1 I don't know, on February 29th it's against the law to, it's  
2 against the rule to raise the dial above a certain amount.  
3 And this engineer does not know that this is a leap year. On  
4 ever other day of the year, for the entire time he's been an  
5 engineer, it's been legal to raise it. Is that a willful  
6 violation by raising it on a day when he had no reason to  
7 think -- this is just really --

8 MR. WELCH: This goes back to about a minute ago I  
9 said, hopefully I wasn't going to regret raising this hypo.  
10 Actually, I think it would. I think it would. I mean, you  
11 made it sound silly, but I think it would.

12 THE COURT: Let me ask this. Suppose, as you might  
13 guess, we don't agree with you about this, what's your  
14 response to AT&T's argument that the Commission didn't rest  
15 its decision on the alternative basis of repeated.

16 MR. WELCH: Repeated. Well, all I can say to that  
17 is, if you look in the, you know, at every single order, there  
18 were three orders here. There was the notice of apparent  
19 liability, the order of forfeiture, and the order of  
20 reconsideration. All of them say, right up front, we are  
21 finding them liable for willfully or repeatedly violating the  
22 act.

23 Now, you know, is there an extensive discussion  
24 about repeatedly? No, there is not. But it seems to me it  
25 makes perfect common sense, that they violated this slamming

1 prohibition more than once.

2 THE COURT: Thank you very much.

3 MR. WELCH: Thank you. I would respectfully ask the  
4 Court to dismiss or to affirm the Commission. Thank you.

5 THE COURT: Mr. Meron, I think you are out of time.  
6 You can take two minutes.

7

8

9

REBUTTAL ARGUMENT OF DANIEL MERON, ESQ.

10

ON BEHALF OF THE PETITIONER

11

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14

MR. MERON: Thank you, Judge Tatel. I will try very  
quickly to address a number of points that were made here.

15

THE COURT: You have two minutes.

16

17

18

19

20

MR. MERON: In two minutes, yes. First, Judge  
Williams, you should know that the pre-existing regulations  
that existed prior to the 96 act did not have this feature of  
an 1120(a)(1)(i) does of saying authorization and  
verification. It was only verification.

21

22

23

24

THE COURT: Well, did they require strict liability?  
I mean, his argument is, if we go with your interpretation of  
this, it's essentially reducing the standard that the FCC has  
been operating under for years.

25

MR. MERON: Well, the FCC was not operating under a

1 standard that required you to obtain the actual authorization.  
2 The standard was verification procedures that Congress built  
3 in 258 and said, you have to follow verification procedures.

4 Now --

5 THE COURT: But did it read the verification  
6 procedures that it was previously, pre-96, applying to mean  
7 verification by an interchange with the right person? And  
8 strict liability for not getting the right person?

9 MR. MERON: I don't know of any case in which the  
10 FCC has said, you've asked all the questions you are required  
11 to ask. The person said they were authorized, and said that  
12 they were the billing customer. You had no indicia that any  
13 of that was wrong, and nevertheless, you've committed a slam.

14 THE COURT: So you're at least saying that you don't  
15 know of any case corresponding to what Mr. Welch said they did  
16 all the time.

17 MR. MERON: I don't think they did read it, you know  
18 hold it that way. And when Congress, anyway, puts in specific  
19 language, I think the argument that it's implicitly ratifying  
20 a whole series of FCC orders that I think it never read, is  
21 very weak as a premise.

22 Very quickly on this phone number issue. Patterson  
23 JA-200 puts in an affidavit, the phone number exactly matches  
24 the phone number in the TPB record in JA-128. AT&T was told  
25 that it had reached the right phone number.

1           Judge Garland on the question of the FCC's prior  
2 positions in the Eighth Circuit case on whether you can get  
3 review in the District Court, the exact argument made to the  
4 District Court, I mean, to the Court of Appeals by the FCC was  
5 that despite 504, that was the argument made to the Eighth  
6 Circuit, that 504 meant that the District Court had  
7 jurisdiction over the underlying regs. The FCC said no, and  
8 that was the issue decided. I don't know how the FCC  
9 distinguishes that.

