SAPRONOV & ASSOCIATES, P.C.
ATTORNEYS AT LAW

info@wstelecomlaw.com
www.wstelecomlaw.com

5555 GLENRIDGE CONNECTOR, SUITE 200
ATLANTA, GEORGIA 30342
TEL. 770-399-9100

1300 I STREET, NW, SUITE 400
WASHINGTON, D.C. 20005
TEL. 202-429-2900

MOZILLA CORPORATION V. FCC
NET NEUTRALITY'S LATEST AND UNDOUBTEDLY NOT LAST CHAPTER

February 14, 2019

On February 1, 2019, Judges Millett, Wilkins and Williams of the United States Court of Appeals for the District of Columbia Circuit heard almost four and a half hours of oral argument about the FCC's 2018 *Restoring Internet Freedom Order*.[1]

The *2018 Order* rejected the Wheeler Commission's definition of broadband Internet service as a regulated "telecommunications service," finding instead that broadband Internet access service is better defined as an unregulated "information service." By doing so, the *2018 Order* also eliminated the FCC's prohibitions on Internet Service Providers (ISPs) blocking or throttling traffic, or agreeing with content providers to paid prioritization arrangements (collectively, the "conduct rules"). The *2018 Order* did, however, retain a transparency rule requiring disclosure of network management practices and other details. The FCC justified its elimination of the conduct rules in part on the concept that "the transparency rule . . . in combination with the state of broadband Internet access service competition and the antitrust and consumer protection laws obviates the need for conduct rules by achieving comparable benefits at lower cost."[2]

Our Story So Far

While the history of the issue goes back almost 50 years, for brevity's sake, we'll start in 2016.[3]

In the 2016 *USTA* decision, the D.C. Circuit upheld the FCC's 2015 "Net Neutrality" order, titled the *Open Internet Order*, applying the broad standard of deference under *Chevron* as applied in *Brand X*.[4] The *Open Internet Order* promulgated the conduct and transparency rule under the FCC's Title II, common carrier authority.

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[1] *Restoring Internet Freedom*, Declaratory Ruling, Report & Order & Order, 33 FCC Rcd 311 (adopted 2017, released 2018) (*"2018 Order"*).
[2] *Id.* at ¶ 239.
[3] For past alerts and a more complete background on Net Neutrality, please contact us at info@wstelecomlaw.com.
[4] *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

In January, 2018, the FCC, under Chairman Pai, released the *Restoring Internet Freedom Order*.[5]

- The Order reclassified broadband Internet access service as an information service, reviving the concept that broadband services may require telecommunications, but inherently involve the offering of data processing and other capabilities. And even if such capabilities could be separated from the service offered by broadband providers, the service still included data processing capabilities such as DNS and caching that operated for the benefit of the consumer.
- The FCC justified its reversal by pointing to the absence of actual harmful conduct by providers, and the likelihood that the transparency requirement, together with antitrust protections, would prevent or redress any significant harmful network practices.
- The Order thus eliminated all of the conduct rules but retained the transparency rule, doing so as an exercise of the FCC's authority under Section 257(a) to issue an initial report on market entry barriers and Section 257(c) of the Telecommunications Act to issue reports on a triennial basis thereafter. The FCC refused to use Section 706 as a basis of authority, finding that Section 706 is merely hortatory, thus reversing the approach of previous Commissions as upheld by the D.C. Circuit.
- The Order held that it preempted any state decision inconsistent with its classification of broadband as an information service.

Following the release of the Order, but before it became effective, Section 257(c) was repealed.[6] Given the appeal of the Order, the Supreme Court ultimately denied *certiorari* of the *USTA* case.

Petitioner Arguments

Pantelis Michalopoulos and Kevin Russell argued on behalf of Mozilla, Vimeo and a group of public interest organizations. Mr. Michalopoulos argued about whether *Chevron* deference should apply under *Brand X* and Mr. Russell argued about whether the FCC had met the APA's basic requirement of reasoned decision making.

Mr. Michalopoulos stated that the FCC was not entitled to deference because it failed to explain how broadband is anything other than simple transmission. Instead, the FCC placed the entire weight of its argument on (1) capabilities not provided by Internet service providers or (2) incidental data processing such as DNS/caching, which are nothing more than network management. Judge Williams repeatedly asked why the petitioners appeared to argue that the Telecommunications Act mandates a specific finding, when *Brand X* and subsequent D.C. Circuit decisions left the decision to the FCC's discretion. Similarly, Judge Millett tried to pin down whether petitioners were arguing prong 1 of *Chevron*, which applies when legislative language compels a result, or prong 2, which allows deference in the case of ambiguous language.

[5] *Supra*, n.1.
[6] Pub. L. 115-141, § 402(f), 132 Stat. 1089 (2018).

Mr. Russell was somewhat more successful in arguing that the APA requires reasoned decision making, but that the FCC's Order fails even that low bar by failing to explain how (1) antitrust enforcement would actually serve as a backstop to prevent harmful behavior, (2) Section 257 can serve as an ongoing basis for the transparency rule when 257(c) was repealed, (3) DNS/caching is different from other types of network management services, and (4) there was no significant threat of harm when there was evidence of tens of thousands of complaints about Internet service providers. Mr. Russell argued that while *Chevron* and *Brand X* might not compel a particular result, the FCC is required to conduct some sort of analysis, which it did not do.

Stephanie Weiner argued on behalf of a group of intervenor trade associations, focusing on the Section 257 issue. If the FCC classifies broadband as an information service, and eliminates Section 706 as an independent basis of jurisdiction, the FCC only has Section 257 left, which necessarily fails because as amended it provides no ongoing authority to adopt rules.

