IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brand X Internet Services, *et al.,* Petitioners,	)	
v.	)	No. 02-70518 (and consolidated cases)
Federal Communications Commission and United States of America, Respondents.	)	

MOTION OF THE FEDERAL COMMUNICATIONS COMMISSION TO STAY THE MANDATE PENDING THE FILING OF PETITIONS FOR A WRIT OF CERTIORARI

In an order issued on March 31, 2004, the Court denied petitions for rehearing and suggestions for rehearing en banc in this case. The mandate is scheduled to issue on April 7, 2004. Pursuant to Rule 41(d)(2) of the Federal Rules of Appellate Procedure and Circuit Rule 41-1, the Federal Communications Commission respectfully moves for a stay of the mandate pending the filing of any timely petitions for certiorari. Petitions for certiorari in this case would be due on June 29, 2004. The FCC and the Solicitor General are considering whether to petition for review by the Supreme Court. We understand that intervenors supporting the FCC in this case intend to petition for certiorari.

A stay of the mandate pending the filing of a petition for a writ of certiorari should be granted if the movant "show[s] that the certiorari petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P.

41(d)(2)(A). The movant "need not demonstrate that exceptional circumstances justify a stay." *Bryant v. Ford Motor Co.,* 886 F.2d 1526, 1528 (9th Cir. 1989), *cert. denied,* 493 U.S. 1076 (1990). The requirements of Rule 41(d)(2) are satisfied here.

1. This case involves a question of great national importance concerning the proper regulatory classification of cable modem services that allow subscribers to obtain high-speed ("broadband") connections to the Internet over cable systems. In the declaratory ruling under review, the FCC classified cable modem services (in their current form) as solely "information services" under 47 U.S.C. § 153(20) and rejected arguments that such services are partly "telecommunications services" subject to the requirements of Title II of the Communications Act, 47 U.S.C. § 201 *et seq.,* or "cable services" subject to the requirements of Title VI of the Act, 47 U.S.C. § 601 *et seq.* *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* 17 FCC Rcd 4798 (2002). This Court overturned the FCC's regulatory classification of cable modem services without resolving the question whether that classification reflects a reasonable interpretation of the Communications Act that is entitled to judicial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). The Court did so on the ground that it was bound by the interpretation of the Communications Act that another Ninth Circuit panel had adopted in *AT&T Corp. v. City of Portland,*

216 F.3d 871 (9th Cir. 2000) ("*Portland*"), even though *Portland* did not address the application of *Chevron* principles to regulation of cable modem services.

As the Supreme Court recently recognized, the issue of how to classify cable modem services under the Communications Act is a "hard" question involving a subject that "is technical, complex, and dynamic; and as a general rule, agencies have authority to fill gaps where the statutes are silent." *National Cable & Telecommunications Ass'n v. Gulf Power Co.,* 534 U.S. 327, 338-39 (2002) ("*Gulf Power*") (citing *Chevron,* 467 U.S. at 843-44). In *Portland,* this Court did not state that its interpretation of the Communications Act was dictated by plain statutory language. Accordingly, there is a substantial question whether the Court erred here in overturning the FCC's statutory interpretation without applying the *Chevron* framework. *Cf. Satellite Broadcasting & Communications Ass'n v. Oman,* 17 F.3d 344, 348 (11th Cir.) (when earlier panel decision did not purport to find statute's "clear meaning," subsequent panel of same court was not precluded from revisiting question of statutory interpretation), *cert. denied,* 513 U.S. 823 (1994); *Schisler v. Sullivan,* 3 F.3d 563, 568 (2d Cir. 1993) (new regulations at variance with earlier judicial precedents must be upheld unless they exceed statutory authority or are arbitrary and capricious).[1]

[1] In its response to the rehearing petitions in this case, petitioner Brand X argued that, unless *Portland* were affirmatively overruled, it would preclude the application of *Chevron* principles by an en banc panel. *See* Brand X Opposition at

The answers to the substantial legal questions in this case have profound implications for the development of the Internet, for the communications and information services industries in the United States, and for millions of cable modem subscribers receiving service today. As of June 2002, cable operators provided more than 9.1 million broadband lines for Internet access, and cable modem service was available to more than 70 million homes. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 18 FCC Rcd 16978, 17118 (¶ 229) (2003), *aff'd in part and rev'd in part, United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004). The FCC recently described the deployment of broadband infrastructure as "the central communications policy objective of the day," noting the expectation that "ubiquitous broadband deployment will bring valuable new services to consumers, stimulate economic activity, improve national productivity, and advance economic opportunity for the American public." *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities,* Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3021 (¶ 1) (2002). Just two weeks ago, President Bush established a goal of "universal, affordable access for broadband technology by the

