FCC BROADBAND JURISDICTION: THE PSTN TRANSITION IN AN ERA OF CONGRESSIONAL PARALYSIS

City of Arlington, Texas v. FCC, S.C. No. 11-1545
Verizon v. FCC, D.C. Cir. No. 11-1355
In Re: FCC 11-161, 10th Cir. No. 11-9900

Russell Lukas
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LNGS LUKAS, NACE, GUTIERREZ & SACHS, LLP

8300 Greensboro Drive
Suite 1200
McLean, VA 22102
www.fcclaw.com
(703) 584-8678

SIGNIFICANCE

- The FCC is without express statutory authority to regulate broadband (high-speed) Internet access services.
- Congress has been unable to pass legislation that would either authorize or prohibit FCC broadband regulation.
- *City of Arlington, Verizon* and *In Re: FCC 11-161* could determine whether or how the FCC can regulate broadband and an IP PSTN without express statutory authority.

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THE FCC'S BROADBAND DILEMMA

- Telecommunications Act of 1996 codified the FCC's *Computer II* regime, under which information service providers were exempt from Title II (common carrier) regulation.
- Between 2002 and 2007, the FCC issued a series of decisions classifying all forms of broadband as information services.
- In 2008, the FCC ordered Comcast to cease practices that violated the agency's broadband "policy statement."
- In *Comcast,* the D.C. Circuit held that the FCC did not have ancillary jurisdiction to regulate broadband cable, because it failed to show that its regulations were reasonably ancillary to any express delegation of authority in Titles II, III and IV.
- The FCC wanted to implement its National Broadband Plan.

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McLean, VA 22102
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THE FCC'S OPTIONS

- "Reclassify" broadband services as telecommunications services and regulate them under Title II.
- Regulate the transmission component of broadband service under Title II, while the information service component would be subject to Title I ancillary jurisdiction.
- Stick with the information service classification, try to find regulatory authority in the Act, and "see how it goes" in court.

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THE CHEVRON DOCTRINE (1984)

- Step One: If "Congress has directly spoken to the precise question at issue," a court "must give effect to the unambiguously expressed intent of Congress."
- Step Two: "If the statute is silent or ambiguous," a court must decide whether the agency has adopted "a permissible construction of the statute."

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THE MEAD DOCTRINE (2001)

- *Chevron* assumes that the agency's exercise of authority is constitutional and "does not exceed its jurisdiction."
- Agency interpretation of an ambiguous statutory provision qualifies for *Chevron* deference when Congress delegated authority to the agency generally to "speak with the force of law" (by giving it the power to engage in adjudication or notice-and-comment rulemaking) and the interpretation was adopted in the exercise of that authority.

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BACKGROUND

- § 332(c)(7) was intended to preserve local zoning authority regarding wireless facilities.
- A local zoning decision on a wireless carrier's request must be rendered "within a reasonable period of time … taking into account the nature and scope of such request."
- CTIA asked the FCC for a declaratory ruling adopting deadlines for local zoning decisions.
- The FCC declared that (1) a "reasonable time" would be 90 days for collocation requests and 150 days for all other requests, and (2) a failure to meet those deadlines would be a "failure to act" for the purposes of judicial review.

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FIFTH CIRCUIT DECISION

- Issue: whether the FCC had the statutory authority to adopt the 90- and 150-day time frames.
- The Court held that § 332(c)(7) did not "unambiguously preclude" the FCC from establishing the deadlines.
- Applying *Chevron*, the Court held that because the statutory terms "a reasonable period of time" and "failure to act" are ambiguous, the FCC's interpretation of those terms was owed "substantial deference."

SUPREME COURT

- Issue: whether a court should apply *Chevron* to review an agency's determination of its own jurisdiction.
- Petitioners: a court must begin at *Chevron* Step O with a *de novo* determination of whether Congress delegated the FCC authority – to issue binding interpretations of § 332(c)(7)(B).
- FCC: absent an express Congressional withholding of its general rulemaking authority, C*hevron* deference is due whenever it administers the Act through rulemaking, adjudication, or other actions that carry the force of law.
- Argued January 16, 2013.

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McLean, VA 22102
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ORAL ARGUMENT

- Justices Ginsburg & Kagan: would look first to see if the agency was given rulemaking authority, and, if so, it gets deference whenever it exercises that authority to interpret its organic statute.
- Justice Sotomayor: most concerned with how to instruct the lower courts.
- Justice Scalia: viewed the "entry jurisdictional question" as whether the FCC has the authority to administer the Act, and would decide that question "without listening to the FCC."
- Chief Justice Roberts: saw the issue was whether Congress gave the FCC authority with respect to administering § 332(c)(7).

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COMMENTS

- The Court may follow *Mead* without making the threshold determination of whether the FCC is acting within its jurisdiction.
- The FCC was not exercising its rulemaking authority; it issued a declaratory ruling.
- The FCC's rulemaking authority under § 303(r) is limited to making such rules "as may be necessary to carry out the provisions of this chapter."
- If it defines jurisdiction as the "power to regulate an activity," the Court should find that the FCC was attempting to regulate local zoning boards.
- Since judicial review of a local zoning board's decisions resides in "any court of competent jurisdiction," was it necessary for the FCC to decide what constitutes "a reasonable time" in which the board should act?

