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**Why *Chevron* Deference May Not Save the FCC's
Open Internet Order – Part I**

by

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With the Federal Communications Commission's "[*Open Internet*](#)" order now on appeal, there is much speculation, some not very informed, concerning the role that so-called *Chevron* deference will play in determining the outcome of the various appeals. *Chevron* deference refers to the doctrine, announced by the Supreme Court in [*Chevron U.S.A. Inc. v. Natural Resources Defense Council*](#) (1984), that when a statute is silent or ambiguous with respect to the interpretation of a statutory provision the court will defer to an agency's interpretation as long as it is reasonable.

As a former FCC Associate General Counsel, former Chair of the American Bar Association's Section of Administrative Law and Regulatory Practice, and current member of the Administrative Conference of the United States and National Academy of Public Administration, I have followed *Chevron* jurisprudence fairly closely since the decision was handed down over three decades ago. And I have written several law review articles concerning various aspects of the *Chevron* doctrine.

There is no dispute that *Chevron* is the most cited administrative law case in law reviews, and, indeed, it now rivals the landmark *Marbury v. Madison*, the most consequential Supreme Court decision in history, in law review citations. In 2005, Professor Jerry Mashaw, a leading

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administrative law scholar, wrote: “[F]orests have been laid waste to publish the outpouring of legal commentary on [*Chevron*] and its progeny.” Since then, the decimation of forests attributable to *Chevron* commentary has continued unabated.

I don’t propose to add appreciably to further forest destruction. Rather, what I propose to do is offer some brief observations concerning *Chevron*’s possible application in the *Open Internet* appeals. The upshot is to suggest that *Chevron* deference may not play the decisive role in supporting the FCC’s decision that the agency and proponents hope for. [This is Part I of what will be at least one more paper in this series.]

But, first, some quick stage-setting. At the outset it is relevant to point out the tension, at least on the surface, between *Marbury v. Madison* and the *Chevron* doctrine. After all, *Marbury*’s most famous dictum, in establishing the principle of judicial review as a matter of constitutional law, is: “It is emphatically the province and duty of the judicial department to say what the law is.” Obviously, to the extent *Chevron* is applied mechanistically in a way that becomes outcome-determinative, then the deference doctrine derogates from *Marbury*’s injunction that it is the province of the courts to say what the law is. This is why Professor Cass Sunstein, President Obama’s first-term “regulatory czar,” in a notable [2005 law review article](#), referred to *Chevron* as “a kind of counter-*Marbury*.”

And what of the Administrative Procedure Act? Each one of the *Open Internet* order appeals will be brought under the judicial review provisions of the APA, which is often called the “constitution” of the modern administrative state. The APA provision establishing the right to review agency action states the reviewing court “shall decide all relevant questions of law, interpret...statutory provisions, and determine the meaning and applicability of agency action.” The APA also provides that the reviewing court shall hold unlawful agency action found to be “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”

Like *Marbury*, these APA provisions, read literally, appear, at least on the surface, to be in considerable tension with *Chevron*, at least a strong version of the doctrine, because they seem, like *Marbury*, to direct the judiciary to “say what the law is.” Curiously – and this *really* is curious – in his opinion for the Court in *Chevron*, Justice John Paul Stevens didn’t bother to cite, much less address, either *Marbury* or the Administrative Procedure Act.

Be that as it may, and despite the fact that the *Chevron* doctrine remains subject to much critical commentary, there *is* a *Chevron* doctrine, and it could well play a significant role in the judicial decisions reviewing the FCC’s *Open Internet* order. In the [Brand X Internet Services](#) case, in which the Supreme Court in 2005 upheld the FCC’s ruling that a cable broadband operator’s broadband Internet access offering is properly classified under the Communications Act as an “information service” and not a “telecommunications service,” *Chevron* deference did play a significant, perhaps decisive, role.

It is certainly possible that *Chevron* again could prove decisive in leading to an affirmance of the FCC’s decision. But there is a fairly good chance – assuming for the sake of argument that the FCC rebuffs the substantial procedural APA notice-and-comment challenges that may well first

prove fatal to the agency's case – that *Chevron* deference won't save the Commission in its reversal of position.

Here's why:

It is true that an agency is entitled to change its mind, reversing previous decisions, as long as it engages in reasoned decision-making. Net neutrality proponents, including the FCC in its *Open Internet* opinion, often cite to the Supreme Court's [*FCC v. Fox Television Stations, Inc.*](#) (2009) decision in support of this proposition. There, affirming a change by the Commission in its broadcast indecency policy, the Court declared the reversal of policy should not be subject to a more searching judicial review than review of the initial policy. This proposition may be true, but it does not say much about whether the decision to do an about-face on the "information services" classification question, standing on its own terms, is reasoned or not. And, remember, to receive *Chevron* deference the agency's decision must be reasonable – in other words, it must not be arbitrary and capricious. Indeed, *Fox* did not even cite *Chevron*.

