D.C. Circuit in *Verizon* Strikes FCC's "Net Neutrality" Rules for Broadband Providers

In *Verizon v. FCC*,[1] the United States Court of Appeals for the District of Columbia, for the second time in four years, reviewed the Federal Communications Commission's (FCC) authority to impose "net neutrality" rules on broadband service providers' network management practices.[2] In 2005, the FCC issued a policy statement outlining the principles of Internet neutrality applicable to all Internet service providers operating in the United States in an effort to make broadband networks "widely deployed, open, affordable, and accessible to all consumers."[3] After the policy was adopted, the FCC discovered that Comcast Corporation was limiting bandwidth to peer-to-peer sharing websites in contravention of the Internet-neutrality principles. In response, the FCC issued an order requiring Comcast to disclose sufficient details of its network management practices and to create a compliance plan to end the unreasonable practices.[4] Following the issuance of the order, Comcast petitioned for judicial review of the FCC's authority to regulate their broadband network management practices.[5] The D.C. Circuit agreed with Comcast, holding that the FCC only had the authority to compel open network practices on common carriers, which broadband providers did not qualify as.[6] Shortly after the D.C. Circuit's 2010 ruling in *Comcast*, the FCC adopted the Open Internet Order which imposed Internet-neutrality rules of disclosure, antiblocking, and antidiscrimination on broadband providers.[7] Verizon then

1. 740 F.3d 623 (D.C. Cir. 2014).

2. *Id.* at 628-29.

3. *See In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 14,986, 14,988 ¶ 4 (Adopted Aug. 5, 2005). The four principles of the policy are that consumers are entitled to: access the lawful Internet content of their choice; run applications and services of their choice, subject to the needs of law enforcement; connect their choice of legal devices that do not harm the network; and competition among network providers, application and service providers, and content providers. *Id.* Although the FCC did not adopt formal rules in connection with this policy, it noted that it would incorporate these principles into its ongoing policymaking activities. *Id*.

4. *See* Comcast Corp. v. FCC, 600 F.3d 642, 644-45 (D.C. Cir. 2010) (describing complaints FCC received relative to Comcast's practices and resulting order).

5. *Id.* at 645.

6. *See id.* at 661 (holding FCC failed to assert statutory authority justifying net neutrality on Comcast). The FCC argued that it was given ancillary jurisdiction to regulate broadband providers pursuant to section 4(i) of the Communications Act of 1934. *See id.* at 644; *see also* 47 U.S.C. § 154(i) (2012) (authorizing FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions").

7. *See* Verizon v. FCC, 740 F.3d 623, 632-33 (D.C. Cir. 2014) (setting forth chronology of FCC

petitioned for judicial review of the FCC's authority to adopt the Open Internet Order.[8]

The FCC was established by Congress under the Communications Act of 1934 (Act of 1934) to regulate interstate and international communications transmitted by radio, television, wire, satellite, and cable.[9] One of the FCC's major enforcement provisions under the Act of 1934 mandated that common carriers provide their communications services to the general public on a nondiscriminatory basis.[10] Under the Act of 1934, all telecommunications carriers were classified as "common carriers," with telecommunications defined as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[11] The FCC continues to classify these purely transmission-based services as "telecommunications services."[12]

The FCC's regulatory authority was subsequently overhauled by the Telecommunications Act of 1996 (Act of 1996).[13] The Act of 1996, among other things, expanded the jurisdiction of the FCC to intrastate telecommunications and also reinforced the nondiscrimination principles for telecommunications providers. The FCC was also given the power to regulate "information services," defined as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[14] Notably, information services providers were not classified as common carriers and were thus not subject to the same antidiscrimination laws as telecommunications service providers.[15] In 2002, the FCC issued a declaratory ruling that classified cable modem service as an "interstate information service" causing those services to fall within its jurisdiction; however, the ruling stated that cable modem services do not contain a separate telecommunications service offering and as a result are not subject to common-carrier regulation.[16] Subsequently, many companies

Internet-neutrality policies concerning broadband providers). *See generally In re* Preserving the Open Internet, 25 FCC Rcd. 17,905 (Adopted Dec. 21, 2010).

