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D.C. Circuit Vacates FCC's Federal Preemption of State Net Neutrality Regulations as It Upholds Repeal of FCC Rules

The U.S. Court of Appeals for the District of Columbia Circuit added a new chapter in the ongoing saga over how and whether to regulate providers of broadband internet access service when, on October 1, 2019, it largely upheld the Federal Communication Commission's repeal in 2018 of net neutrality rules, but vacated its effort to preempt state regulation of the same and remanded several other issues without vacatur. In the absence of federal rules, and with states free to do as they please, we will likely end up with a series of state-level regulations as more states follow the examples already set by California, Oregon, Washington and Vermont, among other places, and enact their own net neutrality rules. If a critical mass of key states adopts net neutrality regulations, the Trump administration's repeal of the FCC's 2015 net neutrality regulations may, as a practical matter, be a hollow victory.

### **2018 Repeal**

The D.C. Circuit addressed the FCC's [2018 order](#) repealing the agency's [2015 net](#) neutrality rules—namely, bans on blocking, throttling and paid prioritization by broadband internet access service providers. Following a roadmap from a prior D.C. Circuit decision, the FCC's 2015 order had reclassified the service as a telecommunications service under Title II of the Communications Act but opted to forbear from applying many of the regulatory requirements of Title II, an approach modeled after the one applied to mobile wireless telecom services since 1993. [As discussed in previous updates](#), the 2018 order reclassified the services again as an "information service" under Title I of the Communications Act, essentially deregulating broadband internet access service. By adding federal preemption, the 2018 order effectively established a regime in which neither the federal government nor the states could mandate net neutrality. A large number of state attorneys general and various stakeholders immediately appealed, and the D.C. Circuit issued a ruling on the consolidated challenges last week.

### **Repeal Upheld, With Remands for Issues Not Sufficiently Addressed**

The central issue of the case was whether the FCC's reclassification of broadband internet access service from Title II to Title I was reasonable. Applying the two-step *Chevron* analysis under which courts generally give deference to rational agency interpretations, the court held that the FCC's reclassification was a reasonable policy decision. The judges relied on the binding precedent of the U.S. Supreme Court's ruling in *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), that upheld the right of the FCC to reasonably change how it classifies internet access services.

Recognizing the FCC's interest in treating landline and mobile broadband internet access service consistently, the per curiam opinion also upheld the 2018 order's reclassification of mobile broadband as a "private mobile service." Such a classification has the similar effect of insulating mobile broadband internet access services from

the FCC's generally far-reaching authority under Title II of the Communications Act. The court likewise sustained the commission's retention, under authority granted by 47 U.S.C. § 257, of the "transparency rule," in large part a holdover from the otherwise-repealed 2015 order that requires broadband internet access service providers to publicly disclose accurate information about their service.

The court agreed with challengers that the FCC failed to adequately consider the effect of the repeal on three distinct issues: public safety, pole attachment regulation and the Lifeline program. The FCC's lack of analysis in the 2018 order of its effect on public safety rendered that portion of the decision "arbitrary and capricious," particularly in light of evidence that the broadband internet access services of emergency service providers had been throttled on occasion after the order went into effect. Similarly, the judges agreed that the FCC failed to adequately consider how the deregulatory action would affect the regulation of pole attachments, the communications infrastructure equipment affixed to utility-controlled property. The FCC also failed to consider how the reclassification would affect the Lifeline program that subsidizes low-income consumer access to broadband internet access service, among other communications technologies. Despite finding that the FCC had acted in an arbitrary and capricious manner, the court allowed the FCC to rectify its errors rather than vacate the repeal order in its entirety. Interestingly, the per curiam opinion suggests the panel declined to vacate because the court was mindful of the contentious history of net neutrality and the disruptive effect that vacating the entire order would cause: "Regulation of broadband Internet has been the subject of protracted litigation, with broadband providers subjected to and then released from common carrier regulation over the previous decade. We decline to yet again flick the on-off switch of common-carrier regulation under these circumstances."

### **Court: The FCC Can't Have It Both Ways**

While unanimously upholding the majority of the 2018 order aside from the three issues described above, a 2-1 majority of the panel vacated the order's so-called "preemption directive," which preempted "any state or local requirements that are inconsistent with [its] deregulatory approach." The court ruled that the FCC did not have a lawful source of authority to issue such a broad invalidation. The two judges in the majority reasoned that because the FCC deregulated broadband internet access service under Title I, it essentially asserted its own lack of jurisdiction and regulatory authority. Having made this jurisdictional declaration, the FCC could no longer assert "legal authority to categorically abolish all fifty States' statutorily conferred authority to regulate intrastate communications." In short, the FCC could not simultaneously declare the lack of its own jurisdictional authority while asserting authority to preempt the states from regulating themselves. The court did note, however, that specific factual circumstances could potentially arise that could trigger the doctrine of "conflict preemption" between a particular state's regulation and the federal regulatory posture that could compel preemption of such state's regulation.

### **Significance**

The D.C. Circuit's ruling is unlikely to mark the end of the net neutrality debate. Both the decision to not vacate the 2018 order, notwithstanding the finding that it was arbitrary and capricious, and the decision to vacate the preemption directive, will likely be appealed to the Supreme Court. Language in the concurring opinions lays bare the fragility of the commission's legal arguments and the *Brand X* precedent that undergird the per curiam

opinion. Judge Millett, for example, felt compelled to follow the *Brand X* precedent but conveyed concern that the "result is unhinged from the realities of modern broadband service." Her concurrence urged the Supreme Court to follow instead the route favored by Justice Scalia in his *Brand X* dissent and classify broadband internet access service as a telecommunications service. Judge Wilkins also suggested in his concurrence that the Supreme Court revisit the *Brand X* decision since "critical aspects of broadband Internet technology and marketing underpinning the court's decision have drastically changed since 2005."

If the Supreme Court agrees to hear an appeal, affirmation of the D.C. Circuit's decision to uphold the 2018 repeal order may not be a slam dunk. For example, Justice Gorsuch has shown a high degree of skepticism towards the *Chevron* doctrine. Will Justice Gorsuch find it difficult to support the D.C. Circuit's reliance on the *Chevron* doctrine in upholding the repeal? Further, would the conservative majority of the Supreme Court be willing to restore the 2018 repeal order's preemption directive and thereby potentially create a new precedent granting federal agencies broad authority to preempt states from self-governance, contrary to principles of federalism?

At the same time, related litigation challenging state net neutrality laws that had been stayed during the pendency of this appeal will resume with new vigor. The specter of a scattered approach to the regulation of broadband internet access service depending on where consumers reside or visit may finally galvanize bipartisan congressional action on a federal net neutrality law. Whatever the immediate consequences, the D.C. Circuit's ruling does not mark the end of a contentious battle regarding whether and how to regulate the companies that provide access to the internet.

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