Danielle Luce Goldstein argued on behalf of Petitioner County of Santa Clara, focusing on the failure of the FCC to consider the impact of its decision on public safety. She argued that if the FCC eliminated its prohibition on blocking and throttling on the basis that antitrust enforcement provided a backstop, such reasoning necessarily failed if applied to public safety, given there is no *post hoc* remedy for lost lives.

Finally, Steven Wu argued on behalf of numerous state government petitioners and focused on the FCC's state preemption. He argued that the FCC cannot disclaim the authority to regulate a service, and then hold that states can't then regulate that service. Judge Wilkins raised the issue of ripeness, given no specific state decision was at issue.

Respondent Arguments

Tom Johnson, General Counsel of the FCC presented the respondent's arguments. Judge Millett's extensive questioning pushed back on Mr. Johnson's basic arguments that *Brand X* is controlling, and also on the argument that the FCC could rely on DNS/caching as providing a data processing capability to support the information service classification. She then pressed on whether the FCC has to apply its classifications consistently, asking whether the FCC's reasoning would similarly result in telephone service being considered an information service because it allows access to data processing (for example, automated drug prescription ordering) and uses capabilities analogous to DNS to route calls. Mr. Johnson answered that telephony was distinguishable from broadband because of its mode of interaction, volume of information accessed and historical treatment. After this exchange, Mr. Johnson argued that the FCC reasonably made the determination that traditional telephone (or "Title II") regulation depressed investment, which Judge Millett also questioned. He also spent a good deal of time on Section 257, arguing that (1) the petitioners lack standing, (2) failure of Section 257 does not impact the reclassification as it was an entirely separate decision, and (3) failure of notice is a harmless error as all parties would have understood that Section 257 was on the table. Mr. Johnson closed out his argument with a lengthy exchange with Judge Millett about the adequacy of antitrust remedies for public safety.

John Neuchterlein argued on behalf of telecom trade associations intervening for the respondents. He focused on the agency's discretion under *Brand X*, arguing that petitioners were essentially making *Chevron* prong 1 arguments that the Telecommunications Act compels a specific interpretation, when *Brand X* could not be clearer that the discretion was left to the FCC. He also pointed out, in response to questions from Judge Millett, that *Brand X* rejected arguments that broadband providers offered consumers pure transmission when they went outside "walled garden services." He dismissed the argument over Section 257, stating that it at most warranted nothing more than a narrow remand and that the FCC could adopt the same rule under Section 706.

What Does It All Mean?

At a very high level, Judge Millett doesn't buy the FCC's arguments, Judge Williams doesn't buy the petitioners' arguments, and Wilkins is the wild card. So it would be rash to try to predict any specific outcome and assert a high degree of confidence. But the oral argument did highlight several crucial areas that would seem to point to a small range of likely outcomes.

- The petitioners rest a great deal of their case on the idea that the Order is like a rickety Jenga tower, and the whole thing will come crashing down if the petitioners either (1) knock out the transparency rule by knocking out Section 257 or (2) knock out the antitrust backstop. But the oral argument emphasized repeatedly that the FCC can remedy a remand on either of these bases simply by providing better arguments.

- The court appeared sympathetic to the public safety arguments presented by Ms. Goldstein, but again a remand on this basis would just invite a more complete argument from the FCC.

- All this being said, should the court remand the transparency rule because Section 257 is insufficient to support it, the FCC would have to decide whether to resurrect Section 706 or ditch the transparency rule. So expect this to be a future issue.

- It seems likely the court will decline to rule on the state preemption issue as the dispute is not yet ripe.

- The fact that Mr. Michalopoulos could not provide satisfactory answers to the panel in response to their questions about *Brand X* emphasizes the point that petitioners' are really arguing *Chevron* prong 1 rather than prong 2. Not a particularly strong position to take in light of *Brand X*.

- And that being said, Judge Millett's telephone analogy is, potentially, a powerful counterpoint that the FCC appears to not have anticipated. Mr. Johnson did not offer any compelling argument as to why the reasoning applied to broadband to define it as an information service could not also be applied to telephony. Whether this is sufficient to persuade two out of three judges to hold that the FCC was unreasonable in exercising its discretion was not clear from the oral argument.

It appears unlikely, then, that this panel will find that the FCC was compelled to find broadband to be an information service - the petitioners disclaimed any such argument, even if their arguments seemed to imply as much. But a sweeping endorsement of the FCC's approach similar to the one the court provided in *USTA* is also extremely unlikely. More likely, the court will remand, requiring the FCC to better explain how antitrust and other protections work for special cases such as public safety, and to better justify its transparency rule. The other possible outcome would be for the court to follow Judge Millett's lead on the telephony/broadband distinction and remand on a broader basis, requiring the FCC to apply the information services classification consistent with its prior use of that term in other contexts – potentially a much harder task for the agency.

Either way, should the court remand, with the 2020 election looming, one would expect Chairman Pai to press for a remand decision as quickly as possible so as to control for the possibility of a changeover in administrations. As such, we should all expect this to be not much more than the current chapter in the classification saga, and by no means a definitive end to the story.

Please let us take this opportunity to introduce Jeffrey Carlisle, Esq., former FCC Competition Bureau Chief, the author of this client alert, who has joined our Firm in an Of Counsel capacity. For more information on Jeff, please see http://wstelecomlaw.com/attorneys-and-staff/jeffrey-j-carlisle/. For those of you who wish to have a more detailed assessment of this oral argument, please contact us at info@wstelecomlaw.com.