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Communications

Future of 'Net Neutrality' May Hinge On Interpretation of Telecom Act Provision

The most significant legal issue of the internet era is expected to be decided by a federal appeals court in the first half of 2013—whether the Federal Communications Commission has the power to keep internet service providers from interfering with web traffic or charging specific websites to deliver their content more quickly, a concept commonly known as ''net neutrality'' (*Verizon Communications Inc. v. Federal Communications Commission*, D.C. Cir., No. 11-1355, 9/30/11).

Legal experts say the final judgment of the U.S. Court of Appeals for the District of Columbia Circuit in *Verizon* may come down to a single question: Did Congress give the FCC the authority to enforce rules for net neutrality under Section 706 of the Telecommunications Act, a statute written in 1996 that only tacitly mentioned the internet.

Section 706(a) directs the FCC to ''encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.''

Under Section 706 (b), the FCC is required to regularly ''determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion'' and take ''immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications markets.''

The FCC based its authority to write rules for net neutrality, at least in part, on those two sections of the act. By doing so, the agency has advanced a novel legal argument: If internet service providers (ISPs), such as Verizon, start blocking or slowing websites, then Americans' perception of ''advanced telecommunications capability'' may change, and fewer consumers will pay the $50-plus per month to continue subscribing to the service—and that, in effect, could create ''barriers to infrastructure investment'' and ''deployment.'' Put another way, if demand for broadband suddenly begins to decline, fewer and fewer companies will deploy broadband infrastructure in the areas that need it most, like rural America, the FCC contends.

But some, including Randolph May, president of the free-market think tank Free State Foundation, see the FCC argument as merely an attempt to rewrite the statute to serve its own ends.

''To the extent that there is any authority at all under section 706, it is the authority to take deregulatory actions,'' May told BNA in an interview. ''It's highly doubtful that Congress intended, in section 706, the type of regulatory action the FCC has taken here.''

The FCC interpretation of Section 706 is ''tenuous at best,'' he added.

''It's twice removed from a more normal reading of the text,'' said May, whose group filed an amicus curiae brief in *Verizon* last July, along with TechFreedom, the Competitive Enterprise Institute, and the Cato Institute. ''I'm doubtful that 706 is going to carry the day for them,'' he said.

Long History of Gray Areas. Almost since the term ''net neutrality'' was coined, legal observers like May have questioned whether the Telecommunications Act of 1996, which amended the Communications Act of 1934, provides the agency with adequate authority to require ISPs to treat all sources of data equally.

The 333-page Communications Act of 1934, as amended in 1996, mentions the word ''broadband'' three times, and the word ''internet'' only 10 times. The 128-page Telecommunications Act of 1996 mentions ''broadband'' only once.

The 333-page Communications Act, as amended in 1996, mentions the word ''broadband'' three times, and the word ''internet'' only 10 times. The Telecommunications Act of 1996 defines ''advanced telecommunications capability,'' without regard to any transmission media or technology, as ''high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graph-

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ics, and video telecommunications using any technology.'' The 128-page act mentions ''broadband'' only once, in the aforementioned definition.

When the *Verizon* case is finally argued before the appeals court sometime in the next several months, it will represent the culmination of five years of legal wrangling over FCC authority as a regulator of internet commerce and communications.

In 2008, when the FCC formally voted to uphold a complaint against Comcast Corp. for illegally inhibiting users of its internet service from using BitTorrent file-sharing software, the agency tried to rely on the broad language of Section 4(i) of the Communications Act, which states that the ''commission may perform any and all acts, make such rules and regulations, and issue such orders—as may be necessary in the execution of its functions.'' The agency also cited Section 706. But, in the end, the D.C. Circuit disagreed with the FCC on every count.

Siding with Comcast, the court ruled that the agency failed to show that its authority to uphold the complaint—and require the cable giant to end such interfering—was ''reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities.'' Those responsibilities cannot be found in Title I of the Communications Act, the court said, because the FCC has no authority over broadband under Title I of the act.

Broadband Largely Unregulated. As a result of a series of decisions in the 2000s under Republican FCC Chairmen Michael Powell and Kevin Martin, broadband is currently classified as a largely unregulated Title I ''information service.'' Under the Communications Act, the FCC has limited authority over information services, but has vast powers to regulate ''telecommunications services'' as ''common carrier'' services under Title II.

In other words, if the FCC wants to regulate the network management practices of ISPs, its authority to do so cannot derive solely from Title I.

