

DC Circuit Court Vacates Significant Portions of the FCC's Net Neutrality Obligations

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Yesterday, the DC Circuit Court of Appeals partially struck down the 2010 Federal Communications Commission rules imposing net neutrality obligations on broadband service providers, while at the same time upholding the jurisdiction of the FCC to adopt rules against Internet service providers to promote broadband infrastructure deployment. *Verizon v. Federal Communications Commission*, ___ F.3d ___ (D.C. Cir. 2014) ("*Verizon Net Neutrality Order*."). Although the Court's decision eliminates much of the FCC's net neutrality rules, it also provides a roadmap for the FCC, should the FCC choose, to impose regulations intended to preserve an open Internet. The Court clearly does not rebuke the FCC's intentions. Indeed, the Court noted that, despite the FCC's prior interpretations of Section 706 of the Communications Act limiting the FCC's substantive authority over Internet broadband services, the FCC had adequately explained its change of interpretation to expand that jurisdiction. The Court also indicated that the FCC has the discretion to impose common carrier type regulations on Internet broadband providers of the sort the Court struck down yesterday provided the FCC reclassifies Internet broadband as a telecommunications service.

In 2010, the FCC adopted its *Open Internet Order*, which imposed three "net neutrality" rules ostensibly intended to preserve an open Internet free of Internet access provider discrimination. *In re Preserving the Open Internet*, 25 F.C.C.R. 17905 (2010) ("the *Open Internet Order*."). More specifically, the FCC 1) required that mobile and fixed Internet access service providers disclose information about its network management practices, performance and commercial terms, 2) prohibited such providers from blocking lawful content or applications, subject to "reasonable network management" practices, and 3) prohibited *fixed broadband* providers from "unreasonably discriminating in transmitting lawful network traffic over a consumer's broadband Internet access service." *Id.* at 17944 ¶ 68.

Notably, the FCC's rules allowed Internet broadband providers to block content and applications only where the provider was engaged in "reasonable network management," designed to "ensur[e] network security and integrity," "address[] traffic that is unwanted by end users," "and reduc[e] or mitigat[e] the effects of congestion on the network." *Id.* at 17952 ¶ 82. The network management rules required Internet broadband providers to carry over their networks content and applications provided by "edge providers" such as Google and Netflix – companies that provide content to consumers. This rule not only prohibited broadband providers from preventing end-user subscribers from accessing a particular edge provider, but also prohibited them "from impairing or degrading particular content, applications, services, or non-harmful devices so as to render them effectively unusable." *Id.* at 17943 ¶ 66.

The Court's opinion over-turns a prior ruling striking down previous FCC net neutrality requirements, and concludes that Section 706 of the of the 1996 Telecommunications Act vests the FCC with authority to regulate how broadband providers treat edge providers of content and applications. However, the Court declares that the 2010 rules concerning blocking and discrimination are still impermissible because they conflict with the FCC's own designation of Internet broadband services as an "information service" rather than a "telecommunications service." According to the Court, because the FCC has previously held Internet broadband services to be information services, the Commission may not impose Title II common carrier-type obligations on Internet broadband access service providers. *See Verizon Net Neutrality Order* at 45, *citing* 47 U.S.C. § 153(51) and *In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 F.C.C.R. 5901, 5919 ¶ 50 (2007). The Court implies that were the FCC, should it choose to do so, to regulate Internet broadband service as a common carrier service, it could impose anti-blocking and non-discrimination obligations on such providers. But the FCC would first have to modify its regulatory classification determinations regarding broadband Internet access. The Court let stand the FCC's 2010 rule requiring that Internet broadband service providers disclose information about its network management practices, performance, and commercial terms.

To understand the particular significance of the Court's ruling, a little history of the FCC's efforts at promoting net neutrality is useful.

