IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 02-70518 (AND CONSOLIDATED CASES)

BRAND X INTERNET SERVICES, ET AL.,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

OPPOSITION OF FEDERAL COMMUNICATIONS COMMISSION TO PETITION FOR REHEARING EN BANC

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Pursuant to the Court's order of December 16, 2003, respondent Federal Communications Commission files this response to the petition for rehearing en banc filed on November 19, 2003 by the National League of Cities and several other organizations representing local franchising authorities. These petitioners (collectively, "the Cities") seek rehearing of their claim that cable modem service is a "cable service" as defined by the Communications Act. For the reasons discussed below, the Court should deny the Cities' petition.

BACKGROUND

This case concerns the regulatory classification of cable modem service, a high-speed Internet access service offered via cable systems. In the order at issue in this case, the FCC determined that cable modem service (as currently offered) is neither a cable service subject to Title VI of the Act nor a telecommunications service subject to Title II, but rather an information service. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4802 (¶ 7), 4819 (¶ 33) (2002) ("*Order*") (R.E. 110, 114, 131).[1]

[1] All citations to Record Excerpts ("R.E. ___") refer to the Excerpts of Record submitted by petitioner EarthLink.

In concluding that cable modem service is not a cable service, the Commission noted that the Act's definition of "cable service" requires the "one-way transmission" of video programming or "other programming service" from a cable operator to subscribers. *Order* ¶ 65 (R.E. 148) (citing 47 U.S.C. § 522(6)(A)). The Commission construed the phrase "one-way transmission" in the definition "to require that the cable operator be in control of selecting and distributing content to subscribers." *Order* ¶ 67 (R.E. 148). The Commission found that cable modem service did not satisfy that requirement because the cable operator does not control "the selection of the information made available to subscribers" via cable modem service. *Ibid.* (R.E. 149). Instead, the cable modem subscriber exercises "the ultimate control" over the selection of information, so that "much of the information received by the subscriber is tailored to that subscriber's interests." *Ibid.* (R.E. 149).

The panel in this case affirmed the FCC's ruling that cable modem service is not a cable service. *Brand X Internet Services v. FCC*, 345 F.3d 1120, 1132 (9th Cir. 2003). It concluded that it was bound to adhere to an earlier panel's statutory interpretation in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000) ("*Portland*"). The panel in that case, like the FCC in this case, had ruled that cable modem service does not fit the

statutory definition of "cable service." Citing the language that the Act used to define cable service, the *Portland* panel found that "[t]he essence of cable service … is one-way transmission of programming to subscribers generally." *Id.* at 876. That panel reasoned that cable modem service did not meet the "one-way transmission" requirement of the cable service definition because "Internet access is not one-way and general, but interactive and individual beyond the 'subscriber interaction' contemplated by [47 U.S.C. § 522(6)(B)]." *Ibid.*

ARGUMENT

Essentially, the Cities contend that the statutory interpretation they prefer – the classification of cable modem service as a "cable service" – is compelled by the statute's plain language. Although their rehearing petition does not even mention *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Cities are basically arguing that the first part of the *Chevron* test governs this case. Simply put, they maintain that "the court … must give effect to" what they perceive as "the unambiguously expressed intent of Congress" to classify cable modem service as a cable service. *See id.* at 842-43. But the panel in *Portland* correctly found that the statute does not clearly mandate a "cable service" classification; and the panel here

properly adopted that conclusion. The Cities have offered no good reason for the Court to revisit that reasonable finding.

To be sure, the panel in *Portland* did not apply the *Chevron* test. *Portland* was not "a case involving potential deference to an administrative agency's statutory construction pursuant to the *Chevron* doctrine." *Portland*, 216 F.3d at 876. But even if this Court would now review the Cities' claim under *Chevron*, it would not reach a different conclusion about the "cable service" issue than the *Portland* panel did. That panel held that the statute could not reasonably be read to classify cable modem service as a cable service. If such a classification was not even reasonable, then *a fortiori* it is not a classification that Congress intended or the Act unambiguously required. [2]

The Cities try to cast doubt on *Portland*'s conclusion that cable modem service is not a cable service. They make much of the fact that the *Portland* panel reached this conclusion without requesting supplemental

