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.

Petition For Rehearing En Banc

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STATEMENT REQUIRED BY FRAP 35(b)(1)

Rehearing en banc is warranted here because this case involves a question of exceptional importance: Did the Federal Communications Commission reasonably construe the Communications Act when it ruled that cable modem service (as currently provided) is solely an information service? The answer to this question has major implications for the future development of the Internet; yet the panel in this case never decided whether the FCC's statutory construction was reasonable under the Supreme Court's well-established *Chevron* test. Instead, the panel held that it was bound to accept the statutory interpretation that another panel of this Court had previously adopted in an unrelated case. The Court should grant rehearing en banc in order to apply the correct standard of review – the *Chevron* standard – to this case. Applying that standard, the Court should conclude that the FCC reasonably construed ambiguous statutory terms when it classified cable modem service as solely an information service.

PETITION FOR REHEARING EN BANC

The Federal Communications Commission respectfully petitions the Court for rehearing en banc. This case involves the important issue of how to classify Internet access service under the Communications Act. In recent years, the Internet has assumed an increasingly integral role in our nation's economy and culture. Any decision concerning the regulatory classification of Internet access

will significantly shape the future development of the Internet and affect the lives of millions of Americans.

In the order on review here, the FCC construed various provisions of the Communications Act to determine the appropriate regulatory classification for cable modem service, a type of high-speed Internet access service provided over cable facilities. After reviewing a fact-intensive record that laid out the intricate details of how the service is offered, the Commission ruled that cable modem service (as currently provided) is neither a "telecommunications service" subject to common carrier regulation nor a "cable service" governed by local franchise requirements, but an "information service" that is generally not regulated. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* 17 FCC Rcd 4798 (2002) ("*Order*") (R.E. 110).[1]

When courts review legal challenges to an agency's interpretation of its authorizing statute, they must use the two-part test adopted by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). In this case, however, the panel did not apply the *Chevron* test to the FCC's statutory construction. Instead, the panel held that it was bound to accept the statutory interpretation that another panel of this Court had previously adopted in *AT&T Corp. v. City of Portland,* 216 F.3d 871 (9th Cir. 2000) ("*Portland*").

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

Comparing the *Portland* panel's interpretation to the FCC's reading of the statute, the panel here vacated the *Order* insofar as it deviated from the *Portland* panel's conclusion that cable modem service is partly a telecommunications service.

The FCC's statutory interpretation in this case never received the sort of judicial review to which it is entitled under the Supreme Court's *Chevron* doctrine. Under *Chevron,* if the statute itself does not unambiguously foreclose the FCC's interpretation, and if that interpretation is reasonable, then the Commission is free to adopt that reading of the statute – even if it differs from the views expressed in *Portland*. The panel in this case concluded that it could not apply the *Chevron* test because Ninth Circuit law compelled the panel's adherence to the statutory construction adopted in *Portland.* Even if the panel was correct that this Court's precedents precluded the panel from applying *Chevron* here, the same constraints do not apply to the en banc Court, which is not bound by *Portland.*

The Court should grant rehearing en banc so that it can apply the correct standard of review – the *Chevron* test – to decide the issue at the heart of this case, an issue that the panel left unresolved: whether the FCC reasonably construed the Communications Act when it ruled that cable modem service (as currently provided) is solely an information service. Once the Court applies the *Chevron* test, it will find that all of petitioners' attacks on the *Order* lack merit. Because the Act does not clearly address the issue of how to classify cable modem service, and

because the FCC resolved that issue by reasonably interpreting ambiguous statutory terms, the Court should deny all of the petitions for review and affirm the *Order* in all respects.

BACKGROUND

The Communications Act distinguishes among various types of communications services. It defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). The statute defines the term "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43). The Act separately defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." *Id.* § 153(46). Another section of the Act defines "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." *Id.* § 522(6).

These different categories of communications service receive different regulatory treatment under the Communications Act. Information services are generally not regulated. By contrast, cable services are regulated pursuant to the provisions of Title VI of the Act, 47 U.S.C. §§ 521-572, while telecommunications services are normally subject to extensive common carrier regulation under Title II of the Act, *id.* §§ 201-276 (except when the FCC finds that regulatory forbearance is warranted under 47 U.S.C. § 160). Thus, the way in which a particular service is regulated depends in large part on how that service is classified under the statute.

