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ALERT

Federal Appeals Court Upholds Internet Reclassification, Remands Specific Issues to FCC

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On Tuesday, October 1, 2019, a panel of the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion that largely upheld the key determinations in the Federal Communications Commission's (FCC or Commission) 2018 Restoring Internet Freedom Order (2018 Order), though it partially vacated and remanded the Order on a small subset of specific issues. The 2 – 1 decision was authored by Judge Patricia Millet, who was joined by Judge Robert Wilkens. Judge Stephen Williams issued a separate opinion concurring in part and dissenting in part. The decision is just the latest in a long history of litigation before the same Circuit concerning the FCC's rules governing providers of broadband internet access services (BIAS).

Panel Vacates Preemption Portions of the 2018 Order

While the court largely upheld the FCC's classification of BIAS as a lightly-regulated "information service," the part of the opinion that arguably grabbed the most headlines was the panel's decision was to vacate the portion of the 2018 Order that preempted state and local laws governing broadband service. The panel concluded that "the Commission lacked the legal authority to categorically abolish all fifty States' statutorily conferred authority to regulate intrastate communications." The court's decision potentially opens the door for state governments to introduce their own regulations governing BIAS providers, though it is important not to over-read the court's holding. The decision left open the possibility that individual state laws could conflict with FCC rules, and even that the FCC itself could adopt more specific preemptive findings targeted at particular state policies.

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In its opinion, from which Judge Williams dissented, the majority panel concluded that the FCC lacked sufficient legal authority to issue its Preemption Directive, which would have barred states from imposing their own rules governing regulation of BIAS providers. The majority panel concluded that the FCC lacked either express or ancillary authority under the Communications Act to preempt state laws.

With respect to express authority, the majority panel concluded that the Preemption Directive "could not possibly be an exercise" of the FCC's express statutory authority. It reasoned that by reclassifying broadband as an information service, "the Commission placed broadband *outside* of its Title II jurisdiction" (emphasis in original). It also concluded that the FCC's express authority "under Titles III or VI does not come into play either." With respect to ancillary authority, the majority panel similarly concluded that by removing BIAS from Title II of the Act, the FCC lacked the necessary ancillary authority to preempt state laws. They further noted that the FCC did not claim ancillary authority for its Preemption Directive in either its 2018 Order and subsequent court briefings. The court also held that conflict preemption could not be the source for such a broad, *ex ante* determination of preemption. Quoting an earlier DC Circuit opinion, the court noted that "[b]ecause a conflict-preemption analysis 'involves fact-intensive inquiries,' it 'mandates deferral of review until an actual preemption of a specific state regulation occurs.'"

Judge Williams issued a partial dissent on the preemption aspect of the court's opinion, in which he rejected the majority's view that the FCC lacked preemption authority. He argued that states could not reasonably be asked to step up and fill gaps in federal law, especially for something as complex as internet policy. Although the majority panel argued that the FCC lacked express statutory authority to preempt state laws, Judge Williams argued that the "Supreme Court has clearly ruled that authority to preempt may be inferred to support an agency's regulatory scheme."

A number of commenters have characterized this holding as giving the states free reign to adopt their own regulations, but the court's careful treatment of conflict preemption suggests that caution is warranted. As the court held, conflict preemption analysis requires a fact-specific inquiry into whether particular state regulations interfere with federal law, but that does not mean state laws can never conflict with federal law. "If the Commission can explain how a state practice actually undermines the 2018 Order, then it can invoke conflict preemption." In finding that the Preemption Directive was beyond the FCC's authority, the court "d[id] not consider whether the remaining portions of the 2018 Order have preemptive effect under principles of conflict preemption or any other implied-preemption doctrine."

Panel Affirms Classification of BIAS and Mobile Broadband as Information Services

The panel also upheld the FCC's decision to classify BIAS and mobile broadband as information services. The panel concluded that the FCC had "compelling policy grounds to ensure consistent treatment of the two varieties of broadband Internet access, fixed and mobile, subjecting both, or neither, to Title II."

Applying the Supreme Court's "binding precedent" established in its *Brand X* decision, the panel concluded that the FCC permissibly classified BIAS as an information service by virtue of the functionalities afforded by DNS and caching. *See National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 973–974,

989–992 (2005). The panel held that classifying BIAS as an information service based on the functionalities of DNS and caching was a "reasonable policy choice" reached by the Commission. Applying the *Brand X* analysis, the panel concluded that DNS and caching constituted an "information service", and that both components were sufficiently integrated with the transmission element of BIAS.

