The FCC's Authority to Interpret Section 230 of the Communications Act

October 21, 2020 - 10:30 am

By Thomas M. Johnson Jr.| FCC General Counsel

Last week, FCC Chairman Ajit Pai announced his intent to move forward with a rulemaking to interpret Section 230 of the Communications Act of 1934. Under certain circumstances, Section 230 provides websites, including social media companies, that host or moderate content generated by others with immunity from liability. In announcing his decision, Chairman Pai noted that "[m]embers of all three branches of government have expressed serious concern about the prevailing interpretation" of Section 230, and observed that an overly broad interpretation could "shield[] social media companies from consumer protection laws in a way that has no basis in the text" of the statute.

The Chairman's decision was consistent with my advice that the FCC has the legal authority to interpret Section 230. Due to the unique interest generated by this proceeding, Chairman Pai has now asked me to make my analysis public, in furtherance of his longstanding commitment to transparency in the rulemaking process.

The policy issues raised by the debate over Section 230 may be complex, but the FCC's legal authority is straightforward. Simply put, the FCC has the authority to interpret all provisions of the Communications Act, including amendments such as Section 230. As I explain below, this authority flows from the plain meaning of Section 201(b) of the Communications Act of 1934, which confers on the FCC the power to issue rules necessary to carry out the provisions of the Act. By expressly directing that Section 230 be placed into the Communications Act, Congress made clear that the FCC's rulemaking authority extended to the provisions of that section. Two seminal U.S. Supreme Court cases authored by the late Justice Antonin Scalia—*AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999) and *City of Arlington v. FCC*, 569 U.S. 290 (2013)—confirm this conclusion. Based on this authority, the Commission can feel confident proceeding with a rulemaking to clarify the scope of the Section 230

immunity shield.

Statutory Background

To understand why the Commission has authority to interpret Section 230, it helps to understand how that section became part of the Communications Act. In 1934, Congress adopted the Communications Act in its original form, establishing the FCC as an independent federal agency charged with regulating interstate and international communications. Four years later, Congress added Section 201(b), which delegated to the Commission the power to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."

Since then, the most consequential set of amendments to the Communications Act arrived in the Telecommunications Act of 1996, which updated the Act for the then-nascent Internet age. Section 1(b) of that Act made clear that, except where otherwise expressly provided, each of the 1996 Act's provisions were to be inserted into the Communications Act of 1934.

Title V of the 1996 Act was named the "Communications Decency Act of 1996." Among other provisions, this Title included Section 509, named "Online family empowerment." Consistent with Section 1(b), Congress instructed in Section 509 that "Title II of the Communications Act of 1934 . . . is amended by adding at the end the following new section: Section 230." Thus, Section 230 was born and became part of the Communications Act of 1934.

Section 230 provides, among other things, that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." It further provides that "[n]o provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." The term "interactive computer service" is defined "as any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." That broad definition is commonly understood to include websites that host or moderate content generated by others, such as social media companies.

The FCC's Interpretive Authority

The Supreme Court has twice considered whether the FCC's general rulemaking authority under Section 201(b), adopted in 1938, extends to the 1996 amendments to the Act. Both times, the Court held that it does. Writing for the Court in *Iowa Utilities Board*, and employing his trademark textualist method, Justice Scalia wrote that this provision "means what it says: The FCC has rulemaking authority to carry out the 'provisions of [the 1934] Act.'" The Court explained that "the clear fact that the 1996 Act was adopted, not as a freestanding enactment, but as an amendment to, and hence part of, [the 1934] Act" shows that Congress intended the Commission to have rulemaking authority over all its provisions. Likewise, in the later *City of Arlington* case, the Court confirmed that the Commission's rulemaking authority "[o]f course . . . extends to the subsequently added portions of the Act." From these authorities, a simple conclusion follows: Because Section 230 is among the "subsequently added portions of the Act," it is subject to the FCC's Section 201(b) rulemaking authority.

This rulemaking authority plainly encompasses the power to interpret ambiguous language throughout the Communications Act. And courts have repeatedly upheld the Commission's authority to do so. *City of Arlington*, for example, upheld the Commission's use of its authority under Section 201(b) to interpret a provision that preserved state and local authority over the placement of things like cell towers unless those localities failed to act within a "reasonable period of time." The Supreme Court rejected an argument that the agency should receive no deference for its interpretation because the provision was "jurisdictional" and thus contemplated no regulatory action by the Commission. The Commission deserved deference, the Court explained, because "Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority."

