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Supreme Court Ruling Could Help FCC In Legal Battles Over Net Neutrality

By: Paul Barbagallo – May 22, 2013

Though a legal victory for the Federal Communications Commission, the recent decision by the Supreme Court in *Arlington, Texas v. FCC* may provide little help to the agency in defending its statutory authority to adopt rules for net neutrality, which is now being challenged by Verizon Communications Inc. in the U.S. Court of Appeals for the District of Columbia Circuit. At the same time, however, the ruling may aid the FCC in appealing a D.C. Circuit decision in favor of Verizon to the Supreme Court, experts told BNA May 21.

The high court, in the 6-3 decision (*City of Arlington v. FCC,* U.S., No. 11-1545, 05/20/13) handed down May 20, held that in cases where Congress has left ambiguous a regulatory agency's jurisdiction, "the court must defer to the administering agency's construction of the statute so long as it is permissible" under the framework established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984), known as*Chevron* deference (*Arlington, Texas v. FCC,* U.S., No. 11-1545, 5/20/13.

Writing for an unconventional majority, Justice Antonin Scalia, joined by Justices Clarence Thomas, Ruth Bader Ginsburg, Sonia M. Sotomayor, and Elena Kagan, said there is no distinction between an agency's "jurisdictional" and "nonjurisdictional" interpretations because the question any court faces when confronted with an agency's interpretation of a statute "is always, simply, *whether the agency has stayed within the bounds of its statutory authority*" (Scalia's emphasis).

Despite this affirmation, many still believe the FCC will face an uphill battle in winning its legal conflict with Verizon.

"Justice Scalia, in his very clear opinion for the majority, doesn't say that the FCC necessarily gets it right; he just says the FCC gets deference," Matt Wood, policy director for Free Press, a nonprofit group that supports net neutrality rules, told BNA in an interview May 21. "I just don't know if this is something you could add to the ledger in the FCC's favor. It's a good defensive piece for them, but not necessarily something that does anything to bolster their argument on the merits about whether they have jurisdiction to adopt [net neutrality] rules."

In the *Arlington* case, the U.S. Court of Appeals for the Fifth Circuit concluded in January 2012 that Congress did not directly address whether the FCC can establish "shot clocks" for state and local governments when considering applications by wireless carriers to construct cell towers and, as such, deferred to the FCC "construction" of the Communications Act of 1934 and the agency's interpretation of its own jurisdiction. The

lone question the Supreme Court took up on appeal was whether "a court should apply *Chevron* to review an agency's determination of its own jurisdiction."

In the *Verizon* case (*Verizon Communications Inc. v. Federal Communications Commission,* D.C. Cir., No. 11-1355, 9/30/11), the D.C. Circuit Court is reviewing both statutory and constitutional challenges to the agency's rules for net neutrality, as set out in what is known as the*Open Internet* order. Just as in *Arlington*, the FCC here has asked for*Chevron* deference.

But in the end, according to several experts, the D.C. Circuit may find the statute to be unambiguous, based on past FCC decisions and case law.

"*Chevron* deference is not carte blanche," Scott Cleland, chairman of Netcompetition.org, an organization that represents many telecommunications companies and their industry associations and opposes net neutrality regulations, told BNA in an interview May 21. "It's where the statute is unclear that the FCC gets deference. When the court looks at this, it's pretty clear that Congress didn't anticipate the FCC regulating the internet and promoting a new purpose: internet openness. Congress didn't anticipate that and didn't define that."

Is the Statute Ambiguous?

Pursuant to the Communications Act, the FCC still regulates internet services providers separately--telephone companies under Title II, wireless carriers under Title III, and cable operators under Title VI--and thus cited different sections of each title to justify rules prohibiting these companies from blocking websites or treating their own web content better than that of rivals.

To begin, the FCC cited Sections 201 and 202 of Title II of the act, which prohibit telecom providers from engaging in "unjust" and "unreasonable" practices. Next, the FCC cited Section 303 of Title III, specifically 303(b), which gives the agency the power to "prescribe the nature of the service to be rendered by each class of license stations and each station within any class." And, finally, the FCC cited Section 628 of Title VI, which states that it "shall be unlawful for a cable operator to engage in unfair methods of competition, or unfair or deceptive practices, the purpose of which is to hinder significantly any MVPD [multichannel video programming distributor] from providing service."

