

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brand X Internet Services, <i>et al.</i> ,)	
)	Nos. 02-70518
Petitioners,)	02-70684
)	02-70685
v.)	02-70686
)	02-70879
Federal Communications Commission)	02-71425
and the United States of America,)	02-72251
)	
Respondents.)	

RESPONSE OF CONSUMER FEDERATION OF AMERICA,
CONSUMERS UNION, AND CENTER FOR DIGITAL DEMOCRACY
TO
PETITIONS FOR REHEARING *EN BANC*

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Consumer Federation of America, Consumers Union and the Center for Digital Democracy (“Public Interest Petitioners”) concur in the arguments of Petitioners Earthlink and Brand X in opposition to grant of rehearing. To avoid needless replication, Public Interest Petitioners’ response is limited to discussion of why this case is particularly ill-suited to become a vehicle for making circuit law of general applicability on matters unrelated to the merits of this case.

SUMMARY OF ARGUMENT

The FCC and NCTA rehearing petitions do not challenge the validity of the panel’s holding that applied principles of *stare decisis*, as enunciated in *Neal* and *Mesa Verde*.

The rehearing petitions are premised on the notion that this Court can and should apply *Chevron* deference to the decision under review, but they do not establish that the FCC would ever be entitled to deference in this case. Thus, even if this Court were to go beyond principles of *stare decisis*, it would still have to resolve the case as a *Chevron* “step one” proceeding, *i.e.*, without deference.

Moreover, there are four reasons why this case is inappropriate for making Circuit-wide law of general applicability.

First, the FCC has doggedly avoided rendering a reviewable statutory interpretation since 1998, thereby forcing private parties to seek redress from the courts. The

unusually long passage of time makes this case an especially poor candidate for making precedent on the proper weight of *stare decisis*.

Second, the FCC has sought “two bites at the apple” by declining to present this case for initial hearing *en banc*, as is appropriate when there is a challenge to controlling Circuit precedent. If the case is important now, it was no less important a year ago.

Third, the Department of Justice has not joined the FCC’s rehearing petition, thus indicating that the federal respondents do not have a unified position.

Fourth, the Commission has completed all steps necessary to implement its “tentative conclusion” to exercise statutory forbearance powers conferred on it under 47 U.S.C. §160(a). Thus, it can, at any time, moot or nullify this Court’s decision as to the states comprising the Ninth Circuit.

Simply put, the FCC is “gaming the system.” If it cannot obtain the result it seeks, it is prepared to use alternative powers to achieve the desired policy outcome. Exercise of discretion to grant rehearing for accommodation of these tactics is inappropriate, and threatens to waste the time and resources of this Court and the many citizens and industries in this country which seek certainty and clarity in the rollout of internet services.

INTRODUCTION

The sole issue that Respondent FCC and Intervenor NCTA have raised is the panel's failure to afford *Chevron* deference to the FCC's decision. *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984). However, as Petitioner Brand X correctly argues, the panel was unanimous that this case can be entirely resolved on the basis of *stare decisis*. Response of Brand X, pp. 7-12. Neither the FCC nor the NCTA even attempt to show why *Neal v. U.S.*, 516 U.S. 284, 294-95 (1996) should not govern, or even that the panel decision in *AT&T v City of Portland*, 216 F.3d 871 (9th Cir. 2000) was wrong. Absent any challenge to how the panel applied *Neal*, there is no basis for rehearing this Circuit's application of *Neal*, much less for revisiting this Circuit's decision in *Mesa Verde Construction Co v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124 (9th Cir. 1988)(*en banc*).

But there is yet another hurdle that the rehearing petitions fail to address: whether this case would ever qualify for *Chevron* deference. The premise of the FCC and NCTA rehearing petitions is that this Court should apply *Chevron* "step two" deference.¹ However, they do not demonstrate that the statutory provision at issue here is ambiguous. This is, of course, a necessary predicate of *Chevron* deference. *Chevron*,

¹If this were treated as a "step one" case, under which the reviewing court applies traditional tools of statutory construction, *stare decisis* would clearly require this Court to apply the *City of Portland* precedent.

467 U.S. at 842-43.

The panel in this case correctly held that *City of Portland* is controlling, and that Chevron “step two” deference is inappropriate. *Brand X Internet Services v. FCC*, 345 F.3d 1130 (9th Cir. 2003). As Earthlink has forcefully and persuasively shown in its merits briefs to the panel, the outcome of this case is governed by the plain language of the statute. *Brief of Petitioner Earthlink, Inc.*, pp. 27-34; *Reply Brief of Petitioner Earthlink, Inc.*, pp. 6-11. Commission counsel *says* that “the FCC resolved the issue by reasonably interpreting ambiguous statutory terms,” FCC Petition, p. 4. However, “The Federal Communications Commission...speaks through its orders, not through counsel's filings.” *MD/DC/DE Broadcasters Association v. FCC*, 253 F.3d 732, 735 (D.C. Cir. 2001); *see also Alvarez v. IBP, Inc.*, 339 F.3d 894, 908 (9th Cir. 2003).² As it happens, the decision under review *never said*, much less explained why, the statute is ambiguous. In fact, the agency’s *Order* and the *Notice of Inquiry* which initiated this proceeding *do not even use the word “ambiguous”* to discuss the relevant terms (“information services” and “telecommunications services”). *Order*, 17 FCC Rcd 4898, 4820-32 (2002), *Notice of Inquiry*, FCC Rcd 19287, 19294-97 (2000). (R.E. 130-144; R.E.