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SECTION 706 OF THE 1996 TELECOM ACT

- § 706(a) directed the FCC to encourage broadband deployment by utilizing "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."
- § 706(b) directed the FCC: (1) to determine annually whether broadband is being deployed in a reasonable and timely fashion; and (2) if its determination is negative, to take immediate action to accelerate broadband deployment by "removing barriers to infrastructure investment" and by promoting competition in telecommunications.
- § 706 became a note to § 157.
- In 1998, the FCC held that § 706 did not constitute an independent grant of authority, but that it obliged the FCC to encourage broadband deployment by exercising its existing authority.

THE OPEN INTERNET RULES (2010)

- Regulated fixed and mobile broadband Internet access service.
- The FCC claimed § 706 expressly authorized it to adopt its open Internet rules.
- The FCC now read § 706(a) to authorize it to take actions, within its subject matter jurisdiction, that encourage broadband deployment by any means listed in § 706(a).

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ISSUES

- Whether the issue of the FCC's authority to regulate broadband Internet access is reviewed *de novo* or under *Chevron*.
- Whether the FCC has the statutory authority to adopt its Open Internet Rules.
- Whether the rules impose common-carrier obligations on broad-band Internet access service providers.

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VERIZON & METROPCS

- The rules conflict with the Act because they subject broadband service (which is both an information and private mobile service) to common carrier regulation.
- § 706(a) does not authorize the rules because they govern the transmission of Internet traffic, not network deployment.
- § 706(a) directs the FCC to encourage broadband deployment by using regulatory authority provided in the Act.
- The FCC can only regulate wireless carriers under Title III.
- Title III does not delegate the FCC authority to regulate broadband Internet access service.

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FCC's Arguments

- § 706 granted the FCC "direct authority" to set policy for broadband Internet access service.
  - Congress used the language of command when it provided that the FCC "shall" encourage broadband deployment.
  - Its finding that broadband was not being reasonably and timely deployed triggered the exercise of its authority under § 706(b) to take "immediate action to accelerate broadband deployment by removing barriers to infrastructure invest-ment and by promoting competition in the telecommuni-cations market."
- It has the discretion under *Chevron* to interpret § 706.
- The FCC "reasonably interpreted" §§ 301, 303 and 307(a) of Title III to give it authority to promulgate the rules for wireless broadband Internet access.

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COMMENTS

- Appellants failed to cite a line of D.C. Circuit cases that hold that the FCC's interpretation of the reach of its ancillary jurisdiction is entitled to no deference under *Mead*, since *Chevron* only applies when Congress has delegated the authority to the FCC to regulate the area at issue.
- Presumably waiting for the decision in *City of Arlington*, the Court has not set a date for oral argument.
- May not be argued until next Fall.

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BROADBAND AND DATA IMPROVEMENT ACT (2008)

- Amended the FCC's broadband data collection under § 706 and imposed collection requirements on Census Bureau and SBA.
- Editorially transferred § 706 from a note to § 157 (Chapter 5) to become 47 U.S.C. § 1302 (Chapter 12).

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IN RE: FCC 11-161

American Recovery and Reinvestment Act of 2009

- § 6001(k): required the FCC to submit "a report containing a national broadband plan" to Congress by February 17, 2010.
- § 6001 codified at 47 U.S.C. § 1305 (Chapter 12).

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TITLE 47
TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

Chapter		Section
1	Telegraphs	1
2	Submarine Cables	21
3	Radiotelegraphs [Repealed]	51
4	Radio Act of 1927 [Repealed or Omitted]	81
5	Wire or Radio Communication	151
6	Communications Satellite System	701
7	Campaign Communications [Repealed]	801
8	National Telecommunications and Information Administration	901
9	Interception of Digital and other Communications	1001
10	Local TV	1101
11	Commercial Mobile Service Alerts	1201
12	Broadband	1301

IN RE: FCC 11-161

COMMENT

- The FCC argued in *Verizon* that §§ 153(51) and 332(c)(2) prohibit common-carriage treatment of information service providers only under the Act, but § 706 is not part of the Act and thus is not subject to the statutory limitation on common-carrier treatment.
- The FCC's rulemaking authority under §§ 201(b) and 303(r) is limited to making such rules "as may be *necessary* to carry out the provisions of this *chapter*" 5 of Title 47 (which contains the provisions of the Act).
- The FCC is without rulemaking authority to implement § 706 since its authority extends only to making such rules as may be necessary to carry out the provisions of Chapter 5 and § 706 is in Chapter 12 (Broadband).

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IN RE: FCC 11-161

The National Broadband Plan

- Prepared by the FCC's staff for implementation by the FCC.
- The NBP was not adopted by the FCC nor published in the Federal Register.
- Delivered to Congress on March 16, 2010.
- Called for comprehensive reform of USF and ICC.
- Recognized that broadband is not a USF-supported service.
- Stated that the current per-minute ICC system is unsustainable in an all-broadband IP world where charges for traffic are based on the amount of bandwidth used.
- Listed over 60 initiatives that the FCC could undertake to implement its recommendations.
- Acknowledged that the classification of broadband services as information services created uncertainty as to the FCC's jurisdiction to implement the plan's broadband agenda.