This case concerns the question of how to classify cable modem service. That service uses cable facilities to provide subscribers with high-speed Internet access and related data processing functions. Unlike "narrowband" or "dial-up" Internet access, which is relatively slow, cable modem service is a "broadband" service that allows for much faster and easier use of the Internet. *Order* ¶ 10 (R.E. 116-17).

In June 2000, before the FCC had resolved the difficult legal and factual question of where cable modem service fits within the Act's service definitions, a panel of this Court addressed the matter in *Portland,* 216 F.3d 871. In that case, AT&T challenged a local ordinance that conditioned the transfer of the cable franchise for Multnomah County, Oregon on AT&T's commitment to provide unaffiliated information service providers ("ISPs") with "open access" to its cable

modem facilities. In the course of analyzing the challenged ordinance, the panel in *Portland* made some findings concerning the classification of cable modem service. First, it concluded that the franchise for cable service in Multnomah County did not govern AT&T's cable modem service because that service was not a "cable service" as defined by the Act. 216 F.3d at 876-77. In addition, the *Portland* panel found that AT&T's cable modem service, which combined transmission and data processing functions, was partly a "telecommunications service" and partly an "information service" under the statute. On the basis of that finding, the panel held that Multnomah County's "open access" ordinance violated 47 U.S.C. § 541(b)(3) by regulating a cable operator's provision of "telecommunications service." 216 F.3d at 877-80.

Several months after the *Portland* decision was announced, the FCC issued a notice of inquiry seeking comment on how cable modem service should be classified. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 15 FCC Rcd 19287 (2000) (R.E. 1). The agency received comments from numerous parties advocating as many as five different legal classifications for cable modem service. *See Order* ¶ 31 (R.E. 131). After reviewing these comments, the Commission in March 2002 released the *Order* at issue in this case. In the *Order,* the Commission concluded that cable modem service (as currently provided) is neither a telecommunications service subject to

Title II of the Act nor a cable service subject to Title VI, but rather an information service. *Order* ¶¶ 7, 33 (R.E. 114, 131).[2]

The Commission reached this conclusion only after carefully analyzing the Act's service definitions in the context of a detailed factual record that documented how cable modem service is offered. The Commission reasoned that the definitions of information service and telecommunications service "establish mutually exclusive categories of service." *Order* ¶ 41 (R.E. 135-36). Proceeding from this premise, the Commission ruled that cable modem service, as currently provided, "is not itself and does not include an offering of telecommunications service to subscribers." *Id.* ¶ 39 (R.E. 135). The agency observed that subscribers to cable modem service receive a fully integrated information service that incorporates telecommunications transmission. In the Commission's judgment, the telecommunications component of the service did not constitute a separate offering of telecommunications to subscribers. Noting the Act's distinction between "telecommunications" and "telecommunications service," the Commission concluded that a "cable operator providing cable modem service over its own facilities … is not offering telecommunications service to the end user, but rather is

[2] At the same time, the Commission commenced a rulemaking to address questions concerning the regulatory implications of its classification of cable modem service. *Order* ¶¶ 72-112 (R.E. 151-66). That rulemaking remains pending.

using telecommunications to provide end users with cable modem service." *Id.* ¶ 41 (R.E. 136).[3]

Various parties filed seven petitions for review of the *Order* in the Third, Ninth, and D.C. Circuits. After a lottery was conducted pursuant to 28 U.S.C. § 2112(a)(3), the Judicial Panel on Multidistrict Litigation ordered that all of the petitions be transferred to this Court. Petitioners' challenges to the *Order* fell into three different categories. One group of petitioners argued that cable modem service is both an information service and a telecommunications service. Another group of petitioners contended that cable modem service is a cable service as well as an information service. Finally, Verizon, which maintained that the FCC had correctly classified cable modem service as solely an information service, asserted that the agency should have adopted the same classification for broadband services provided over telephone lines.