Similarly, the panel also upheld the FCC's classification of mobile broadband as a "private mobile service"—a classification that under the statute automatically exempted it from common carriage treatment. Acknowledging that the FCC had statutory authority to modify regulatory definitions, the panel rejected arguments that the agency inappropriately reverted to its pre-Title II definition of the "public switched network" which excluded reference to IP addresses. The panel similarly concluded that the FCC permissibly found that mobile broadband does not qualify as a service functionally equivalent to mobile voice.

Panel Remands 2018 Order on Public Safety, Pole Attachments and Lifeline

Although Petitioners argued that ten aspects of the 2018 Order were arbitrary and capricious, the panel remanded on only three discrete issues. The panel concluded that the FCC failed to: 1) examine the implications of its decisions for public safety; 2) sufficiently explain what reclassification would mean for the regulation of pole attachments; and 3) adequately address Petitioners' concerns about the effects of broadband reclassification on the Lifeline Program.

With respect to public safety, the panel agreed with Petitioners that the FCC's failure to consider the implications for public safety of its changed regulatory posture in the 2018 Order was arbitrary and capricious. The panel concluded that the FCC failed to satisfy its obligations under Section 151 of the Communications Act, which requires the agency "to consider public safety by . . . its enabling act." After emphasizing the important role of public safety, the panel concluded that the "Commission's disregard of its duty to analyze the impact of the 2018 Order on public safety renders its decision arbitrary and capricious in that part and warrants a remand with direction to address the issues raised."

The panel also remanded portions of the 2018 Order addressing pole attachments based on the FCC's failure to adequately address how the reclassification of broadband would affect such regulations. The court acknowledged that the Order's rationale worked for mixed-use service facilities, but reasoned that the "plain text of Section 224 speaks only of telecommunications services and cable television services," and concluded that "under the 2018 Order, the statute textually forecloses any pole-attachment protection for standalone broadband providers." As a result, the court asked the Commission to do more to explain how standalone facilities might be impacted by the Order.

Finally, in remanding portions of the 2018 Order relating to Lifeline, the panel agreed with Petitioners who argued that the FCC's reclassification would eliminate the statutory basis for broadband's inclusion in the Lifeline program. Although the FCC added broadband service to the Lifeline program in 2016, the panel noted that "the 2018 Order's reclassification of broadband—the decision to strip it of Title II common-carrier status—facially disqualifies broadband from inclusion in the Lifeline Program." On remand, the FCC will likely have to consider whether there are statutory grounds for incorporating broadband into Lifeline even if it is a

Title I information service.

Panel Affirms FCC's Interpretation of Section 706 and Transparency Requirements

The panel also rejected arguments from Petitioners that the FCC could have issued open Internet rules under Section 706 of the Telecommunications Act. In its 2018 Order, the FCC declined to interpret Section 706 as an independent grant of regulatory authority. Applying the two-step analysis from *Chevron*, the panel concluded that Section 706 is "ambiguous" and the FCC's interpretation of Section 706 as hortatory represented a "reasonable interpretation of the statute."

Finally, the panel rejected challenges from the Petitioners regarding the FCC's legal authority to issue a transparency rule under Section 257 of the Communications Act. While acknowledging that portions of Section 257 were removed from the Communications Act before the 2018 Order became effective, the panel concluded that it "was not altered in any material respect for purposes of the Commission's authority in this regard." The panel further noted that it had previously recognized Section 257 as a possible source of authority for such rules. *Comcast Corp. v. FCC*, 600 F.3d 642, 659 (D.C. Cir. 2010).

In a statement, FCC Chairman Ajit Pai called the decision "a victory for consumers, broadband deployment, and the free and open Internet," a sentiment that Commissioners O'Rielly and Carr echoed in separate statements. Commissioners Rosenworcel and Starks, on the other hand, issued statements applauding the preemption aspects of the court's decision.

We will continue to monitor further developments in this proceeding. If you have questions about the panel's decision, please contact the Wiley Rein attorney who regularly handles your FCC matters or one of the attorneys listed on this client alert.