As if that were not enough of a blow, the court in its April 2010 ruling in *Comcast v. Federal Communications Commission* also deferred consideration of the agency's assertion of Section 706 authority.

It noted in particular that, in 1998, the commission had concluded that Section 706 ''does not constitute an independent grant of authority,'' but rather a direction for ''the commission to use the authority granted in other provisions . . . to encourage the deployment of advanced services.'' According to the court, that 1998 decision and the FCC's 2008 Comcast decision were in clear contradiction with one another.

Despite handing a defeat to the FCC in *Comcast*, the court left the door open for the agency to try again.

Agency Does About-Face. Less than a year later, the agency under Democratic FCC Chairman Julius Genachowski had not only adopted rules, but reversed course with a new legal argument on Section 706.

The FCC drew from, among other sources, a 1995 Senate report that stated that the provisions of Section 706 are ''intended to ensure that one of the primary objectives of the 1996 Telecommunications Act—to accelerate deployment of advanced telecommunications capability—is achieved.'' The report, the FCC noted, stressed that these provisions are ''a necessary fail-safe'' to guarantee that the objective of Congress is reached.

''It would be odd indeed to characterize Section 706(a) as a 'fail-safe' that 'ensures' the commission's ability to promote advanced services if it conferred no actual authority,'' the FCC wrote in its *Open Internet* order, adopted on a party-line vote in December 2010. ''Here, under our reading, Section 706(a) authorizes the commission to address practices, such as blocking VoIP [Voice over Internet Protocol] communications, degrading or raising the cost of online video, or denying end users material information about their broadband service, that have the potential to stifle overall investment in internet infrastructure and limit competition in telecommunications markets.''

The FCC pointed out, too, that the D.C. Circuit in *Comcast* identified Section 706(a) as a provision that ''at least arguably . . . delegate[s] regulatory authority to the commission,'' and in fact ''contain[s] a direct mandate—the commission 'shall encourage.' ''

Push to Use Title II. But while the court in *Comcast* essentially gave the FCC a second chance to make a Section 706 argument, public interest groups led by Free Press and Public Knowledge pushed for the agency to use Title II of the Communications Act to re-establish jurisdiction over broadband service. With a majority vote by the FCC, broadband easily could be reclassified as a ''telecommunications service,'' which would put it more squarely within its statutory jurisdiction, they said.

The FCC decided against such an approach, but Sherwin Siy, vice president of legal affairs at Public Knowledge, said Section 706 still provides a sound basis for FCC authority.

''To say simply that there was a deregulatory mood in the air in Congress at the time doesn't mean that you removed regulatory authority from the agency. The point is: Did 706 grant them authority or not?''

SHERWIN SIY, PUBLIC KNOWLEDGE

''The cleanest way the FCC could have done this, as we said back before the FCC's *Open Internet* order came out, was to reclassify broadband under Title II,'' Siy told BNA in an interview. ''At the same time, I don't

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think that it was absolutely necessary for them to have done that to issue the order they did.''

As Siy sees it, by its very nature, Section 706 of the Telecommunications Act is a regulatory statute.

''To say simply that there was a deregulatory mood in the air in Congress at the time doesn't mean that you removed regulatory authority from the agency,'' he said. ''The point is: Did 706 grant them authority or not?''

Less Uncertainty Noted. In an intervenor brief filed in November, Public Knowledge argued just that. The Telecommunications Act accords ''great leeway'' to the FCC, the group said, to fulfill the intent of Congress to remove barriers to infrastructure investment.

Matt Wood, policy director for Free Press, agreed, citing several differences between *Comcast* and *Verizon*.

''While the *Comcast* decision will be the most relevant and fresh in the court's mind, the FCC has come back here this time with an expanded version of the authority argument they made in that case,'' Wood told BNA in an interview. ''In that case, there were also concerns about fair administrative notice and whether the rules were enforceable rules.''

After all, the FCC action against Comcast in 2008 was based on net-neutrality ''principles'' that were purely voluntary, he said.

''There was quite a lot more uncertainty that first time around than we have this time,'' Wood said. ''Now, at least Section 706 gives them something to hang their hat on.''

Chevron Deference. A Supreme Court case that could have bearing on *Verizon* is *City of Arlington, Texas, and City of San Antonio, Texas v. Federal Communications Commission*, which is set for oral argument Jan. 16 (*City of Arlington, Texas and City of San Antonio, Texas v. Federal Communications Commission,* U.S.,11-1545; 11-1547,10/05/12).