In a per curiam opinion issued on October 6, 2003, a panel of this Court affirmed the *Order* in part, vacated in part, and remanded for further proceedings. *Brand X Internet Services v. FCC,* 345 F.3d 1120 (9th Cir. 2003). The panel acknowledged that, for purposes of reviewing the FCC's interpretation of the Communications Act, this Court "[n]ormally" would "apply the two-step formula set forth by the Supreme Court in *Chevron*." *Id.* at 1127. In this case, however,

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[3] The Commission also declined to categorize cable modem service as a "cable service." *See Order* ¶¶ 60-69 (R.E. 145-51).

the panel declined to use the *Chevron* test. Instead, on the basis of its reading of Ninth Circuit law, the panel held that it was bound by the earlier panel decision in *Portland*. *Id.* at 1128-32. Applying the *Portland* ruling to the FCC's statutory interpretation, the panel affirmed the portion of the *Order* in which the FCC, like the panel in *Portland,* concluded that cable modem service is not a cable service. It vacated the part of the *Order* in which the agency, in contrast to *Portland,* ruled that no part of cable modem service is a telecommunications service. The panel declined to address petitioners' remaining claims, reasoning that the agency could reconsider them on remand. *Id.* at 1132 & n.14.

Two of the three judges on the panel filed concurring opinions. In his concurrence, Judge O'Scannlain observed that the panel's adherence to *stare decisis* produced a "strange result" in this case: "three judges telling an agency acting within the area of its expertise that its interpretation of the statute it is charged with administering cannot stand" – and that the *Portland* panel's "interpretation of how the Act should be applied to a 'quicksilver technological environment' … is the correct, indeed the only, interpretation." 345 F.3d at 1133-34 (O'Scannlain, J., concurring) (quoting *Portland,* 216 F.3d at 876). Judge O'Scannlain considered this outcome "strikingly inconsistent with *Chevron*'s underlying principles." *Id.* at 1132 (O'Scannlain, J., concurring) (internal quotations omitted). Nonetheless, he joined the panel's opinion only because he

believed that this Court's precedent compelled this "strange result." *Id.* at 1134 (O'Scannlain, J., concurring).

In a separate concurrence, Judge Thomas, the author of the *Portland* opinion, stated that he would have reached the same conclusion in this case "even if [the panel] were writing on a clean slate." 345 F.3d at 1140 (Thomas, J., concurring). He asserted that the FCC's statutory construction was not entitled to *Chevron* deference because, in his view, the statute "compels the conclusion that cable modem [service] contains a telecommunications service component." *Id.* at 1134 (Thomas, J., concurring).

ARGUMENT

When reviewing an agency's interpretation of its authorizing statute, this Court must apply the two-part test established by the Supreme Court in *Chevron.* Under that test, if "Congress has not spoken to the precise question at issue," the Court "must defer" to the agency's interpretation "so long as it is 'based on a permissible construction of the statute.'" *City of Los Angeles v. United States Department of Commerce,* 307 F.3d 859, 873 (9th Cir. 2002) (quoting *Chevron,* 467 U.S. at 843). Simply put, *Chevron* requires this Court to apply a "deferential standard" of review to agency interpretations of ambiguous statutory provisions. *Ninilchik Traditional Council v. United States,* 227 F.3d 1186, 1193 (9th Cir. 2000). If a statute's language can reasonably be construed in more than one way,

the Court "may not substitute its own construction" of the statute "for a reasonable interpretation made by" the agency that Congress has entrusted to implement the legislation. *United Food & Commercial Workers Union v. NLRB,* 307 F.3d 760, 767 (9th Cir.) (en banc) (quoting *Chevron,* 467 U.S. at 844), *cert. denied,* 123 S. Ct. 551 (2002).

In applying the *Chevron* test, this Court has recognized that an agency's interpretation of an ambiguous statute "need not be flawless to be reasonable." *Leisnoi, Inc. v. Stratman,* 154 F.3d 1062, 1070 (9th Cir. 1998). Even the likelihood that an "alternative" reading of the statute would better achieve the statute's goals "is not sufficient to warrant this Court's invalidating" an agency's "otherwise reasonable" statutory construction. *San Bernardino Mountains Community Hospital District v. Secretary of Health & Human Services,* 63 F.3d 882, 889 (9th Cir. 1995). If the agency's "reading fills a gap … in a reasonable way in light of the Legislature's design," the Court must "give that reading controlling weight, even if it is *not* the answer [the Court] would have reached *if the question initially had arisen in a judicial proceeding*." *City of Los Angeles,* 307 F.3d at 873 (emphasis added) (quoting *Regions Hospital v. Shalala,* 522 U.S. 448, 457 (1998)); *see also Chevron,* 467 U.S. at 843 n.11.

