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D.C. Circuit Grudgingly Upholds FCC's Internet Freedom Order

In the latest twist in the net neutrality saga, the United States Court of Appeals for the District of Columbia upheld the Federal Communications Commission's ("FCC" or "Commission") 2017 decision to once again classify broadband internet access service as an information service, and not a telecommunications service. The distinction is important. Information services are minimally regulated whereas telecommunications services are subject to substantial regulation under Title II of the Communications Act. The FCC's order had reversed the decision under former FCC Chairman Wheeler to classify these services as telecommunications services (itself a reversal of a yet earlier FCC ruling that they were information services) and to use that classification as legal authority to issue net neutrality rules. Having restored the information services classification, the FCC, finding it now lacked legal authority to regulate, eliminated the net neutrality rules, with the exception of a rule requiring disclosure by broadband internet access service providers of their practices.

That the courts have found each of these opposing determinations permissible readings of the statute is a testament to the power of deference afforded agencies in interpreting ambiguous legislative language. Nevertheless, the Commission's victory was not a complete sweep. The court struck down the FCC's blanket preemption of state net neutrality rules. It also found that the Commission had insufficiently addressed the effect of its ruling on public safety, pole attachment rules and the Lifeline program, which provides low-income subsidies for telephone and broadband services. The court sent those three issues back to the FCC for further consideration.

The Court's Unhappy Ruling

The court's decision appears to be a grudging one. None of the three judges hearing the case signed the decision. Instead, it was issued per curiam, or by the court, which is unusual for a decision of this magnitude. One of the judges, Judge Millett, wrote a concurring opinion, stating that the decision was rendered with "substantial reservation." She wrote that they were compelled to their conclusion by the Supreme Court's nearly 15-year-old decision in *Brand X,* which upheld the FCC's initial determination in 2002 that broadband internet access services was an information service. A second judge, Judge Wilkens, also wrote a short concurrence largely endorsing Judge Millett's concurrence, which he found "persuasively explains" that they are bound by *Brand X*, "even though critical aspects of broadband Internet technology and marketing underpinning the [Supreme] Court's decision have drastically changed since 2005."

Some context will help appreciate the concurring opinion. The FCC's classification determination was based on two services offered by internet service providers, Domain Name Service ("DNS"), which maps website names to IP addresses for routing purposes, and caching (which stores website information in locations closer to consumers). *Brand X* found it permissible for the FCC to have concluded that those two services plus other information services

that internet service providers at that time offered consumers as part a "walled garden," such as email, were so intertwined with transmission that the resulting offering to consumers constituted a single information service. In other words, the transmission component of internet access service was not a separate offering of telecommunications services to consumers. The FCC's latest order, hewing closely to the findings in *Brand X,* again found that DNS and caching (it did not rely on other services like email this time around), bundled together with the transmission of information between the consumer's computer (or smartphone) and content providers rendered the overall service an information service.

Judge Millett's concurrence makes clear that she (and presumably Judge Wilkens as well) would have overturned the FCC's information services classification but for the binding effect of *Brand X*. Of course, all appellate courts are bound by Supreme Court precedent, and it may be irksome at times for appellate judges to follow precedent. But it is unusual to have the majority of an appellate panel so exhaustively explain why they would have preferred to come out differently. Judge Millett found that reliance on DNS and caching rendered the FCC decision "unhinged from the realities of modern broadband service." Noting that the sole question before the court was whether DNS and caching "*alone* can justify the information service classification," she made clear that, absent *Brand X*, the "only" answer "given the current state of technology" would be "No." She would also find, again absent *Brand X*, that internet access service is a telecommunications service and that DNS and caching should be viewed falling within what is known as the telecommunications management exception. This exception treats services that otherwise would fall within the definition of an information service as telecommunications services because they are used in the management and operation of the telecommunications network. Despite that view, the court felt constrained by the language of *Brand X* to conclude that DNS and caching did not fall within the exception.

