Mozilla Corp., et al. v. FCC and United States of America

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940 F.3D 1 (D.C. CIR. 2019)

In *Mozilla Corp. v. FCC*,[1] the United States Court of Appeals for the D.C. Circuit upheld the FCC's 2018 *Restoring Internet Freedom Order* in part, vacated it in part, and remanded it in part.[2] The court found that it was permissible for the FCC to reclassify cable broadband internet as an "information service" rather than as a "telecommunications service" and mobile broadband as a "private mobile service" rather than as a "commercial mobile service,"[3] meaning that broadband internet providers would not be subject to the more rigorous common carrier regulations of Title II of the Telecommunications Act of 1996.[4] The court also found that the FCC's revised transparency rule, reducing disclosure requirements it had instituted under a prior administration, was not arbitrary and capricious.[5] The D.C. Circuit vacated the FCC's Preemption Directive, which would have prevented states from implementing more rigorous regulations of their own on broadband providers, and remanded the issues of pole attachments, the Lifeline program, and public safety matters, as the court found that the FCC failed to adequately address those issues in its 2018 Order.[6]

I. BACKGROUND

Mozilla Corporation, among other Internet companies, non-profits, state and local governments, and other petitioners, brought this action in objection to the terms of the FCC's 2018 *Restoring Internet Freedom Order*, which reversed many of the terms implemented by the FCC's prior 2015 *Promoting and Protecting the Open Internet Order* ("*Open Internet Order*").[7] Petitioners urged the D.C. Circuit to find the 2018 *Order* to be a misinterpretation or a violation of the law.[8]

1. Mozilla Corp. v. FCC, 940 F.3d 1 (D.C. Cir. 2019).
2. *See id.* at 86.
3. *See id.* at 35.
4. *See id.* at 17.
5. *See id.* at 49.
6. *See id.* at 86.
7. *See* Joint Brief for Petitioners Mozilla Corporation, Vimeo, Inc., Public Knowledge, Open Technology Institute, National Hispanic Media Coalition, NTCH, Inc., Benton Foundation, Free Press, Coalition for Internet Openness, Etsy, Inc., Ad Hoc Telecom Users Committee, Center for Democracy and Technology, and Incompas, Mozilla Corp. v. FCC, 940 F.3d 1 (D.C. Cir. 2019) (No. 18-1051), 2018 WL 5282022 at *1-2.
8. *See id.*

To provide a very brief overview of the recent history of the "net neutrality" dispute within the FCC, in 2002 the FCC classified broadband providers as an information service.[9] The Supreme Court found this classification permissible in *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*.[10] In 2015, the FCC classified them as a telecommunications service, which the D.C. Circuit found permissible in *United States Telecom Ass'n v. FCC*.[11] In 2018, the FCC classified broadband providers as an information service, which the D.C. Circuit found permissible here in *Mozilla*.[12]The defense test articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, was referenced heavily in each of these opinions.[13]

Prior to the 2015 *Order*, in *Brand X*, the Supreme Court held that it was appropriate to apply *Chevron* deference to the agency's interpretation of the definition of "telecommunications service"[14] and that it was permissible for the FCC to classify broadband providers as an information service.[15] In a dissenting opinion, Justice Scalia observed that the Court recognized that DNS functionality,[16] one of the bases for the FCC's classification, is scarcely more than routing information, which is "expressly excluded from the definition of 'information service.'"[17]

In *Verizon v. FCC*, which was also decided prior to the FCC's 2015 *Order*, the D.C. Circuit determined that, having classified fixed broadband providers as information service providers and mobile broadband providers as private mobile service providers, the FCC exempted those providers from treatment as common carriers, even under the agency's Section 706 authority.[18] This classification meant the FCC could not apply anti-discrimination[19] and anti-blocking rules to broadband providers.[20]

In its 2015 *Open Internet Order*, the FCC observed that, not only do broadband providers have the tools necessary to deceive consumers and degrade or disfavor content,[21] but they also—as the *Verizon* court noted

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9. *See* In Re Inquiry Concerning High-Speed Access to Internet Over Cable & Other Facilities, 17 F.C.C. Rcd. 4798, 4802 (2002).

10. Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

11. United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016) (*USTA*).

12. *See Mozilla* at 65.

13. *See e.g.*, *Mozilla* at 19-20, 84; *USTA* at 692, 701; *Brand X* at 974, 979-86.

14. *See Brand X* at 980 (citing to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

15. *See Brand X* at 998-1000.

