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THE CHEVRON DOCTRINE: HOW DO COURTS APPLY DEFERENCE WHEN AN AGENCY REVERSES POLICY?

The *Chevron* doctrine is one of the foundations of administrative/regulatory law. In plain English, the doctrine stands for the proposition that courts will generally defer to an agency's reasonable interpretation of an ambiguous statute. *Chevron* involves a two-step analysis in which a court first determines whether the statute in question is ambiguous. If so, the court then asks whether the agency has made a reasonable interpretation of the statute. But what happens if the agency's reasonable interpretation changes and takes the agency in an entirely new policy direction? In the communications realm, we've had an opportunity to see how federal courts handle such a scenario though the line of decisions relating to whether broadband service should be classified as an "information service" or a "telecommunications service" under the federal Communications Act.

While the history of the issue dates back much further than 2005, for the purposes of this article, we'll start with the U.S. Supreme Court's decision in *Brand X Internet Services v. FCC*, 545 U.S. 967 (2005). In *Brand X* the Supreme Court reversed a 9th Circuit ruling that cable modem broadband service was an information service and thus subject to "light touch" regulatory treatment under Title I of the Communications Act. The Court found step one of the *Chevron* test had been met — the definition of "telecommunications service" under 47 U.S.C. section 153(46) of the Communications Act was ambiguous. The Court upheld the FCC's interpretation of the term "telecommunications service" in its *Cable Modem Declaratory Ruling* as a permissible reading of the statute and a "reasonable policy choice." The FCC had ruled cable modem service was an "information service" and not a "telecommunications service." The FCC reasoned that cable modem service *used* telecommunications but did not constitute a stand-alone offering of a telecommunications service.

The *Brand X* Court addressed the relationship between *stare decisis* – the deference courts give to prior court precedent and *Chevron*. The Court found there was confusion among the lower courts between these doctrines. Agency inconsistency, the Court held, is not a basis for not applying *Chevron*. While unexplained

inconsistency may be found to be arbitrary and capricious, "The agency must consider varying interpretations and the wisdom of its interpretations on a continuing basis, for example, in response to changes in circumstances or a change in administrations." The Court said a court's prior construction of a statute trumps an agency's interpretation only when the court finds the statute to be unambiguous, leaving no room for agency discretion. Allowing a court's interpretation to override an agency's interpretation of an ambiguous statute, even if the agency's decision is inconsistent with a previous decision of the same agency, runs directly counter to *Chevron*.

The FCC reversed course on its *Cable Modem Declaratory Ruling* with the issuance of its 2015 *Open Internet Order*. The FCC reclassified all broadband internet access services as "telecommunications services" subject to Title II common carrier style regulation. The telecommunications industry appealed the FCC's Order to the United States Court of Appeals for the District of Columbia. The D.C. Circuit applied *Chevron*. The court held its role is to determine whether the FCC's decision was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. The court also held that while an agency must explain its reasons for a changed interpretation, an agency need not explain why new reasons are better than the old. In its *Open Internet Order*, the FCC explained it had to reclassify broadband as a telecom service in order to apply common carrier (Title II) regulation.

The D.C. Circuit found the FCC adequately explained the basis for changed circumstances – finding that the record demonstrated that consumers no longer viewed broadband service as an integrated information service using telecommunications. The court also discussed the Supreme Court's decision in *FCC v. Fox TV Stations* (the case reviewing the FCC's changed position on whether "fleeting expletives" were indecent and subject to FCC enforcement action against the broadcaster). In *Fox*, the Supreme Court held that sometimes an agency must provide a more detailed justification when new factual findings contradict those which underlie a previous policy, or when its prior policy has engendered serious reliance interests.

In upholding the *Open Internet Order,* the D.C. Circuit determined that the FCC did not rely heavily on changed factual circumstances, but rather on a changed interpretation of law. Further, the court found that the FCC adequately accounted for reliance interests, finding that the regulatory status of broadband had only an indirect impact on investment. The court noted that the regulatory classification had shifted back and forth since 1998. The court found the FCC reasonably concluded that increased

investment in broadband was a function of increased demand, not light regulatory treatment.

The regulatory classification of broadband may again be up in the air with the change in the FCC under the Trump Administration. If so, *Chevron* and its application to agency decisions that reverse course may be tested again soon.

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