The FCC's First Effort at Net Neutrality

The FCC's efforts to overtly impose "open Internet" mandates essentially began in 2008 when the FCC entered an order in a complaint proceeding brought by two non-profit advocacy organizations, Free Press and Public Knowledge, against Comcast. The complaint alleged that Comcast was impermissibly interfering with the public's use of peer-to-peer networking applications; Comcast responded by asserting that it was required to limit the use of peer-to-peer network applications in certain circumstances in order to manage its network capacity. *In re Formal Complaint of Free Press and Public Knowledge against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C.R. 13028 (2008). The FCC concluded that it had jurisdiction over Comcast's network management practices, and that Comcast's bandwidth management practices contravened public policy. To support its position, the FCC relied on Section 706 of the 1996 Telecommunications Act, which provides that the FCC "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . price cap regulation, regulatory forbearance, measure that promote competition in local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 1302(b). The FCC concluded that Section 706, along with other provisions of the Federal Communications Act, vested it with authority to regulate Internet broadband providers.

Comcast appealed the *Free Press* order, and the D.C. Circuit Court vacated the FCC's decision. In *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010), the court affirmed that the FCC has ancillary authority over information services and, at least in certain circumstances, could impose "special regulatory duties on [cable internet providers] under its Title I jurisdiction." *Id.* at 649, *citing* *National Cable & Telecommunications Assoc. v. Brand X Internet Services*, 545 U.S. 967, 996 (2005). The D.C. Circuit declared, however, that the FCC's order imposing network management obligations went too far, and the FCC had not justified its network management obligations with a congressionally-delegated authority. According to the *Comcast* court, the FCC's *Free Press* order failed to tie its ancillary authority in Title I to any express statutorily mandated responsibility in the Federal Communications Act to control or regulate broadband obligations to consumers. The

Comcast Court expressly rejected the FCC's argument that Section 706 gave the FCC the requisite authority, basing its finding in large part on the FCC's own prior construction of Section 706 in its 1998 *Advanced Service Order*, where the FCC concluded that Section 706(a) was not an independent grant of authority. *Comcast*, 600 F.3d at 658, citing *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 F.C.C.R. 24012, 24047 ¶ 77 (1998) ("*Advanced Services Order*").

The FCC's Open Internet Order Rules

In adopting its *Open Internet* rules shortly after the Court's *Comcast* decision, the FCC expressly relied on a changed understanding of Section 706 of the Telecommunications Act of 1996 to establish its authority. Under that provision, the Commission is required to encourage the development of advanced telecommunications capabilities to all Americans and may do so by removing barriers to infrastructure investment and promoting competition. The FCC concluded that its *Open Internet* rules would promote innovation among edge providers who, in turn, provide Internet user experience, thereby increasing user demand for broadband service and, ultimately, encouraging broadband providers to invest in infrastructure to meet that demand. *Open Internet Order* at 17907 ¶ 13 (2010). The FCC determined that by preventing broadband providers from blocking or discriminating against edge providers, the rules "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," and "accelerate deployment of such capability" by removing "barriers to infrastructure investment" and promoting "competition." *Open Internet Order*, 25 F.C.C.R. at 17968, 17972 ¶¶ 117, 123. The Commission further justified its rules by determining that broadband providers' potential disruption of edge-provider traffic to be itself the sort of "barrier" that has "the potential to stifle overall investment in Internet infrastructure," and could "limit competition in telecommunications markets." *Open Internet Order*, at 17970 ¶ 120.

Given these findings, the FCC concluded that its rules would promote the deployment of advanced broadband services consistent with the mandate of Section 706.