In that case, the court will review whether an appellate court properly granted Chevron deference to the agency in affirming its authority to set ″shot clocks″ for state and local governments to approve or deny cell-tower siting applications.

The sole question before the high court in *Arlington* is ''whether, contrary to the decisions of at least two other circuits, and in light of this Court's guidance, a court should apply Chevron to review an agency's determination of its own jurisdiction.''

U.S. SUPREME COURT

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If the Supreme Court rules against the FCC in the case, the commission might not receive Chevron deference to interpret the authority granted to it by Congress in Section 706. At that point, the D.C. Circuit would begin to ask the question: Does Section 706 give the agency rulemaking authority or not? If not, Verizon wins.

However, if the court finds that Section 706 does give the agency some rulemaking authority, then the three-judge panel must determine whether the net-neutrality rules are ''arbitrary and capricious.''

If the Supreme Court rules for the FCC in the *Arlington* case, several scenarios might play out. The court could conclude that the FCC gets deference to determine whether Section 706 grants rulemaking authority, while at the same time ruling that the deference is overcome by the ″unreasonableness″ of the agency's net-neutrality rules. The court also could agree with the FCC that Section 706 grants the agency authority, but that the rule is arbitrary and capricious. Or the court could uphold it on its merits.

Given the timing of the two cases, the D.C. Circuit could ask the FCC and Verizon to file new briefs on how the Supreme Court decision in *Arlington* might change the case. The standing law in the D.C. Circuit is that agencies are entitled to the highest degree of deference, known as Chevron deference, after a 1984 Supreme Court decision (*Chevron v. Natural Resources Defense Council*).

Data-Roaming Decision May Have Bearing. D.C. Circuit consideration of the *Open Internet* comes just months after the court sided with the FCC in another legal battle with Verizon.

In early December, a three-judge panel upheld an FCC rule requiring wireless carriers to allow customers of their competitors to roam on their networks.

While largely targeting Verizon and AT&T Inc., the rule stipulates that all facilities-based mobile broadband providers must offer their competitors' data-roaming arrangements on ''commercially reasonable terms and conditions,'' subject to certain limitations. Companies may, for example, negotiate on an ''individualized'' basis, yielding different terms with different competitors in the market, and condition any roaming agreement on a provider offering service with a generation of technology ''comparable to the one it seeks to roam on.''

In that case, *Cellco Partnership v. Federal Communications Commission*, Verizon argued, much like in the case now before the court, that the FCC lacked statutory authority to issue the rule, and relegated the company's wireless unit to ''common carrier'' status, in violation of Title III of the Communications Act.

The D.C. Circuit, however, was not persuaded. In ruling for the FCC, the court explained that instead of invoking the full breadth of common carriage regulation—the idea that certain businesses are so critical to commerce that their owners cannot discriminate against any paying customers—the FCC decided to leave discretion up to Verizon to, in essence, discriminate.

''The data roaming rule . . . imposes no presumption of reasonableness,'' Judge David Tatel wrote for the D.C. Circuit in the opinion handed down Dec. 4. ''And the 'commercially reasonable' standard, at least as defined by the commission, ensures providers more freedom from agency intervention than the 'just and reasonable' standard applicable to common carriers . . . .

The commission has thus built into the 'commercially reasonable' standard considerable flexibility for providers to respond to the competitive forces at play in the mobile-data market. Although the rule obligates Verizon to come to the table and offer a roaming agreement where technically feasible, the 'commercially reasonable' standard largely leaves the terms of that agreement up for negotiation.''

Agency officials now say the *Cellco* case could prove useful to the FCC in its defense of the *Open Internet* order's provisions affecting wireless carriers—but only those provisions.

The court also concluded that the FCC does, in fact, have the authority to regulate wireless carriers in this way pursuant to Section 303(b) of Title III of the Communications Act, which agency officials now say could prove useful to the FCC in its defense of the *Open Internet* order's provisions affecting wireless carriers—but only those provisions.

Justifying Net-Neutrality Rules. Because the FCC regulates telecommunications providers under Title II, wireless carriers under Title III, and cable operators under Title VI, the agency had relied on certain sections of each title to justify imposing net-neutrality rules.