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10-12. Brand X's view that *Portland* binds even en banc panels of this Court (and, by extension, the Supreme Court as well) is incorrect. Indeed, in *Gulf Power,* the Supreme Court indicated that the deferential *Chevron* standard applies to review of the FCC's classification of cable modem services. *See Gulf Power,* 534 U.S. at 338-39.

year 2007." Allen, *Bush Sets Internet Access Goal; Talk of High-Speed Hookups Added to Homeownership Speech,* Wash. Post, March 27, 2004, at A4 (available at 2004 WL 74475298). The outcome of this case will directly affect the conditions under which those important objectives are pursued and, perhaps, the degree to which they are achieved.

2. There is good cause for a stay of the mandate under Rule 41(d)(2). Absent a stay, the FCC's nationwide policy of classifying cable modem service as an information service will cease to be in effect after April 7, 2004. At that point, difficult and possibly urgent questions would arise whether cable operators that provide cable modem services are subject to the myriad federal and state regulatory obligations that apply to providers of telecommunications services – obligations that do not now apply to providers of "information services." *See, e.g.,* 47 U.S.C. § 203 (common carriers must file tariffs with the FCC listing the charges for their telecommunications services); 47 U.S.C. § 251(a) (telecommunications carriers must interconnect with the facilities of other providers of telecommunications services); 47 U.S.C. § 254(d) (providers of interstate telecommunications services must contribute to federal mechanisms for subsidizing universal service). Moreover, issuance of the mandate would raise complicated questions concerning regulatory jurisdiction. The Communications Act reserves to the states regulatory jurisdiction over the provision of intrastate

telecommunications services. *See* 47 U.S.C. § 152(b). But state and federal regulators have yet to grapple with the issue of how to allocate regulatory responsibilities with respect to the "telecommunications service" component that, under this Court's decision, would exist within cable modem service.

In addition to affecting broadband deployment in the marketplace, the uncertainty and market confusion surrounding those issues likely would spawn complex and burdensome court and/or agency proceedings at the federal level, and possibly at the state and local levels as well. Those proceedings would be entirely unnecessary and wasteful if the FCC's classification of cable modem services as information services ultimately is upheld after Supreme Court review.[2]

Justices of the Supreme Court have concluded that, pending the filing and disposition of a petition for certiorari, a stay of a judicial mandate is warranted when issuance of the mandate "would impose a considerable administrative burden" on an agency by requiring substantial alteration of the existing regulatory regime. *INS v. Legalization Assistance Project of the Los Angeles County Fed'n of Labor,* 510 U.S. 1301, 1305 (O'Connor, Circuit Justice 1993); *see Ledbetter v. Baldwin,* 479 U.S. 1309, 1310 (Powell, Circuit Justice 1986) (entering stay so that

[2] To indicate the magnitude of those potential proceedings, the FCC's Notice of Inquiry in its declaratory ruling proceeding prompted the filing of more than 250 comments by more than 150 parties. *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* 17 FCC Rcd at 4801 (¶ 3), 4861-65 (Appendix).

agency would not have to "bear the administrative costs of changing its system to comply with" a lower court's mandate); *Heckler v. Redbud Hosp. Dist.,* 473 U.S. 1308, 1314 (Rehnquist, Circuit Justice 1985) (staying court order that would have required "significant readjustment in the administration of" a federal program); *Heckler v. Blankenship,* 465 U.S. 1301, 1302 (O'Connor, Circuit Justice 1984) (staying court order that "would, in all likelihood, require a substantial restructuring of" the process for adjudicating disability claims under the Social Security Act); *Edelman v. Jordan,* 414 U.S. 1301, 1303 (Rehnquist, Circuit Justice 1973) (staying court order that mandated procedures that "might prove to be entirely useless" if the Supreme Court subsequently reversed or modified the judgment). *Accord Books v. City of Elkhart,* 239 F.3d 826, 829 (7th Cir. 2001) (when "the formulation of a remedy" by government officials in response to an appellate court decision "would require significant time and attention," "the public interest is best served by affording the [government] a full opportunity to seek review in the Supreme Court … before its officials devote attention to formulating and implementing a remedy"). The same considerations of unwarranted administrative burden that justified stays in those cases justify a stay of the mandate in this case, in order to avoid the necessity of conducting proceedings – possibly in multiple fora – concerning application of the rules that *would* govern cable modem services *if*, contrary to the FCC determination that this Court

overturned without review under *Chevron*, cable modem services include telecommunications services.

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For the foregoing reasons, the Court should grant a stay of the mandate pending the filing of any timely petitions for a writ of certiorari.

Respectfully submitted,

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