The Court's Order Vacating the Open Internet Order

In yesterday's *Verizon Net Neutrality Order*, the DC Circuit rejected two of the three rules adopted by the FCC but does so for reasons other than those expressed in its earlier *Comcast* decision and only after affirming the Commission's changed understanding of its regulatory authority under Section 706. In particular, the Court approved the FCC's finding in the *Open Internet Order* that it (the FCC) *does have* substantive authority to regulate Internet broadband providers by virtue of Section 706. However, the Court still concluded that certain of the FCC's "net neutrality" regulations exceeded this new-found Section 706 authority because they sought to impose "common carrier" regulations on Internet broadband providers which the FCC had concluded provided "information service," not "telecommunications service." Because the Communications Act reserved common carrier regulation solely for telecommunications service providers, the Court struck down the common-carrier-like anti-blocking and anti-discrimination provisions of the *Open Internet Order*.

First, The Court distinguished its earlier ruling in the *Comcast* decision from 2010, wherein it held that Section 706 did not grant the FCC authority to regulate Internet service providers because the FCC itself had previously declared that Section 706 "does not constitute an independent grant of authority" to so regulate. *Verizon Net Neutrality Order* at 18, quoting *Comcast*, 600 F.3d at 658 (quoting *Advanced Services Order*, 13 F.C.C.R. at 24047 ¶ 77.). The Court concluded that the FCC had previously construed Section 706 to limit its own jurisdiction, and was bound by that

interpretation until the FCC construed Section 706 more broadly in the 2010 *Open Internet Order*. Under the FCC's re-constructed interpretation of Section 706 in the *Open Internet Order*, the FCC found that it indeed has substantive authority to regulate broadband Internet service providers. The Court deferred to the FCC's interpretation of the Communications Act to establish the scope of its own authority, just as the Supreme Court did in 2013 in upholding the FCC's antenna-siting shot-clock. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013).

After finding that the FCC has Section 706 authority to regulate how Internet broadband providers treat edge providers, the Court nevertheless concluded that the anti-discrimination and anti-blocking regulations conflicted with the FCC's own prior rulings that Internet broadband service is an information service and not a telecommunications service subject to common carrier obligations. The Court recounted the history of the common carrier regulations, and noted that a key feature of a common carrier is that a common carrier that may not decide on an individualized basis whether and on what terms to deal with potential customers. *Verizon Net Neutrality Order* at 51. Because the FCC had previously determined that Internet broadband service is an information service not subject to common carrier obligations, *see In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 F.C.C.R. 14853, 14862 ¶ 12 (2005), the Court concluded the FCC could not treat them as telecommunications carriers.

The Court then examined the three sets of rules adopted by the FCC to see if the Commission crossed that line. Because the FCC's *Open Internet* rules required fixed Internet broadband providers to carry edge providers' content on non-discriminatory terms, the Court determined that the FCC's rules impermissibly imposed common carrier obligations on the Internet broadband providers. For the same reasons, the Court also vacated the FCC's anti-blocking rules, which prohibited providers from blocking lawful content and applications, another common carrier-type restriction. The Court, however, let stand the rules requiring Internet broadband providers disclose information about their network management practices, performance and commercial terms,. The Court determined that these latter rules were within the authority vested to the FCC by Section 706, and did not obligate information service providers to submit to common carrier-type obligations. *Verizon Net Neutrality Order* at 61-62.

Conclusion

The *Verizon Net Neutrality Order* is a compelling decision that demonstrates the discretion and latitude that the courts will give the FCC in construing their own enabling statutes, including provisions that address the substantive jurisdiction of the agency. This decision also demonstrates that the FCC may fundamentally change its mind about the scope of its statutory authority provided it offers an adequate explanation. It follows that the FCC, should it choose to do so, has the ability to change its prior rulings and impose common carrier obligations on Internet broadband service providers in an effort to re-establish the vacated net neutrality regulations. ("Despite the calls to revisit these classification orders, *see, e.g., Open Internet Order*, 25 F.C.C.R. at 18046 (concurring statement of Commission Copps), the Commission has yet to overrule them." *Verizon Net Neutrality Order* at 10.) This decision will only add fuel to the debate about whether and to what extent Internet access providers should be regulated and whether the Communications Act should be revamped to address this, among other issues.