To begin, the FCC cited Sections 201 and 202 of Title II of the act, which prohibit telecom providers from engaging in ''unjust'' and ''unreasonable'' practices. Next, the FCC cited Section 303 of Title III, specifically 303(b), which gives the agency the power to ''prescribe the nature of the service to be rendered by each class of license stations and each station within any class.'' And, finally, the FCC cited Section 628 of Title VI, which states that it ''shall be unlawful for a cable operator to engage in unfair methods of competition, or unfair or deceptive practices, the purpose of which is to hinder significantly any MVPD [multichannel video programming distributor] from providing service.''

Whether these sections can serve as a source of direct or ancillary authority to ensure an open internet remains an open question before the court.

''If those sections are of any use to the FCC, they would have tried them in the *Comcast* case,'' Larry Downes, internet industry analyst, consultant, and author of the books ''Unleashing the Killer App'' and ''The Laws of Disruption'' said in an interview with BNA. ''These are just the 'Hail Marys'; they really have nothing else that's left but Section 706.''

While the FCC now believes the data-roaming decision of the D.C. Circuit Court reaffirms the FCC Title III authority to pass *wireless* net-neutrality rules, Verizon and MetroPCS Communications, which has joined the Verizon legal challenge, disagree.

In a reply brief filed in *Verizon v. FCC* shortly before Christmas, MetroPCS quoted from an excerpt of the court's decision that made it clear that ''the commission may not rely on Title III's public-interest provisions without mooring its action to a distinct grant of authority in that Title.''

Common Carriage Versus Net Neutrality. Filing a similar brief that same week, Verizon focused on the question of whether the FCC net-neutrality rules really amount to common carriage.

As the company sees it, the data-roaming rules leave ''substantial room for individualized bargaining and discrimination in terms,'' while the net-neutrality rules, in contrast, leave no discretion to the ISPs to ''discriminate'' web traffic.

''The [FCC's] no-blocking rule compels broadband providers to hold out their networks for use by all edge providers—that is, 'to offer service indiscriminately,' '' Verizon wrote.

It is still unclear, however, how and to what extent the D.C. Circuit would rely on its data-roaming ruling.

Susan Crawford, a visiting professor at Harvard Law School who served as a special assistant to President Obama for science, technology, and innovation policy, said the ruling ''cuts two ways.''

''On one hand, the court's firm deference to the FCC's determination of what is or isn't common carriage will help the FCC's interpretation of its legal authority in the *Open Internet* case,'' Crawford told BNA. ''On the other hand, the clear statement in the data-roaming case that the FCC's authority there could be easily and tightly mapped to statutory authority may signal that in the *Open Internet* case—where the D.C. Circuit has already said once that the FCC did not have ancillary jurisdiction—the FCC's arguments for authority are, by comparison, weaker.''

Berin Szoka, president of TechFreedom, a libertarian think tank, said the difference between the two cases is ''compensation.''

''If the D.C. Circuit Court thinks that the FCC's net-neutrality rules, in practice, will deny broadband providers the ability to recover the economic value of their networks by preventing them from contracting with content or application providers, that's where the FCC loses,'' Szoka told BNA in an interview.

Impact of *Midwest Video II*. One case that could factor into the court's interpretation of what is and is not common carriage is *FCC v. Midwest Video Corp.*, also known as *Midwest Video II*. In that case, the Supreme Court rejected the FCC assertion of ancillary authority to require cable operators to make certain channels available for public use, saying such a rule amounted to a common carrier regulation, contrary to Section 3(h) of the Communications Act that ''a person engaged in . . . broadcasting shall not . . . be deemed a common carrier.'' Cable operators, the court concluded, are not common carriers.

As Verizon argues, much as under those rules, the *Open Internet* order requires ISPs to carry web traffic at ''no cost.''

But the FCC claims the rules fall outside the scope of a common carrier framework because they stop short of regulating the terms of services to ''the end users who subscribe'' to high-speed internet service.

''Because there is no obligation to 'offer service indiscriminately and on general terms,' there is no common carriage,'' the FCC wrote in its reply brief in *Verizon*, filed Jan. 8.

In plain language, the rules themselves do not affect Verizon's ability to sell its broadband internet service at different speeds and at different rates.

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And in *Cellco*, the FCC noted, the court went so far as to suggest that the Communications Act gives the FCC some latitude to impose ''common carrier-like regulation'' on non-common carriers, like Verizon.

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The second report in the three-part series, examining Verizon's First and Fifth Amendment challenges, will appear in the Jan. 24 issue of Daily Report for Executives.

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