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The Sixth Circuit Stays the FCC's Latest Net Neutrality Flip-Flop

by

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At last! There's now a good chance the two decades-old "net neutrality" wars may be coming to an end, at least in the courts. If so, this would leave the important question of how broadband internet access services should be regulated to Congress, where it properly belongs.

In two previous essays, "*Chevron* and Net Neutrality at the FCC" and "The Ongoing Saga of *Chevron* and Net Neutrality," I explained that the Federal Communications Commission (FCC), depending upon whether the agency was controlled by Republicans or Democrats, alternated between classifying broadband internet access services as "information services" or "telecommunications." This classification matters because telecommunications service providers are considered common carriers under Title II of the Communications Act and regulated akin to traditional public utilities. This means they are subject to rate regulation, non-discrimination, and other utility-like mandates. Information services providers (ISPs) are subject only to light-touch regulatory oversight.

In the leading case of *National Cable & Telecommunications Association v. Brand X* (2005), the Supreme Court affirmed the FCC's determination that broadband services properly are classified as information services rather than telecommunications services. Importantly, the Court's majority declared that the Communications Act's definitions are ambiguous and, therefore, pursuant to *Chevron*, it was required to defer to the agency's statutory interpretation.

What followed the Supreme Court's *Brand X* decision is perhaps the paradigmatic example of agency regulatory flip-flopping. In 2015, the Obama FCC classified broadband as telecommunications subject to public utility regulation. In 2018, the Trump FCC reverted back to the lightly-regulated information services classification. Each decision was affirmed in the court of appeals based on *Chevron* deference. (For more detail and subsequent history on the agency flip-flopping, please refer to my two essays cited above.)

Not surprisingly, the Biden FCC, in a May 2024 order, again classified broadband as a telecommunications service. On August 1, in a per curiam decision by Chief Judge Sutton and Judges Clay and Davis, the Court of Appeals for the Sixth Circuit stayed the implementation of the FCC's latest flip-flop on the basis that the broadband providers challenging the latest iteration of the rule are likely to succeed on the merits and that the equities favor them.

While the grant of a stay normally might not be considered highly significant, this stay decision is important enough to warrant comment.

As for likelihood of success on the merits, the court concluded that "[n]et neutrality is likely a major question requiring congressional authorization." In finding the Commission's rule to be a question of "vast economic and political significance," the court relied on the agency's own assertion that broadband services "are absolutely essential to modern day life, facilitating employment, education, healthcare, commerce, community-building, communication, and free expression." And the court pointed to the Commission's invocation of public safety and national security considerations. All this together virtually screams "major question."

The Sixth Circuit's decision refers to some of the early precursors of the major questions doctrine (MQD), rather than the Supreme Court's decision in *West Virginia v. EPA* (2022), which firmly embedded the doctrine in the Court's jurisprudence. But it's worth pointing out here that Chief Justice Roberts' majority opinion in *West Virginia* cited favorably then-Judge Kavanaugh's dissent in *United States Telecom Association v. FCC* (2017), which called net neutrality regulation a major policy decision. While this has been infrequently noted, I suspect the Sixth Circuit judges may have had this in mind.

Following its determination that the FCC's action constitutes a major question, the court declared that "[t]he Communications Act likely does not plainly authorize the Commission to resolve this signal question." According to the court, "[n]owhere does Congress clearly grant the Commission the discretion to classify broadband providers as common carriers." And to put a point on it: "Absent a clear mandate to treat broadband as a common carrier, we cannot assume Congress granted the Commission this sweeping power."

As for the equities, the court stated that, absent the stay, the challengers face delays in product rollouts and disadvantages in negotiating interconnection agreements, along with unrecoverable compliance costs, all of which qualify as irreparable harms.

The court considered and rejected the FCC's contention that *Brand X*'s reliance on *Chevron* deference and its silence regarding the MQD somehow still controlled. The court declared that *Brand X*'s silence doesn't matter to the present dispute, especially because *Brand X* affirmed the FCC's decision to apply light-touch regulation to ISPs, whereas the FCC's 2024 decision does the opposite, subjecting them to common carrier regulation. The court also rejected as unpersuasive agency claims to authority under various Communications Act provisions.

While the per curiam decision rests firmly on the MQD, Chief Judge Sutton filed a separate concurring opinion to offer an additional reason for granting the stay. In his view, "the best reading of the statute" demonstrates that Congress did not view ISPs as common carriers under the Communications Act. In the event the merits panel or *en banc* court disagrees with the stay panel's MQD analysis, Judge Sutton's concurring opinion lays the groundwork for showing, now that *Loper Bright* has buried *Chevron* deference, that the FCC's action still exceeds the agency's delegated authority.

Given the FCC's persistent regulatory flip-flopping—which I earlier likened to Bobby Vee's "bouncing ball"—based on the partisan makeup of the Commission, the bipartisan nature of the unanimous stay panel is noteworthy. Chief Judge Sutton was appointed by George W. Bush, Judge Clay by Bill Clinton, and Judge Davis by Joe Biden.

It's impossible to know for certain what the Sixth Circuit merits panel will do, or the Supreme Court if an appeal lands there. My prediction is that the stay panel's reasoning will prevail—that the FCC's classification of broadband providers as public utilities constitutes a major question that Congress has not clearly authorized the Commission to decide.

There's evidence that public utility regulation of broadband discourages investment in new facilities and development of innovative applications and services. Certainly, the instability of regulatory policy, with flip-flopping based on which party happens to control the FCC, is not conducive to longer-term business planning in an arena so important—so "major" if you will—to the nation's social and economic well-being.

So, for now, it's good that the existing light-touch regulatory policy for ISPs remains in place.

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