Likewise, in *City of Portland v. FCC*, 969 F.3d 1020 (9th Cir. 2020), the U.S. Court of Appeals for the Ninth Circuit earlier this year largely affirmed two FCC orders clarifying the scope of a preemption provision in the Communications Act that provides that states and localities may not take actions that "have the effect of prohibiting" telecommunications service. Citing *City of Arlington*, the court said that "[w]here terms of the Telecommunications Act are ambiguous, we defer to the FCC's reasonable interpretations."

Concerning the Commission's interpretive authority, there is no meaningful distinction between the jurisdictional provision in *City of Arlington*, the preemption provision in *City of Portland*, and the immunity shield in Section 230 of the Act. All three provisions appear in the Communications Act, as amended. And like the jurisdictional and preemption provisions, Section 230 contains ambiguous terms: What constitutes an action "voluntarily taken in good faith" to restrict access to material? What constitutes material that can be excluded as "otherwise objectionable"? As in *City of Arlington* and *City of Portland*, the Commission has the authority to clarify these ambiguities in Section 230. As the Supreme Court observed in *Iowa Utilities Board*, this conclusion is nothing more than application of the general principle, derived from the Supreme Court's landmark decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), that "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency."

Response to Common Objections

In response to the U.S. Department of Commerce's petition asking the Commission to pursue a rulemaking on Section 230, some commenters supported the FCC's authority to clarify the statute. Others, reading Section 201(b)—as well as *Iowa Utilities Board* and *City of Arlington*—narrowly, claimed that the FCC lacked such authority. I found the arguments of this latter group of commenters unpersuasive.

Some commenters claim that Congress did not intend for the Commission to administer Section 230, and therefore, the Commission has no authority to interpret it. Sometimes called "*Chevron* Step Zero," this inquiry focuses on whether agencies deserve deference at all where there is no clear evidence that Congress intended the agency, rather than courts, to interpret an ambiguous statute. But the Supreme Court's conclusion that Congress adopted the entire 1996 Act against the backdrop of the FCC's Section 201 rulemaking power while leaving that power in place appears to foreclose this argument. As the Supreme Court put it in *City of Arlington*, "the whole [Act] includes all of its parts," and therefore, the Court does not engage in a freewheeling judicial inquiry whereby "*every* agency rule must be subjected to a *de novo* judicial determination of whether the *particular issue* was committed to agency discretion."

There is no reason why Section 230 of the Act alone should escape Section 201(b)'s general grant of rulemaking

authority. Congress specifically instructed—in Section 509 of the Communications Decency Act, which in turn was in Title V of the Telecommunications Act of 1996—that a new Section 230 be added to the Communications Act. While Section 230 itself deals primarily with an immunity shield, that fact alone does not exempt it from Commission rulemaking. *City of Arlington* and *City of Portland* make clear that the FCC can clarify even those ambiguous statutory provisions within the Act that are arguably directed toward courts—such as preemption or jurisdictional provisions. Similarly, *Iowa Utilities Board* upheld the Commission's authority under Section 201(b) to interpret ambiguous provisions in the Act that provided standards for state utility commissions to resolve pricing and interconnection disputes. Nothing in the Act, the Court explained, "logically preclude[s] the Commission's issuance of rules to guide the state-commission judgments." The same logic applies here: Section 201(b) allows the Commission to interpret Section 230 to guide the judgments of courts.

Others attempt to read limitations into the text of Section 201(b) that could exclude Section 230. They note that most of Section 201(b) deals with rules that apply to common carriers and argue that Congress did not intend to treat social media companies and other covered websites as common carriers. But the general grant of rulemaking authority at the end of Section 201(b) contains no reference to common carriers; it simply empowers the Commission to make rules that are "necessary in the public interest to carry out the provisions of this Act," without qualification. For this reason, the U.S. Court of Appeals for the Sixth Circuit in *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), held that Section 201(b) gave the Commission authority to interpret ambiguous provisions in the Cable Television Consumer Protection and Competition Act of 1992. Notably, that Act by its terms applies to cable operators, not common carriers. The Court reasoned, relying on *Iowa Utilities Board*, that it was sufficient that the 1992 law amended the Communications Act and incorporated the relevant provisions therein. The same reasoning applies to Section 230.