In this case, however, the panel did not even attempt to ascertain whether the FCC's classification of cable modem service was entitled to *Chevron* deference.

Instead, the panel ruled that it had no choice under this Court's precedents but to enforce the statutory construction adopted by an earlier panel in *Portland.* By concluding that it must adhere to *stare decisis,* the panel here failed to address the pivotal question under *Chevron*: Does the Communications Act mandate a particular classification of cable modem service? If the answer to this question is no, then the Act does not obligate the Commission to adopt the same classification that the *Portland* panel did, and *Chevron* requires this Court to defer to any reasonable alternative classification that the FCC might select. The panel did not even consider that possibility. It simply found that because the *Portland* panel "beat the FCC to the punch" by classifying cable modem service before the agency did, the *Portland* decision effectively precluded the FCC from adopting a different classification – even if the language of the statute itself could bear more than one interpretation. 345 F.3d at 1133-34 (O'Scannlain, J., concurring). This anomalous outcome is "strikingly inconsistent with *Chevron*'s underlying principles." *Id.* at 1132 (O'Scannlain, J., concurring) (quoting Weaver, *The Emperor Has No Clothes*: Christensen, Mead *and Dual Deference Standards,* 54 Admin. L. Rev. 173, 192 (2002)).

Given the momentous issues involved here, it is essential that this Court apply *Chevron*. At stake in this case is the future evolution of broadband services that promise to fuel economic growth and technological innovation in this country

for years to come. The "development of broadband infrastructure … is vital to the long-term growth of our economy as well as our country's continued preeminence as the global leader in information and telecommunications technologies."[4] Absent any clear statutory directive to regulate broadband services in a certain way, Congress plainly intended for the expert agency to decide which regulatory approach could best promote broadband deployment. In particular, as both the Supreme Court and the Fourth Circuit have noted, Congress did not specify how cable modem service should be classified, leaving that complex and technical issue for the FCC to resolve.[5]

To be sure, the question of how to classify cable modem service implicates difficult policy judgments. The answer to that question will largely determine the extent to which cable modem service is regulated; and many parties, including petitioners in this case, strongly disagree about how – or whether – the service

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[4] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 18 FCC Rcd 16978, 17110 (¶ 212) (2003), *petitions for review pending, United States Telecom Ass'n v. FCC,* D.C. Cir. No. 00-1012 (and consolidated cases).

[5] *See National Cable & Telecommunications Ass'n v. Gulf Power Co.,* 534 U.S. 327, 338 (2002) (the issue of how to classify cable modem service is a "hard" question with no obvious answer); *id.* at 339 (because the subject of Internet access via cable "is technical, complex, and dynamic," the FCC has "authority to fill gaps" where the statute is silent on the subject); *MediaOne Group, Inc. v. County of Henrico,* 257 F.3d 356, 365 (4th Cir. 2001) (because "the issue of the proper regulatory classification of cable modem service … is complex and subject to considerable debate," resolution of that issue is best left "to the expertise of the FCC").

should be regulated. The panel's ruling here "effectively stops" this "vitally important policy debate in its tracks" by requiring the agency to adopt the *Portland* panel's classification of cable modem service. 345 F.3d at 1133 (O'Scannlain, J., concurring). In effect, a three-judge panel has supplanted the expert agency as the architect of regulatory policy in this critical area. This odd outcome is contrary to congressional intent and the tenets of *Chevron.*

If this case had been adjudicated in any other circuit, the reviewing court would have applied *Chevron.* And if the Supreme Court decided to review this case, it would surely apply *Chevron. See, e.g., INS v. Aguirre-Aguirre,* 526 U.S. 415 (1999). The only reason why the panel here did not apply *Chevron* was because the panel ruled that Ninth Circuit law compelled it to adhere to the statutory construction adopted by a prior panel in *Portland.*

The panel's conclusion that *stare decisis* barred the application of *Chevron* makes this case an ideal candidate for rehearing en banc. Whether or not the panel correctly concluded that *stare decisis* constrained it to follow *Portland*'s reading of the statute, no such constraints apply to the en banc Court, which is "not bound" by *Portland* or any other "panel opinions." *United States v. Cabaccang,* 332 F.3d 622, 634 (9th Cir. 2003) (en banc). Indeed, the en banc Court would be bound by Supreme Court precedent to use the *Chevron* test – a different standard of review

than either the *Portland* panel or the panel here applied. That fact alone provides a compelling justification for rehearing en banc.[6]