²“Administrative agency constructions of governing statutes are the product of deliberation and analysis by the entity charged with application of the statute. Agency positions developed in litigation, by contrast, are not of the same character: they are specifically tailored to help obtain a favorable outcome in a pending controversy in which the agency is involved.” *Id.*

ARGUMENT

The peculiar circumstances of this case make it an especially poor candidate for Chevron deference and, hence, for *en banc* review.

First, Federal agencies have rarely worked so hard to avoid deciding an issue as has the FCC. Indeed, for several years prior to its refusal to render its view to this Court in the *City of Portland* decision, 216 F.3d at 874, the FCC had passed up numerous opportunities to interpret the relevant statutory provision. *See, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group to AT&T*, 15 FCCRcd 9816, 9872 (2000);⁴ *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from TCI to AT&T*, 14 FCCRcd 3160, 3205 (1999); *1999 Advanced Services Report*, 14 FCCRcd

³All citations to Record Excerpts (“R.E. ____”) refer to the Excerpts of Record submitted by Petitioner Earthlink.

⁴“There may well come a time when it will be necessary and useful from a policy perspective for the Commission to make these legal determinations. However, those legal determinations would have industry-wide application, as well as legal and practical implications that extend far beyond the contours of this particular merger. Our review of this merger does not provide an appropriate forum for a determination of the legal status of cable broadband Internet access services.” *Id.*

2398, 2449 (1999).⁵ See also, *NCTA v. Gulf Power*, 534 U.S. 327, 357 (Thomas, J. and Souder, J., concurring and dissenting)(noting that the FCC has avoided the question “no less than six times in recent years.”).

After this Court issued its *City of Portland* decision, the Commission continued to avoid ruling on the definitional issue for almost two more years. See, *Amicus Curiae* Brief of FCC, *MediaOne Group v. County of Henrico*, 4th Cir. (Docket No. 00-1680L)(filed August 9,2000).⁶

It is now three and one-half years since the panel decision in *City of Portland*. The Commission’s willingness to exacerbate the tension between *stare decisis* and *Chevron* deference raises serious questions as to its motives and the legitimacy of the decisionmaking process. In light of these unusual facts, this case is not an appropriate

⁵“We note, as a preliminary matter, that our duty to encourage broadband deployment of advanced services requires us to look broadly at all methods of providing additional bandwidth to customers, not just those methods provided by cable companies or other particular types of service providers. We observe further that the record, while sparse, suggests that multiple methods of increasing bandwidth are or soon will be made available to a broad range of customers. On this basis, we see no reason to take action on this issue at this time. We will, however, continue to monitor broadband deployment closely to see whether there are developments that could affect our goal of encouraging deployment of broadband capabilities pursuant to the requirements of section 706.” *Id.*

⁶“[T]he appropriate course is for this Court to rule narrowly, affirming the District Court on the basis of one of the provisions relied upon by the Ninth Circuit, 47 U.S.C. §541(b)(3)(D), without also resolving the industry’s dispute about how to characterize cable modem service for broader regulatory purposes.” *Id.*, p. 15.

vehicle to consider the interplay between *stare decisis* and Chevron deference. To grant rehearing on these atypical facts would set a standard that would encourage agencies to delay their implementation of Congressional directives and deprive the public of the benefit of prompt enforcement.

Second, the request for *en banc* review is not timely presented. Since the relief the Commission seeks is a decision which would overrule *City of Portland*, the proper procedure should have been for the Commission to have asked that this case be initially heard *en banc*. Rule 35, FRAP expressly contemplates such practice. *See also*, Rule 35(b)(1)(A), FRAP; Rule 35(c), FRAP.

Now that it has lost before the panel, the Commission argues that this case is of such exceptional importance that it merits rehearing *en banc*. But if the case is important now, it was no less important a year ago when the FCC chose not to ask for initial *en banc* treatment.

Third, as Petitioner Earthlink has noted, Earthlink Response at 1, n.1, although the United States is, by statute, a Respondent here, the United States has remained silent as to whether rehearing should be granted. This would not seem to be an accident, as the United States, represented by the Department of Justice, typically joins in such pleadings. Thus, there is, at the least, the possibility that the federal Respondents do not have a unified position on this matter.