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McLean, VA 22102
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CONNECT AMERICA FUND NPRM

- Issued on February 9, 2011 to implement the NBP.
- Adopted after the D.C. Circuit's decision in *Comcast*.
- Explicitly referred to the NBP 32 times.
- Bypassed the Federal-State Joint Board on Universal Service.
- Proposed to refocus USF and ICC to make affordable broadband available and to accelerate the transition from circuit-switched to IP networks.
- Stated (without addressing *Comcast*) that the FCC could extend USF support to "broadband services offered as information services" either under §§ 254 or 706.

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IN RE: FCC 11-161

CONNECT AMERICA FUND R&O

- Released on November 18, 2011 and published in the Federal Register on November 29, 2011.
- Implemented the NBP's USF and ICC recommendations.
- Supported broadband networks regardless of regulatory classification.
- Held that §§ 254 and 706 empowered the FCC to provide USF support for telecommunications services and to "condition" the receipt of that support on the deployment of broadband networks.
- Did not add broadband to its list of USF-supported services, but required telecommunications carriers that receive USF support to invest in modern broadband-capable networks and to offer broadband services meeting basic performance requirements.
- Abandoned the per-minute ICC system and imposed a bill-and-keep regulatory framework for all telecommunications traffic.

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STATUS

- 31 petitions for review of the FCC's *Connect American Fund R&O* were consolidated in the 10th Circuit.
- Lead case was filed in the 10th Circuit on December 16, 2011.
- 201 parties in the consolidated case.
- 26 briefs have been filed.
- 13 reply briefs will be filed by petitioners.
- Briefing will be completed on June 12, 2013.
- Oral argument is set for November 19, 2013 (two years after the *Connect American Fund R&O* was released).

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McLean, VA 22102
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ISSUES

- Petitioners initially raised 160 issues, which were later reduced to 120.
- Petitioners raised 18 issues in their joint preliminary brief.
- 45 more issues were raised by the petitioners in their principal merits briefs.

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USF ARGUMENTS

- The Act unambiguously prohibits: (1) the FCC from treating ETCs as common carriers under the Title II USF program when they are engaged in providing information services; and (2) ETCs from using support to offer information services.
- The FCC used its rulemaking authority under § 254(a) to impose Title II regulation on broadband service without the express statutory authority necessary to do so.
- The FCC used its Title II authority to provide USF support to designated telecom services as a "jurisdictional bootstrap" to regulate information services under Title II.

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McLean, VA 22102
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ICC ARGUMENTS

The FCC lacks the statutory authority to:

- Classify exchange access as reciprocal compensation.
- Preempt State intrastate authority by classifying intrastate access as reciprocal compensation.
- Establish a zero rate for reciprocal compensation.
- Instruct the States not to grant § 251(f)(2) relief from bill-and-keep.

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FCC

- It reasonably determined that § 254(e) authorized it to provide USF support for broadband-capable networks by empowering it to support the telecom services designated under § 254(c)(1) and the facilities necessary to achieve the principles set forth in § 254(b)(2), (3).
- It reasonably interpreted the phrase "for which support is intended" in § 254(e) to refer to the principles in § 254(b).
- Having found that broadband deployment lagged, it was authorized by § 706(b) to take immediate action to accelerate broadband deployment by providing USF support to broadband-capable networks.
- Its interpretations of the ambiguous provisions of § 254 and § 706 were clearly not precluded by the statute and must be accorded *Chevron* deference.
- Its interpretation of §§ 201(b), 251(b) and 252(d) to authorize the adoption of bill-and-keep for the exchange of telecom traffic should be affirmed under *Chevron*, because petitioners failed to show that the it was unambiguously foreclosed by the Act.

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47 U.S.C. § 254

§254. Universal service

* * * * *

(e) Universal service support

After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of *facilities and services* for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

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IN RE: FCC 11-161

COMMENTS

- *City of Arlington* and *Verizon* will be decided well before the November 19, 2013 oral argument.
- Supplemental briefing may be necessary after *City of Arlington* and *Verizon* are decided.
- For the FCC to be affirmed, the Supreme Court must limit the *Mead* doctrine and extend *Chevron* deference to the FCC's determination of its own jurisdiction even in the absence of an express statutory delegation of authority.
- FCC was not delegated the authority to make rules to implement the broadband provisions of § 1302; it was not authorized "speak with the force of law" when it interpreted those provisions; and, thus, it was not entitled to *Chevron* deference.
- In *Cellco Partnership,* the FCC conceded that broadband is an information service and not CMRS under § 332, and the court held that "mobile-data providers are statutorily immune, perhaps twice over, from treatment as common carriers."

8300 Greensboro Drive
Suite 1200
McLean, VA 22102
www.fcclaw.com
(703) 584-8678