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COMMUNICATIONS
LAW UPDATE

July 18, 2005

Supreme Court Upholds FCC's Classification of Cable Modem Service

On June 27, 2005, the US Supreme Court upheld a determination by the Federal Communications Commission (FCC) that cable modem service—broadband Internet access provided directly to consumers over cable facilities—is exclusively an "information service" that is not subject to common carrier regulation. *See National Cable & Telecommunications Ass'n v. Brand X Internet Servs.,* 125 S. Ct. 2688 (2005) (*"Brand X"*). The Court's 6-3 decision not only clarifies the regulatory treatment of cable modem service but also gives the FCC a wide berth for more comprehensive agency action to rationalize the regulation of Internet-based services generally and of other new technologies and services as they emerge.

The question of how cable modem service should be classified for regulatory purposes first arose in another Ninth Circuit case that predated the decision reviewed in *Brand X*. In *AT&T Corp. v. City of Portland,* 216 F.3d 871 (9th Cir. 2000) (*"Portland"*), the Ninth Circuit held that cable modem service provides end users with both an "information service" supporting email, web browsing, and other means of manipulating information, and a "telecommunications service" involving the use of a transmission "pipeline" over the cable wires themselves. The court made that holding in resolving a dispute between a local franchising authority and a cable company, and thus the FCC was not a party to the case. While the FCC did file an amicus brief, it declined to take a position on the classification issue.

Shortly thereafter, and partly in response to the *Portland* decision, the FCC began its own proceeding to address how it should exercise its authority over cable modem service, including how to classify it. In the 2002 order at issue in *Brand X,* the FCC ruled that cable modem service is an interstate information service that does not contain a separate telecommunications service component. The FCC stated that the statutory definition of a telecommunications service—"the offering of telecommunications for a fee directly to the public," 47 U.S.C. § 153(46)—should be understood from the consumer's point of view. And with cable modem service, the consumer does not receive a stand-alone "offering" of telecommunications; rather, the transmission component of cable modem service is "part and parcel" of the service and "integral to its other capabilities." The FCC noted that the Ninth Circuit had reached a contrary conclusion in *Portland,* but on a record "that was less than comprehensive" and without the benefit of the FCC's "expert opinion" or even full briefing by the parties. The FCC further determined that cable operators were not (and had never been) subject to the *Computer Inquiries* requirement to strip out the transmission component of cable modem service and offer it at

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tariff, and stated that it would waive the rule even if it could be argued to apply.

Several petitions for review of the FCC's ruling were consolidated and transferred to the Ninth Circuit, which held that it was bound by its precedent in *Portland* to reverse the FCC. *Brand X Internet Servs. v. FCC,* 345 F.3d 1120 (9th Cir. 2003); *see also* "Communications Law Update: Ninth Circuit Reverses FCC's Cable Modem Ruling" (Oct. 17, 2003). The Ninth Circuit noted that, in reviewing an agency's statutory interpretation, it "normally" would defer to the agency's views consistent with *Chevron USA Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984) (*"Chevron"*). But the court observed that, at the time of the *Portland* decision, the FCC had declined, "both in its regulatory capacity and as amicus curiae," to address the classification issue. On that basis, the court considered its *Portland* decision to be binding precedent despite the FCC's subsequent, contrary ruling. It thus vacated and reversed the FCC's ruling that cable modem service does not contain a separate telecommunications service. (It upheld against a challenge by the cities the FCC's determination that cable modem service is not a "cable service" on which cities can assess franchise fees.)

In reversing, the Supreme Court first held that the Ninth Circuit should have applied the *Chevron* framework to the FCC's ruling. Consistent with the presumption that an agency is authorized to fill in the gaps in an ambiguous statute, the Court held that a court's prior construction can only trump a subsequent one by the agency if the court had found that its reading was unambiguously required by the statute at issue. Because the Ninth Circuit in *Portland* had not made such a finding, the Supreme Court concluded that the lower court should have followed *Chevron* and not Ninth Circuit precedent.