PI Petitioners can only speculate as to why the United States failed to join in the rehearing petition. However, they do note that it is a matter of record that as recently as December 8, 2003, the Deputy Attorney General and the Deputy Solicitor General submitted a letter to the FCC stating the “belief that the Commission’s *Cable Modem Declaratory Ruling*, which classifies Internet access as a pure information service, suffers from statutory interpretation problems and directly threatens CALEA.” *Ex Parte Notice*, Docket 02-33 (December 8, 2003).⁷ The letter, which was submitted pursuant to 47 CFR §1.106(b), is accessible on the FCC’s website at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6515292444.

Fourth, the Commission is poised to moot this case and evade this Court’s mandate, in the event it finds the outcome unsatisfactory. If the Commission is, indeed, determined to carry out this threat to obtain its desired policy outcome no matter what this Court holds, there is no good reason to waste judicial resources on rehearing this case.

Both Brand X and Earthlink have decisively rebutted the FCC’s unwarranted warning, that “In effect, a three-judge panel has supplanted the expert agency as the architect of regulatory policy in this critical area...,” FCC Rehearing Petition, p. 14. *See*

⁷“CALEA” is an acronym for the Communications Assistance for Law Enforcement Act, 47 U.S.C. §§1001 *et seq.*

Brand X Response , pp. 14-15; Earthlink Response, pp. 17-18. As the *City of Portland* case recognized, Congress has provided a specific statutory mechanism that would permit the FCC to obtain the policy result it seeks without forcing this Court to make bad law. *See, City of Portland*, 216 F.3d at 879 (“not[ing] that the FCC has broad authority to forbear from enforcing the telecommunications provisions if it determines that such action is unnecessary to prevent discrimination and protect consumers, and is consistent with the public interest. *See* 47 U.S.C. § 160(a).”); *see also, Brand X*, 345 F.3d at 1138 (Thomas, J., concurring)(similar).

This is not a hypothetical proposition, or a mere technicality. As part of the decision under review in this proceeding, the FCC issued a *Notice of Proposed Rulemaking* pursuant to which it proposed, *inter alia*, to exercise statutory forbearance authority, but *only* as it will affect the states in this Circuit’s jurisdiction:

94. *Forbearance from Telecommunications Service Obligations.*
As noted above, the U.S. District Court for the Southern District of California has expressed its view that it is bound by the Ninth Circuit's Portland decision with regard to the classification of cable modem service.

95. To the extent that cable modem service may be subject to telecommunications service classification, we seek comment on whether we should for-bear from applying each provision of Title II or common carrier regulation.

Order, 17 FCCRcd at 4847 (R.E. 159)

The Commission was uncharacteristically candid as to the intended outcome for the newly-initiated proceeding:

We tentatively conclude that such forbearance would be justified.**** Given that cable modem service will be treated as an information service in most of the country, we tentatively conclude that the public interest would be served by the uniform national policy that would result from the exercise of forbearance to the extent cable modem service is classified as a telecommunications service.

*Id.*⁸

The deadline for reply comments in the forbearance proceeding (Docket 02-52) was August 6, 2002, and the matter is ripe for decision at any time. Thus, the Commission is poised to take which would moot or vitiate any further action of this court which might not be to its liking.

⁸Lest there be any doubt as to what the Commission meant by the term “uniform national policy,” the Commission’s press release was more direct in stating that the Commission had tentatively concluded that “In the interest of national uniformity, the FCC should exercise its forbearance authority in light of the U.S. Court of Appeals for the Ninth Circuit’s decision in the *Portland* case, which classified cable modem service as both an “information service” and “telecommunications service.” *Press Release, “FCC CLASSIFIES CABLE MODEM SERVICE AS “INFORMATION SERVICE”* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-220835A1.pdf (last accessed January 2, 2004).

CONCLUSION

Simply put, the FCC has been “gaming the system.” Instead of proceeding straightforwardly, it repeatedly declined invitations of this and other courts to resolve what it considers to be a matter of great importance. Rather than candidly acknowledging that it is unwilling to acquiesce to this Court’s *City of Portland* decision and seeking to have this matter heard *en banc* from the outset, it first sought to convince another of panel of this Circuit *City of Portland* did not apply to the present case. Having failed to do so, and without support from the Department of Justice, it has now sought *en banc* rehearing to nullify the the three and one-half year-old *City of Portland* decision without even addressing the fact that the panel rested its decision on *stare decisis*. At the same time, it has announced a “tentative conclusion” to take action which would forestall or moot any further action of this court which might not be to its liking.

This Court can and should put an end to the matter by denying rehearing. If the agency believes that legal and policy considerations permit it to exercise its forbearance powers, it can do so at any time, without needlessly wasting the time and resources of this Court and the many citizens and industries in this country which seek certainty and clarity in the rollout of internet services.

WHEREFORE, Public Interest Petitioners ask this Court to deny the *Petitions*

for Rehearing En Banc, and grant all such other relief as may be just and proper.

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