But perhaps most important to the FCC defense is Section 706 of the Telecommunications Act of 1996, on which the agency relies heavily to explain its statutory authority.

Section 706(a) directs the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ... by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."

In 1998, the FCC concluded that Section 706 "does not constitute an independent grant of authority," but rather a direction for "the commission to use the authority granted in other provisions…to encourage the deployment of advanced services."

In 2010, the agency reversed course. The commission wrote in the *Open Internet* order itself that "it would be odd indeed to characterize Section 706(a) as a 'fail-safe' that 'ensures' the commission's ability to promote advanced services if it conferred no actual authority. Here, under our reading, Section 706(a) authorizes the commission to address practices, such as blocking VoIP [Voice over Internet Protocol] communications, degrading or raising the cost of online video, or denying end users material information about their broadband service, that have the potential to stifle overall investment in internet infrastructure and limit competition in telecommunications markets."

According to Larry Downes, internet industry analyst, consultant, and author of the books "Unleashing the Killer App" and "The Laws of Disruption," the question is not about *Chevron*, but rather whether Section 706 can be a source of direct or ancillary authority to enact net neutrality rules.

"Verizon is not arguing that the statute doesn't give the agency authority to interpret Section 706(a); it's arguing that its interpretation is 'arbitrary and capricious' and doesn't survive *Chevron* in any case," Downes told BNA in an interview May 21. "Even if the *Arlington* decision gives agencies more leeway in deciding when they can interpret a statute, the relevant issue in the *Open Internet* case is the nature of the interpretation. There is no doubt that the FCC stretched the Communications Act far and wide to anchor its authority."

Edward McFadden, a Verizon spokesman, told BNA May 21 that the company did not "anticipate that the decision in *Arlington* will have any effect on our appeal."

Ruling Could Support FCC in Future Appeal

Harold Feld, senior vice president of the public-interest group Public Knowledge, which along with Free Press has been among the most ardent supporters of net neutrality, agreed that even with *Chevron* deference, the D.C. Circuit could still find that the FCC was wrong--that a statute, the Communications Act or Telecommunications Act, does not support the interpretation that the agency is making. But Feld sees the Supreme Court decision as having a potential "huge positive effect."

"The easiest way for the D.C. Circuit Court to reverse the FCC's *Open Internet* order has been made harder," Feld told BNA in an interview May 21. "The strong language with which the majority endorsed the FCC's broad general authority sends a signal that if the D.C. Circuit issues a sweeping opinion that the FCC lacks jurisdiction over anything relating to IP [internet protocol], the Supreme Court would entertain an appeal and be sympathetic to the FCC. That has to weigh on the D.C. Circuit in a way that was not the case previously."

Along the same lines of thinking, Reed Hundt, chairman of the FCC during the Clinton administration, said the Supreme Court's opinion in *Arlington*, if anything, should "gird the loins" of the FCC general counsel and encourage him to take any D.C. Circuit Court reversal of the *Open Internet*order, in whole or in part, to the high court on appeal.

“It [the May 20 opinion] doesn't guarantee anything, but it's a shot in the arm for Acting FCC Chairwoman Mignon Clyburn, future Chairman Tom Wheeler, and the legacy of former Chairman Julius Genachowski,” Hundt told BNA in an interview May 21. “This eclectic, bipartisan majority opinion is a big win for the FCC. Maybe there is sympathy for the FCC across ideological lines.”

Ultimately, an FCC loss in *Arlington*, Hundt said, would have been a “bad harbinger.”

“Winning the case was a necessity for the FCC,” he said.

Easier Road Ahead for FCC?

Outside the context of the *Verizon* case, the decision could end up being helpful going forward for the FCC, which is governed by a statute that many considered outdated.

Jonathan Adler, a professor and director of the Center for Business Law and Regulation at Case Western Reserve University School of Law, who filed an amicus brief on behalf of the Cato Institute and academics in the*Arlington* case, said the FCC now has an “extra defense” to the argument that the agency should not receive deference to interpret the scope of its own authority.

He noted, however, that the first question for any court will be: “Does the FCC even have the authority it wants to play in this sandbox?” The second question will be “have they played in a way that is justified by reasoned decision making?”