While it is perhaps unusual to focus so much attention on concurring opinions, in this case, the concurrences indicate that the majority of the court was deeply unhappy with the outcome. The concurrences appear to be a clear invitation for the Supreme Court to take up the issue and to reassess *Brand X* in light of changes in technology. Seeking Supreme Court review is certainly an option available to net neutrality proponents. A third concurrence, by Judge Williams, expressed no reservations about the FCC's information services classification, but sharply dissented to the majority's rejection of the agency's preemption of state net neutrality rules, the issue next addressed.

State Preemption Overturned

The FCC's order would have preempted state imposition of net neutrality rules that would be inconsistent with the agency's deregulatory approach, finding that regulation of internet access service should be governed by a uniform federal regime. Effectively, the FCC sought to bar states from imposing their own bans on throttling, blocking or paid prioritization. The FCC largely predicated its authority to preempt on the impossibility exception to in-state communications services whose regulation the Communications Act leaves in the hands of the state. As its name implies, this exception applies when it is impossible or impracticable to separate out the in-state and interstate aspects of the service. State regulation in this circumstance would effectively regulate interstate services and potentially interfere with federal objectives. Opponents of the FCC's preemption ruling argued that if the FCC is without authority to regulate internet access service, it is also without authority to preempt states for engaging in their own regulation, notwithstanding the impossibility exception. The court agreed. The court did not appear to dispute the difficulty of separating in-state and interstate internet transmissions, but nevertheless rejected its application here, writing that"[I]n any area where the Commission lacks the authority to regulate, it equally lacks the power to preempt state law." For the same reason, the court rejected the FCC's claims that state rules would undermine the federal policy of nonregulation.

The court's decision may not leave states completely free to promulgate net neutrality rules, but it does appear to shift a significant portion of the battle to the states. The court suggests that state net neutrality laws may still be subject to what is known as conflict preemption: "[I]f the Commission can explain how a state practice actually undermines the 2018 order, then it can invoke conflict preemption." Conflict preemption contemplates a case-by-case adjudication of state laws that stand as an obstacle to the accomplishment and execution of federal law. As

FCC Commissioner O'Reilly wrote about the court's decision on preemption, "[i]nevitably, this will lead to Commission case-by-case preemption efforts and more litigation." Given that a number of states have adopted some form of net neutrality legislation, or are contemplating taking action, it seems likely that preemption actions will be filed in courts or before the agency. Some lawsuits have already been filed. Judge Williams, in his dissent, however, was highly skeptical that conflict preemption would succeed if, as he viewed the majority opinion, the predicate for a conflict preemption is the existence of affirmative regulation with which to conflict—as opposed to conflicting with a policy of deregulation.

Public Safety, Poles and Lifeline Issues Sent Back to the FCC

In addition to the central question of statutory interpretation and classification, parties challenged a number of specific findings on grounds that the FCC acted arbitrarily and capriciously. The court rejected a number of those claims, although sometimes just barely. Ultimately, however, the court agreed with the FCC that "market forces combined with other enforcement mechanisms, rather than regulation, are enough to limit harmful behavior by broadband providers." The mechanisms include the disclosure requirements in the FCC's transparency rule, the one net neutrality rule retained by the agency, as well as reliance on competition and antitrust and consumer protection laws. However, with respect to three issues, public safety, access to utility poles and Lifeline subsidies, the court found the FCC's analysis lacking. It sent these issues back to the FCC.

Public Safety

State and local governments raised concerns before the FCC that eliminating net neutrality rules could result in the blocking or throttling of vital communications, or force local governments to pay for priority access, which they argued would impair public safety-related broadband-based communications between local governmental entities and citizens. As stated by the court, "public safety officials explained at some length how allowing broadband providers to prioritize Internet traffic as they see fit, or to demand payment for top-rate speed, could imperil the ability of first responders, providers of critical infrastructure, and members of the public to communicate during a crises." The court agreed with local government petitioners that the FCC had wholly ignored the problem and thus, as to this issue, the FCC action was arbitrary and capricious.