In this respect, *Brand X* reaffirms an agency's role as the "authoritative interpreter" of the statute it administers. The Supreme Court recognized that the Ninth Circuit's contrary rule would produce "haphazard results," as it would operate to lock in "unwise" judicial interpretations where the agency did not have the first chance to interpret an ambiguous statute.

Applying *Chevron's* familiar two-step test, the Supreme Court concluded that the FCC's ruling on cable modem service was permissible. Finding the term "offering" in the definition of telecommunications service to be ambiguous, the Court determined that the FCC's reading of it—to refer to a "stand-alone" offering of telecommunications—was reasonable. As the Court explained, the term "offer" is commonly used to refer to what the consumer perceives as the finished, integrated product rather than to each discrete input needed to provide it—for example, when a car dealership "offers" a consumer a car, it is generally not viewed as separately "offering" all of its individual, integral parts (such as the engine). The Court deferred to the FCC's finding that the transmission component of cable modem service is sufficiently integrated with the finished service (like the parts of a car) to constitute a single, integral offering. As the Court explained, that issue turns "on the factual particulars of how Internet technology works and how it is provided," a matter that the FCC was "in a far better position to address."

Brand X is likely to have far-reaching consequences for the regulation of Internet-based services generally. The FCC has stated its intention to insulate all such services from common carrier regulation and, as the Supreme Court observed, the FCC's cable modem ruling was the "first step" in that regard. FCC Chairman Kevin J. Martin observed that the resolution of *Brand X* will allow the FCC to "move forward quickly to finalize regulations that will spur the deployment of broadband services for all Americans."

Brand X may steer that process in at least two respects. First, it is likely to lead to less regulation of incumbent telephone companies that offer wireline broadband Internet access over digital subscriber line (DSL) or other telco

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facilities. Incumbent telephone companies currently are required to make the underlying transport of such services available to their competitors. However, the FCC has increasingly shown an inclination to harmonize the regulation of broadband offerings made by cable companies and phone companies in the absence of traditional market power concerns, with a preference for decreased regulation of the latter rather than increased regulation of the former. (The FCC already has tentatively decided to reclassify DSL as an unregulated information service.) By confirming the FCC's treatment of cable modem service as the regulatory baseline, *Brand X* opens the door to achieving that parity.

Second, the Supreme Court's endorsement of the FCC's framework for determining whether a service is an unregulated information service is likely, if anything, to result in more services falling into this category. One set of follow-on issues is currently pending in the FCC's rulemaking on IP-enabled services. As new Internet-based services such as voice-over Internet Protocol telephony (or "VoIP") emerge and replace traditional offerings, the ambit of Title II regulation will likely be reduced.

That result may in turn affect the FCC's review of specific regulations that turn on a provider's regulatory classification. For example, under the Act's express terms, the obligation to contribute to universal service applies to a "carrier that provides interstate telecommunications services." 47 U.S.C. § 254. If fewer providers are found to fall into this category, the FCC may feel compelled to invoke alternative sources of authority to ensure the adequacy of the universal service fund. This result may likewise require greater reliance on alternative sources of authority, such as the FCC's ancillary jurisdiction under Title I of the Act, to effectuate other public interest goals such as addressing the communications needs of disabled persons. Indeed, the Supreme Court in *Brand X* appeared to endorse the FCC's use of its Title I authority to deal with any problems that might arise from a service's classification as an information service.

Moves in this direction will highlight the question of the scope of the FCC's Title I authority. The FCC recently invoked that authority to justify its imposition of requirements on some VoIP providers to provide Enhanced 911 capability. But recent decisions by the DC Circuit concerning the breadth of the Title I power may keep the question alive by prompting arguments that the FCC must affirmatively show that regulations it imposes on information services are "reasonably ancillary" to the performance of its responsibilities and thus authorized under Title I.

In short, while *Brand X* brings to a close the long saga of cable modem service, it marks the beginning of a more comprehensive reshaping of regulation by the FCC, at least in the absence of action by Congress to address new technologies not easily fit into existing classification schemes.

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