16. The Internet Domain Name System (DNS) translates user-friendly names and numeric network addresses, making the Internet easier to navigate. "Domain Name System," National Telecommunications and Information Administration, https://www.ntia.doc.gov/category/domain-name-system (last accessed: April 8, 2020).

17. *Brand X* at 1012-13 (Scalia, J., dissenting).

18. *See* Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014).

19. *See id.* at 655.

20. *See id.* at 658.

21. *See* Protecting & Promoting the Open Internet, *Report and Order*, 30 F.C.C. Rcd. 5601, para. 8 (2015) [hereinafter *Open Internet Order*].

despite its ruling—have powerful incentives to do so.[22] Explicitly in response[23] to the then-recent *Verizon* ruling, the FCC concluded in its 2015 Order that retail broadband internet service is "best viewed as separately identifiable offers of (1) . . . telecommunications service and (2) various 'add-on' applications, content, and services that generally are information services."[24] The FCC similarly observed that mobile broadband is best viewed as a commercial mobile service, as services that use public IP addresses are interconnected with the public switched network.[25] By changing how it classified broadband providers in its 2015 *Order*—as "telecommunications services"[26] and "commercial mobile services,"[27] rather than as "information services"[28] and "private mobile services,"[29] respectively—the FCC was then able to regulate those broadband providers as common carriers.[30] This permitted the FCC to address its concerns about consumer deception and other unfair conduct by broadband providers by prohibiting blocking, throttling,[31] and/or paid prioritization,[32] citing its authority to do so under Section 706, Title II, and Title III of the Communications Act.[33]

Subsequent to the 2015 *Order*, the D.C. Circuit in *United States Telecom Ass'n v. FCC* found that it was reasonable for the FCC to categorize DNS and caching connected to a telecommunications service to fall under the telecommunications management exception (TME), meaning providers of that functionality should be classified as a telecommunications service rather than an information service, and thus subject to Title II regulation as common carriers.[34] The *USTA* court also noted that its role was to ensure the FCC acted within Congress' delegation of authority to the agency, per the *Chevron* doctrine,[35] which the court ultimately found the agency to have done.[36]

In its 2018 *Order*, the FCC sought to revert to its 2002 standards, upheld by the Court in *Brand X*, by classifying broadband providers as providers of

22. *See Open Internet Order*, at para. 19 (citing to *Verizon* at 645-46); *see also* Joint Brief for Petitioners at *1-2.

23. *See Open Internet Order* at para. 50.

24. *Id.* at para. 47.

25. *See id.* at para. 48. This paragraph also notes that "[u]nder the statutory definition, commercial mobile services must be 'interconnected with the public switched network (as such terms are defined by regulation by the Commission).'" *Id.*

26. *See Open Internet Order* at para. 29.

27. *Id.* at para 48.

28. *Id.* at para 47.

29. *Id.* at para 48.

30. *See id.* at para. 364, 403; *see also* Joint Brief for Petitioners, Mozilla Corp. v. FCC, at *1-2.

31. Throttling is the degradation of a service rather than the outright blocking of it. *See Open Internet Order* at para. 106.

32. *See id.* at para. 14.

33. *See id.* at Appendix B, para. 13.

34. *USTA*, 825 F.3d 674, 706 (D.C. Cir. 2016). To be clear, a provider of DNS and caching functionality that is not connected to a telecommunications service would still be classified as a provider of information services under the TME as outlined in *USTA*.

35. *See id.* at 696-97.

36. *See id.* at 697-98, 703-05.

an information service, not a telecommunication service.[37] The FCC additionally argued that its 2018 adjustments to the 2015 *Order*'s transparency rule was appropriate, given the increased burden the rule represented to providers without a proportionate benefit to consumers or to the FCC,[38] and that its deregulatory policy should preempt any future contrary state policy.[39]

II. ANALYSIS

A. Common Carriers

The court conducted the two-step *Chevron* deference test, citing the findings in *Brand X* as sufficient to show that Congress left the matter of classification[40] to the FCC, and that, with regards to fixed broadband providers specifically, DNS and caching functionality eschew claims of unreasonableness in the FCC's decision to classify those providers as information services.[41]

The petitioners put forward several arguments challenging the reasonableness of the FCC's classification. The court found petitioners' "walled gardens" argument[42] to be inconsistent with the holding in *Brand X*, which puts forward DNS and caching as reasons to classify providers as information services providers, beyond any arguments about information services classification based solely on add-on services.[43] Similarly, the court concluded that the petitioners' argument regarding the "highly ambiguous" TME[44] conflated permissive interpretations of the Title II Order with mandatory interpretations, and as a result failed to consider that the FCC can adopt a contrary view so long as that view is not unreasonable.[45] The court determined petitioners' analogy to the FCC's older adjunct-to-basic framework was inapplicable to such a fact-specific determination best made by agency experts.[46]

The *Mozilla* court also deemed the functional integration argument to be inapplicable, as it failed to establish that there was a clear standalone

37. *See* Restoring Internet Freedom, *Report and Order*, 33 FCC Rcd. 311, para. 2 (2018) [hereinafter *Restoring Internet Freedom Order*].