Under *Chevron,* a reviewing court cannot direct an agency to adopt a specific statutory construction unless the statute itself unambiguously mandates such an interpretation. Neither the *Portland* panel nor the panel in this case determined whether the Communications Act compelled the classification of cable modem service that the *Portland* panel adopted. The Court should grant rehearing en banc to address this unanswered question. Applying the two-part *Chevron* test, the Court should conclude that the Act does not unequivocally require any particular classification of cable modem service. It should then defer to the FCC's reasonable classification of the service.[7]

In the *Order*, the FCC confronted the question of how to classify cable modem service. The Communications Act provides no clear answer to that

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[6] We also believe that the panel's invocation of *stare decisis* constituted legal error because the panel, by adhering to *Portland*, necessarily declined to follow *Chevron*, a binding Supreme Court precedent.

[7] If the Court grants rehearing and affirms the FCC's *Order* here, it need not disturb *Portland*'s holding that the Communications Act prohibits local "open access" ordinances. In our judgment, that holding was correct, and it should be reaffirmed on alternative grounds that do not rely on the premise that the Act classifies cable modem service as a telecommunications service. For example, the Court could reaffirm *Portland* by finding (as the Fourth Circuit did) that an open access ordinance violates 47 U.S.C. § 541(b)(3)(D) by requiring a cable operator to provide "telecommunications facilities" to ISPs as a condition of a cable franchise transfer. *See MediaOne Group,* 257 F.3d at 362-65.

question. Indeed, the varying positions of petitioners in this case confirm the Act's ambiguity. *See* 345 F.3d at 1127 (describing the range of arguments advanced by different petitioners). Although Judge Thomas asserted in his concurrence that the Act compels the classification adopted by the *Portland* panel, he did not – and could not – identify any part of the statute's text that indisputably mandates such a classification.[8]

Contrary to Judge Thomas's assertion, the statute's language supports the FCC's interpretation. The Act defines "telecommunications" as nothing more than the transmission of information "without change in the form or content of the information as sent and received." 47 U.S.C. § 153(44). Therefore, if a service combined transmission and data processing functions, it would not be a "telecommunications service" – an offering of unadorned transmission – but instead would be an "information service" that gives subscribers the "capability" to process information "via telecommunications." *See id.* § 153(20). In other words,

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[8] Judge Thomas suggested that the *Portland* panel, using the *Chevron* framework, found that the statute unambiguously categorized cable modem service as both an information service and a telecommunications service. 345 F.3d at 1134-35 (Thomas, J., concurring). The *Portland* panel made no such finding. To the contrary, it expressly refrained from using the *Chevron* test. It explained that it was "not presented with a case involving potential deference to an administrative agency's statutory construction pursuant to the *Chevron* doctrine" because the FCC had not yet addressed the issue of how to classify cable modem service. *Portland,* 216 F.3d at 876. Consequently, the panel in *Portland* had no occasion to decide if its own reading of the statute reflected "the unambiguously expressed intent of Congress," *Chevron,* 467 U.S. at 843, or if the Commission could reasonably construe the statute's language to support an alternative interpretation.

as the FCC explained, a "cable operator providing cable modem service over its own facilities, as described in the record, is not offering telecommunications service to the end user, but rather is merely using telecommunications to provide end users with cable modem service." *Order* ¶ 41 (R.E. 136). Section 231 of the Act makes a similar distinction. In defining the term "Internet access service," section 231 declares: "Such term does *not* include telecommunications services." 47 U.S.C. § 231(e)(4) (emphasis added).

The statutory definitions that the Commission construed in this proceeding were either adopted or amended as part of the Telecommunications Act of 1996. As the Supreme Court has already discovered, the 1996 Act "is not a model of clarity," but "is in many important respects a model of ambiguity or indeed even self-contradiction." *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 397 (1999). The statute leaves many questions unanswered, including the question of how to classify cable modem service. The FCC reasonably answered that question when it ruled that cable modem service (as currently provided) is solely an information service. In accordance with *Chevron,* the en banc Court should uphold the agency's reasonable statutory construction. It should also reject all of petitioners' related claims that the panel declined to address.

CONCLUSION

The Court should grant rehearing en banc and affirm the FCC's *Order* in all respects.

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