What might this require the FCC to do on remand? The agency has several options. One is to do nothing, at least in the short term, and punt the issue to the next administration. If it decides to address the matter, the Commission will have to seek further comment on the impact on public safety stemming from the elimination of the bright-line net neutrality rules and removing limitations on paid prioritization. The FCC could attempt to build a record that, like the impact on consumers generally, enforcement mechanisms other than regulation are sufficient to protect public-safety communications. After all, the court had found the FCC's reliance on these other mechanisms a reasonable conclusion in light of the deference afforded agency decision-making. The court, however, indicates that a more robust showing may be needed given the "dire, irreversible results" of throttling or blocking in this context. It noted that after-the-fact application of nondiscrimination rules seemed insufficient.

Another alternative would be for the FCC to carve out public safety communications and impose certain net neutrality rules in that context. That might create practical difficulties, however. For example, internet service providers would have to isolate this universe of traffic (however defined) for special treatment. Even local government petitioners, who staunchly opposed preemption, argued in their brief to the court that there "is no evidence that it is possible to isolate and preferentially prioritize communications important to public health and safety, given the diversity or platforms and endpoints."

Access to Poles and Lifeline Subsidies

These two issues raise somewhat different questions than public safety. The problem that the court found with respect to these provisions is that they apply only to telecommunications services. Section 224 of the Communications Act has provisions designed to facilitate access to utility poles at regulated rates and conditions. By enabling companies to attach wires or equipment to existing poles, companies can more efficiently deploy

networks, but the provisions only apply to providers of telecommunications services (or cable service providers). The court found that the FCC failed to explain how providers of internet access service, now classified as an information service, would be able to avail themselves of the pole attachment rules. As the court found, "Section 224 no longer speaks to broadband."

Additionally, states have the option to oversee the pole attachment regime, and some 20 states have exercised that option. They expressed concerns, echoed by the court, that they may be unable to enforce pole attachment safety rules with respect to broadband. The court rejected the FCC's rationale that its pole attachment rules apply to equipment that can be used to provide both telecommunications services and broadband services. It noted that the rationale would not protect broadband providers that offered only broadband service, which consumers increasingly prefer.

The court noted that the same infirmity applies to use of Lifeline subsidies to help low-income persons pay for broadband service: "[B]roadband's eligibility for Lifeline subsidies turns on its common-carrier status." (Telecommunications services and common-carrier are essentially synonymous). Classifying broadband as an information service, and not a telecommunications service, "facially disqualifies broadband from inclusion in the Lifeline Program." As with pole attachments, the court found the FCC's Lifeline analysis unacceptable and sent the issue back for the FCC to address.

Whether the FCC will feel the need take up pole attachments or Lifeline questions anytime soon is unclear. Although the court sent these issues back to the FCC, it did not vacate these parts of the order, so perhaps current rules and processes will continue to be applied, unless the FCC's (or a court's) hand is forced by litigation. Should it take up these two areas through a new rulemaking process, the FCC may be able to apply broadband to both programs through what is known as ancillary authority, which empowers the FCC to extend explicit regulatory authority to matters it does not regulate. The key to exercising ancillary authority is that the FCC must point to an explicit delegation of authority in one of the substantive titles of the Communications Act, such as Title II. Here, both pole attachments and the Lifeline program are tethered to explicit authorities in Title II. Thus, even though the FCC removed broadband from Title II, it could still be able to exercise authority ancillary to the Title II provisions governing poles and Lifeline.

Next Steps

The court's ruling portends substantial further action. Further litigation, most likely by net neutrality proponents asking either the full D.C. Circuit or the Supreme Court to review the decision, seems probable. Additionally, state activity, which has been somewhat on hold pending the outcome of the case, will likely ramp up, and along with it litigation to preempt state efforts to impose net neutrality obligations. Finally, the FCC may seek comment on the issues regarding public safety, pole attachments and Lifeline subsidies, even if it does act on those comments in the near term.

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This document is intended to provide you with general information regarding the U.S. Court of Appeals for the District of Columbia upholding the FCC's decision to classify broadband internet access as an information service. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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