38. *See Restoring Internet Freedom Order* at para. 215.

39. *See id.* at para. 195.

40. Classification of broadband service providers as providers of telecommunications services or information services. *See Mozilla* at 20.

41. *See id.*

42. This is the argument that access to add-on services that could be considered information services represented access to a "walled garden" and therefore the telecommunications functionality should still be classified and regulated as such. *See* Joint Brief for Petitioners, *Mozilla*, at *6.

43. *See Mozilla* at 23.

44. *See id.* at 32.

45. *See id.* at 24.

46. *See id.* at 30-32.

telecommunications offering.[47] The argument is in part based on the faulty premise that a quantitative balancing determines how a provider should be classified, and it fails to otherwise show that the FCC's stance is unreasonable.[48]

Turning to the classification of mobile providers, the court held that interpretations that avoided self-contradiction "have a leg up on reasonableness,"[49] that the FCC's revised definitions of "public switched network" and "interconnected service" were within its authority,[50] and that the FCC's substitutability test was appropriate for determining that mobile broadband is not the functional equivalent of mobile voice.[51] The court similarly held *Chevron* deference applied to the agency's re-interpretation of its authority under Section 706.[52]

Finding none of the petitioners' arguments persuasive, the court found that the 2018 *Order* did not violate the law in classifying fixed broadband internet service providers as information service providers and mobile broadband providers as private mobile providers.[53]

B. Transparency Rule, Preemption Directive, and Remanded Issues

After clarifying that petitioners Mozilla and Internet Association had standing, the court found that they had sufficient notice through the question and corresponding comments in the FCC's Notice of Proposed Rulemaking regarding legal authority for the transparency rule.[54] The court similarly found the argument by intervenor Digital Justice—that the FCC's modifications to the transparency rule were arbitrary and capricious as they failed to take into account the impact on entrepreneurs and other small businesses—to be unpersuasive, as the *Order* specifically addressed keeping entrepreneurs and small businesses informed about the transparency rule.[55]

The court concluded that the FCC failed to ground its Preemption Directive in any lawful source of statutory authority.[56] After demonstrating that the FCC had neither express nor ancillary authority to issue the directive,[57] the court observed the Communication Act's "vision of dual federal-state authority and cooperation,"[58] and pointed out that conflict-preemption can only apply where there is an existing state practice that

47. *See id.* at 34.
48. *See id.* at 34-35.
49. *See id.* at 37.
50. *See id.* at 38-40, 43.
51. *See id.* at 44-45.
52. *See id.* at 46.
53. *See id.* at 35, 45, 46, 47-48.
54. *See id.* at 48.
55. *See id.* at 48-49.
56. *See id.* at 74.
57. *See id.* at 75-76.
58. *Id.* at 81.

actually undermines a regulation—and even then it is a fact-specific inquiry.[59] As such, the *Mozilla* court vacated the Preemption Directive.[60]

Several governmental petitioners were able to persuade the court that the FCC failed to take public safety into account in its 2018 *Order*, despite the FCC's founding purpose, which includes the promotion of safety through wired and radio communications, thus making the *Order* arbitrary and capricious.[61] Additionally, the court found that the FCC failed to address the legal contradictions regarding pole attachments[62] and the Lifeline program[63] created as a result of its changes in classifications. The court remanded these three portions of the 2018 *Order* for the FCC to address.[64]

III. CONCLUSION

The court vacated the Preemption Directive, remanded the issues of public safety, pole attachments, and the Lifeline program, and left untouched provisions regarding changes to the transparency rule and the classification of broadband providers.[65] As a result, broadband providers are once again considered providers of information services, and their reporting requirements are reduced.[66] A request for rehearing en banc was denied on February 6, 2020.[67]

59. *See id.* at 85.
60. *See id.* at 74.
61. *See id.* at 59-60.
62. *See id.* at 65-66.
63. *See id.* at 69.
64. *See id.* at 86.
65. *See id.*
66. *See Restoring Internet Freedom Order* at para. 3.
67. *See* Per Curiam Order, denying petitioners' and intervenor's request for panel reh'g, Mozilla Corp. v. FCC, (No. 18-1051), Document #1827520 at *1.