[2] By contrast, application of the *Chevron* standard in this case would produce a different conclusion with respect to whether cable modem service must be classified as a telecommunications service. Although the *Portland* panel ruled that cable modem service is partly a telecommunications service, the Act did not clearly require the FCC to adopt that classification, and the Commission reasonably declined to do so. For that reason and all the others discussed in the Commission's rehearing petition, the Court should grant rehearing to affirm the agency's reasonable decision not to classify cable modem service as a telecommunications service.

briefing on the issue. Pet. 2, 4, 13. But it was reasonable for that panel to conclude that no further briefing was necessary. Although the parties in *Portland* based their arguments on the premise that cable modem service is a cable service, an *amicus* brief filed by the FCC questioned that premise, noting that the statute's ambiguous language could be construed to categorize cable modem service as something other than cable service. In light of the FCC's *amicus* brief, the *Portland* panel spent virtually the entire oral argument questioning counsel for all parties about the proper classification of cable modem service. Having exhaustively explored this subject at oral argument, the panel had no need to seek additional briefing.

The Cities contend that the Court should grant their rehearing petition because neither the *Portland* panel nor the panel here considered the Cities' arguments in this case. Pet. 11. But those arguments do not justify rehearing. While the Cities have cobbled together snippets of legislative history and isolated statutory language to support their reading of the Act, they have failed to make a convincing case that Congress unequivocally intended to classify cable modem service as a cable service. As the Supreme Court has recognized, the issue of how to classify high-speed Internet services that are "commingled" with traditional cable service is a "hard" question with no obvious answers. *National Cable & Telecommunications*

Ass'n v. Gulf Power Co., 534 U.S. 327, 338 (2002). Indeed, in this very case and in the administrative proceeding leading up to it, various parties have made plausible arguments for several alternative classifications of cable modem service. *See Brand X*, 345 F.3d at 1127 (describing the array of positions taken by the various petitioners); *Order* ¶ 31 (R.E. 131) (parties advocated at least five different legal classifications for cable modem service). This only confirms that the statute has not plainly resolved the question of how to classify cable modem service.

There is no basis for the Cities' suggestion (Pet. 12-13) that the Court could construe the Act to classify cable modem service as an information service, a telecommunications service, *and* a cable service. In fact, the statute's terms make clear that "telecommunications service" and "cable service" are mutually exclusive categories. Title II of the Act imposes extensive common carrier obligations on providers of telecommunications service. *See, e.g.*, 47 U.S.C. §§ 201-205. By contrast, Title VI of the Act expressly prohibits common carrier regulation of cable service: "Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service." 47 U.S.C. § 541(c).

Finally, the Cities are wrong to assert (Pet. 14-15) that the Commission's rationale for rejecting a "cable service" classification differed

substantially from the *Portland* panel's reasoning. To the contrary, the Commission, like the *Portland* panel, based its resolution of the "cable service" issue on the "one-way transmission" requirement contained in the statutory definition. *Compare Order* ¶¶ 60-69 (R.E. 145-51) *with Portland,* 216 F.3d at 876-77. In the end, both the Commission and the *Portland* panel reasonably concluded that cable modem service did not involve the sort of "one-way transmission" contemplated by 47 U.S.C. § 522(6)(A) because cable modem subscribers exercise substantial editorial control over the information transmitted via the service. *Cf. National Cable Television Ass'n v. FCC*, 33 F.3d 66, 70-73 (D.C. Cir. 1994) (affirming the FCC's interpretation of "one-way transmission" in the cable service definition to require a cable operator's active participation in the selection and distribution of video programming).

The Cities argue that cable operators exercise significant editorial control over cable modem service (Pet. 10-11), but the record showed otherwise. The Commission found substantial evidence that cable modem service (as currently provided) gives subscribers the ultimate control over the information they receive through the Internet. *Order* ¶ 67 (R.E. 148-49). In view of that evidence, the Commission determined that cable modem

service does not entail the sort of "one-way transmission" required for cable service. The Court should not disturb that reasonable conclusion.

CONCLUSION

For the foregoing reasons, the Court should deny the Cities' petition for rehearing en banc.

Respectfully submitted,

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