Other commenters reach beyond statutory text to argue that Section 230's legislative history and purposes demonstrate that the Commission lacks authority to interpret it. As an initial matter, neither legislative history nor abstract purposes can trump the plain text of a statute, and as the Supreme Court has twice held, Section 201(b) "means what it says"—the FCC has the authority to interpret each and every provision of the Communications Act, as amended.

In any event, critics of an FCC rulemaking overread the legislative history and statements of purpose on which they rely and fundamentally misunderstand the narrow authority involved in clarifying the scope of the Section 230 immunity shield. For example, commenters note that language in Section 230(b) expresses Congress's intent to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." They further point out that Section 230 co-framer and then-Congressman Chris Cox remarked in floor debates prior to passage that "we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet." And they observe that the FCC cited these authorities in the *Restoring Internet Freedom Order* as support for its decision to repeal the prior Administration's onerous "net neutrality" rules in favor of light-touch regulation of Internet service providers.

But none of these observations bear on the central question here: whether the Commission has authority to interpret ambiguous terms in Section 230(c), which contains the immunity shield. Engaging in such interpretation would not involve creating "net neutrality" rules for social media companies, much less (as some critics have claimed) a "Fairness Doctrine" for the Internet. Rather, it would involve clarifying a legal standard that already exists: the statutory immunity shield in Section 230. Even if the FCC were to interpret that shield more narrowly

than some courts previously have, that would not result in additional FCC regulation. It would simply allow private parties to bring lawsuits, as appropriate, under *other* sources of federal and state law—the same generally-applicable causes of action that apply to newspapers, broadcasters, and other publishers and speakers not covered by Section 230.

Nor does it matter that the U.S. Court of Appeals for the D.C. Circuit in *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010), and the FCC itself in the *Restoring Internet Freedom Order*, agreed that Section 230(b) was merely a statement of policy and not an affirmative source of authority. The Commission need not rely on Section 230(b) as the source of its authority in this contemplated rulemaking. Instead, the Commission can comfortably use Section 201(b) to resolve ambiguities in the text of Section 230(c)—which *City of Arlington* and *Iowa Utilities Board* plainly permit.

At the end of the day, the scope of the Section 230 immunity shield must be interpreted by someone. And as the Supreme Court observed in both *Iowa Utilities Board* and *City of Arlington*, the only question is whether the FCC or a federal court will do the interpreting. Under current law, the answer is clear: The FCC receives deference for reasonable interpretations of all ambiguous terms in the Communications Act.

The fact that courts have been interpreting Section 230 for years does not prevent the Commission from construing its ambiguous terms. As the Supreme Court held in *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967 (2005), the FCC may act as the "authoritative interpreter" of ambiguous provisions in statutes like the Communications Act that it administers, and nothing "preclude[s] agencies from revising unwise judicial constructions of ambiguous statutes." Section 230 allows the FCC to determine whether courts have appropriately interpreted its proper scope. Supreme Court Justice Clarence Thomas, for example, recently expressed the view that courts have "relied on policy and purpose arguments to grant sweeping protection to Internet platforms" under Section 230 that "departed from the most natural reading of the text." Leaving such constructions unchallenged could, in Justice Thomas's words, "have serious consequences," like exempting Internet companies from a broad array of civil claims, even if that is not "what the law demands." Under *Brand X*, the FCC may review these judicial interpretations to determine whether they reflect the best reading of the statute. Indeed, an agency's role as "authoritative interpreter" may be particularly useful where, as here, courts have reached divergent interpretations of key provisions of an important statute, thus creating substantial uncertainty and disharmony in the law.

* * *

Ultimately, the five Commissioners of the FCC must decide whether this legal framework should be adopted in any future rulemaking. But in my own judgment, the FCC's legal authority to interpret Section 230 is straightforward: Congress gave the Commission power to interpret all provisions of the Communications Act of 1934—including amendments—and Section 230 is an amendment to the Communications Act. The Commission therefore may proceed with a rulemaking to clarify the scope of the Section 230(c) immunity shield.

Tags:

Consumers - FCC Management & Policies - Rules

Federal Communications Commission
45 L Street NE

Washington, DC 20554

Phone: 1-888-225-5322

ASL Video Call: 1-844-432-2275

Fax: 1-866-418-0232

Contact Us

Visiting FCC Facilities