10           In terms of, I would just also like to direct your  
11 attention, Judge Tatel, you asked what the response was to our  
12 reply brief, pages eight to nine, where we set forth all the  
13 procedures. Here is what the order said on that. It's  
14 footnote 13, sorry, footnote 11 of the Recon JA-192. After  
15 describing in the text the procedures that AT&T said it  
16 follows, which match what we said in our brief, the footnote  
17 says, the Commission did not attempt to reach any conclusion  
18 regarding the veracity of each step AT&T claims it took. The  
19 order below assumed that AT&T took every one of those  
20 procedures and said it didn't matter.

21           THE COURT: Which page was that, sir?

22           MR. MERON: I'm sorry, this is JA-192, footnote 11.  
23 It's in the reconsideration order.

24           THE COURT: Say it again? JA what?

25           MR. MERON: I'm sorry, JA-192, footnote 11. And then

1 finally, Judge Garland, in your exchange with Mr. Welch on the  
2 other procedures that AT&T could use, vehicles AT&T could use  
3 to challenge the reg, the problem is even more fundamental  
4 than the one you identified, which is that the standard of  
5 review is so weak when you're coming in with a petition to  
6 review a denial of a waiver, it's that the remedy wouldn't  
7 exist.

8           Here's the FCC's view of the scheme. It assesses a  
9 forfeiture. The party doesn't pay. It goes to the District  
10 Court. If your only defense is invalidity, what the District  
11 Court does, it doesn't dismiss. It grants summary judgment.  
12 It imposes the forfeiture.

13           See, now you've paid the forfeiture. Two years  
14 later they deny your petition for waiver. You come up to this  
15 Court. You get that overturned. You don't get your money  
16 back. The only thing you'd be vacating, even if we've  
17 satisfied the very difficult standard of review, you'd be  
18 vacating the denial of the waiver of the rule. But the  
19 forfeiture order, at that point, has become final. And under  
20 504(b), they don't even have the discretion voluntarily to  
21 give you the money back, once the order has become final.

22           So these various vehicles that have been offered to  
23 you are not vehicles --

24           THE COURT: Could you go to the Court of Claims?

25           MR. MERON: Well, as I read 504(b), no.

1 THE COURT: Why not? If there is no other remedy?

2 MR. MERON: Because there has been a final judgment  
3 in their favor. You don't get to reopen final judgments in  
4 the Court of Claims. There's a rule of finality, even if, I  
5 mean, it often times happens, for example, Your Honor, that  
6 you have a circuit that has one law.

7 Supreme Court takes cert and decides the law in the  
8 circuit all those years was wrong. You don't get to go back  
9 and reopen all those procedures. Your case has become final.  
10 And so the FCC's proceeding doesn't give you any remedy.

11 THE COURT: Okay.

12 THE COURT: I just want to ask a question about  
13 authorization/verification.

14 MR. MERON: Yes.

15 THE COURT: Suppose a company follows the  
16 verification procedure just to the letter, putting aside this  
17 question of identity. But it's authorization behavior has  
18 been really off the wall. I mean, they threaten, the person  
19 calling on behalf of the company threatened to break the knees  
20 of the person if he failed to agree to switch, which is  
21 followed up immediately by a nice clean verification call.  
22 Okay. Any liability for the company there?

23 MR. MERON: First of all, the FCC's verification  
24 rules themselves require independence, and nonmarketing to be  
25 used by the verifier.

1 THE COURT: But that doesn't do any good if the  
2 preliminary conversation is fatally flawed.

3 MR. MERON: I think there's not, I think my answer  
4 to that is, there hasn't been a violation of 258. Has there  
5 been an unjust/unreasonable --

6 THE COURT: Is there some other basis for penalizing  
7 this egregious --

8 THE COURT: Is there a rule about the original  
9 solicitation?

10 MR. MERON: There are rules as to the verifying, I  
11 mean, sorry, the original telemarketer must also ask certain  
12 questions, which are then verified.

13 THE COURT: Is there any rule that prohibits them  
14 from threatening to kill the person if they don't agree with  
15 them?

16 MR. MERON: I don't think there's a rule that  
17 expressly says that. If AT&T were to do that, arguably, it is  
18 an unjust and unreasonable practice under 201 of the act. But  
19 it's not a violation of 258. And the FCC has never alleged,  
20 of course, that any of that has happened here.

21 THE COURT: Thank you.

22 MR. MERON: Thank you.

23 THE COURT: Case is submitted.

24 (Recess.)

25

CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

Teresa S. Hinds      Feb. 25, 2003

Teresa S. Hinds

Date

DEPOSITION SERVICES, INC.

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