But here is the part of the *Fox* decision that may well prove to be most relevant to the *Open Internet* appeal. In an important passage, the Court said that, while an agency need not always provide a more detailed justification than what would suffice for a new policy, "[s]ometimes it must – when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." As I pointed out in a blog post last May, ["The Legally Problematic Nature of Title II Reclassification of Internet Services,"](#) the FCC's present *factual findings* do, in fact, contradict those which underlay its prior policy, affirmed in *Brand X*. While the agency does try to explain away the contradiction, there is a good chance the Court may not accept its explanation.

As I explained in the May 2014 blog, in its order finding that Internet access service is an "information service" under the Commissions Act, not a "telecommunications service," the Commission argued that, "from a consumer's perspective, the transmission component of an information service is integral to, and inseparable from, the overall service offering." This analysis of ISPs' service offerings was the principal basis upon which the Supreme Court upheld the FCC classification determination in 2005 in its landmark *Brand X* decision.

Indeed, in upholding the FCC's classification decision, here is what the *Brand X* Court stated:

Seen from the consumer's point of view, *the Commission concluded*, cable modem service is not a telecommunications offering because the consumer uses the high-speed wire *always* in connection with the information-processing capabilities provided by Internet access, and because the transmission is a necessary component of Internet access: 'As provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities.' *Declaratory Ruling* 4823, ¶39.

There is more language to this effect in the *Brand X* majority opinion, for example: "The integrated character of this offering led the Commission to conclude that cable modem service is not a 'stand-alone,' transparent offering of telecommunications."

In the Commission's *Open Internet* order, the agency essentially rests its argument on the assertion that today, "broadband Internet access is fundamentally understood by customers as a transmission platform through which consumers can access third-party content, applications, and services of their choosing." But the Commission fails to backup this argument regarding consumer understanding in any meaningful way. While it refers to an "updated record," it relies on a few different assertions concerning how it supposes Internet access service is most often used, how various new applications can be substituted for applications that previously may have been provided by the Internet service providers, and the trend towards what it calls greater functional "modularity." At bottom, the Commission just baldly claims that information services, such as cloud-based storage services, email, and spam protection, "are not inextricably intertwined with broadband transmission service, but rather are a 'product of the [provider's] marketing decision not to offer the two separately.'" [Para. 376].

But the Commission's evidentiary support for this assertion is flimsy. And, more importantly, the assertion misses the point that it is the consumer's perspective, not the provider's marketing materials, that is key. This is because, as shown above, the Supreme Court affirmed the agency's determination that Internet access services are information services on the basis that the FCC had concluded that consumers perceive the telecommunications and information services components to be offered on an integrated basis.

Perhaps one way the Commission might have been expected to bolster its case concerning consumer perspective would be by referring to the four million comments in the record it touts. Chairman Wheeler is fond of saying that the Commission "[listened and learned](#)" from these mostly Internet-generated form comments. But the Commission did not cite the comments in support of its about-face on the consumer perception question about which they might have been most relevant. Perhaps this should not be surprising. Free State Foundation staff didn't read all four million, but based on a random review of more than 350 "comments," we did not find any that expressed a view concerning whether or not Internet access is perceived to be an integrated offering. Certainly none expressed the view that Internet access, as presently offered by ISPs, is perceived to be an integrated offering.

Thus, the Commission lacks any meaningful evidentiary support, or certainly has failed to cite any support from comments from actual consumers, that consumers' perception of the integrated nature of the Internet offering has changed. (To be sure, there are thousands of comments urging the Commission to treat Internet providers, or more commonly "the Internet," as a common carrier, and urging the agency to prevent the ISPs from "interfering" with communications. But this is much different than an assertion that relates in any way to the integrated nature (or not) of the present offerings.)

So, going back to *Fox*, and the key passage quoted above, there is a good argument that the Commission has not provided the "more detailed justification" required to support a change in agency policy premised on factual findings that contradict the earlier agency findings. Especially when coupled with the serious reliance interests created by the Commission's earlier

classification decision, this foundational evidentiary failing concerning consumer perception on the FCC's part may well be of sufficient import to derogate from any *Chevron* deference that the courts otherwise might have provided.

In any event, I suspect that this evidentiary failing may well play an important role in a reviewing court's decision in determining whether the Commission's Title II classification about-face is arbitrary or capricious.

[I will address another aspect of the FCC's decision, in light of the Supreme Court's *Fox* case, in Part II of this series.]

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