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There's Little Question Net Neutrality Is a Major Question

by

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With the Senate's confirmation of Anna Gomez as the fifth member of the Federal Communications Commission, the Democrats finally have their long-awaited 3-2 majority. So FCC Chairman Jessica Rosenworcel didn't waste any time in initiating a rulemaking proceeding proposing to reimpose "Net Neutrality" regulations on Internet service providers (ISPs) such as Verizon, Comcast, and dozens of others.

The Commission proposes to accomplish this by, once again, determining that ISPs should be classified as "telecommunications carriers" under the Communications Act, rather than information service providers. Unlike information service providers, ISPs' classification since the Obama-era FCC's net neutrality regulations were repealed in 2018 by the *Restoring Internet Freedom Order*, telecommunications carriers are subject to the Communications Act's common carrier mandates. These include, as is typical of common carrier regimes, public utility-like rate regulation and nondiscrimination strictures.

As I have explained elsewhere recently, as a matter of policy, reimposing net neutrality mandates would be a serious mistake, one likely to harm not only ISPs but, more importantly, America's consumers. But it would also be a blunder as a matter of law – one sure to lead to a tremendous waste of time and resources that, instead, would be much more productively directed to efforts to close remaining digital divides.

Shortly after the Supreme Court's decision in *West Virginia v. EPA*, in an essay published in The Regulatory Review, I said the decision "could have a significant impact on the decades-long net neutrality controversy." For my purposes here, and without reciting the nuances of each "bounce of the ball" between imposition of net neutrality mandates and their elimination, it suffices to point out that in each instance of judicial review, *Chevron* deference was outcome-determinative. [If you want more detail on the back-and-forth and *Chevron's* role, please see these two essays published in The Regulatory Review: "Chevron and Net Neutrality at the FCC" (2018) and "The Ongoing Saga of Chevron and Net Neutrality." (2019)].

If the FCC now moves forward to adopt regulations imposing public utility-like mandates on Internet providers like those that characterized previous net neutrality iterations, I predict that, this time, the agency's action will not survive judicial scrutiny. With the *Chevron* doctrine already in hospice care, if not at death's door with *Loper* looming, and the Major Questions Doctrine (MQD) now firmly embedded in the Supreme Court's jurisprudence, the odds of the FCC's action surviving are low.

As readers of this space know, it is now clear, as the Court put it in *West Virginia*, regarding "certain extraordinary cases. . . something more than a merely plausible textual basis for the agency action is necessary." In cases of major economic and political significance, the agency must demonstrate "clear congressional authorization" for the power it claims.

I am sympathetic to the Major Questions Doctrine, especially on separation of powers grounds, as I made clear in this recent law review article. Nevertheless, I respect the views of its critics. My point here is not to debate the MQD's merits, but to show that the doctrine makes it unlikely any future FCC net neutrality public utility-like regulations will pass judicial muster.

Indeed, the opinion of the Court in *West Virginia* provides a tell-tale sign. There Chief Justice John Roberts cited then-Judge Brett Kavanaugh's dissent from denial of rehearing en banc in *United States Telecom Assn. v. FCC*, for the proposition that "Congress intends to make major policy decisions itself, not to leave those decisions to agencies. "*US Telecom* was the D.C. Circuit's review of the Obama-era FCC's net neutrality regulations.

It's difficult to believe the Chief Justice and his five colleagues in the majority were not well aware of the import of then-Judge, now-Justice Kavanaugh's dissent, in which he declared:

> "[The] net neutrality rule is one of the most consequential regulations ever issued by any executive or independent agency in the history of the United States. The rule transforms the Internet by imposing common-carrier obligations on Internet service providers and thereby prohibiting Internet service providers from exercising editorial control over the content they transmit to consumers. The rule will affect every Internet service provider,

> every Internet content provider, and every Internet consumer. The economic and political significance of the rule is vast."

And this too:

> "The rule therefore wrests control of the Internet from the people and private Internet service providers and gives control to the Government. The rule will affect every Internet service provider, every Internet content provider, and every Internet consumer. The financial impact of the rule — in terms of the portion of the economy affected, as well as the impact on investment in infrastructure, content, and business — is staggering."

More could be said regarding net neutrality regulations' impact, say, with respect to their effect on investment and innovation, but it is enough to say here that a majority of Justice Kavanaugh's colleagues are likely to agree that their adoption presents a major question.

As for *Chevron*, which has played a key role in review of prior FCC net neutrality orders, I'll wager that a Supreme Court majority will now agree with what now-Justice Kavanaugh said in *US Telecom*: "In short, while the *Chevron* doctrine *allows* an agency to rely on statutory ambiguity to issue *ordinary* rules, the major rules doctrine *prevents* an agency from relying on statutory ambiguity to issue *major* rules."

Of course, the principal rationale for invoking *Chevron* deference in the earlier net neutrality cases was that the relevant Communications Act provisions upon which the agency relied are ambiguous. This previously relied upon statutory ambiguity is totally at odds with the MQD requirement of "clear congressional authorization" for the power claimed by the agency.

Until such time as Congress clearly grants the FCC the authority to adopt new net neutrality regulations, the Commission would be wise to focus its time and resources on actions – such as, for example, overseeing the disbursement of billions of dollars in subsidies to promote broadband deployment and adoption – that can make a meaningful difference in closing remaining digital divides, while at the same time surviving judicial review.

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