8. *Verizon*, 740 F.3d at 634.

9. *See* Communications Act of 1934, Pub. L. No. 73-416, § 1, 48 Stat. 1064, 1064 (codified as amended at 47 U.S.C. § 151 (2012)) (providing reason for creation and composition of FCC).

10. *See* 47 U.S.C. § 202 (2012) ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service.").

11. 47 U.S.C. § 153(50) (2012).

12. *See Verizon*, 740 F.3d at 629-31 (illustrating difference between basic transmission services and enhanced processing services); 47 USC 153(50)-(51), (53).

13. *See* Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.) (amending Act of 1934 and adding information services to FCC jurisdiction).

14. 47 U.S.C. §153(24).

15. *See* Verizon v. FCC, 740 F.3d 623, 630 (D.C. Cir. 2014).

16. *See In re* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798, 4802 ¶ 7 (Adopted Mar. 14, 2002) (classifying cable modem services as information services).

petitioned for judicial review of this declaratory ruling. The United States Court of Appeals for the Ninth Circuit held that while cable modem services can be classified as information services, the FCC could not reasonably construe the Act of 1996 as exempting cable modem service carriers from the common-carrier regulations.[17] The FCC, in response, petitioned for certiorari to the United States Supreme Court. The Court granted certiorari and overturned the Ninth Circuit's ruling, holding that the FCC's conclusion that broadband cable modem companies are exempt from mandatory common-carrier regulation was a lawful construction of the Act of 1996.[18]

Due to the *Brand X* ruling, all cable broadband providers in the United States are classified as information services and are not subject to the common-carrier regulations, while dial-up Internet providers are subject to such regulations. Despite the early absence of regulation of information services, the FCC signaled its intention to regulate these services when it issued a policy statement in 2005 containing four principles of Internet neutrality, which aimed at preserving and promoting the open and interconnected nature of the Internet.[19] This policy was eventually struck down by the D.C. Circuit when the court determined that the FCC lacked jurisdiction to impose common-carrier regulations on broadband providers.[20] The FCC argued that the Act of 1934 gave the Commission ancillary power to impose common-carrier regulation on broadband providers; however, this argument was defeated.[21] In response to the *Brand X* and *Comcast* rulings—along with the latent ambiguity surrounding the FCC's ability to regulate information service providers—there have been many proposed bills in Congress attempting to resolve the status quo, most imposing the common-carrier regulation of antidiscrimination on broadband providers.[22]

In *Verizon v. FCC*, the D.C. Circuit was aware of the potential ramifications

It is also important to note in this ruling that the FCC disavowed any relation between telecommunications and cable modems. *See id*. at 4823.

17. *See* Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1131-32 (9th Cir. 2003), *rev'd sub nom.* Nat'l Cable & Telecomm. Ass'n. v. Brand X Internet Servs., 545 U.S. 967 (2005).

18. *See* Nat'l Cable & Telecomm. Ass'n. v. Brand X Internet Servs., 545 U.S. 967, 1003 (2005). The Court used a two-part test for review of an administrative agency's interpretation as developed in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*. *See id*. at 986. *See generally* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). Applying the test, the Court concluded that the FCC made a reasonable interpretation of the ambiguous provision defining telecommunications despite the agency's prior inconsistent interpretation. *See Brand X Internet Servs.*, 545 U.S. at 996-99.

19. *See In re* Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 FCC Rcd. 14,986, 14,988 ¶ 4 (Adopted Aug. 5, 2005).

20. *See* Comcast Corp. v. FCC, 600 F.3d 642, 661 (D.C. Cir. 2010).

21. *See id.*

22. *See, e.g.*, Data Cap Integrity Act of 2012, S. 3703, 112th Cong. (2012) (regulating bandwidth throttling); Internet Freedom Preservation Act of 2008, H.R. 5353, 110th Cong. (2008) (protecting competition, consumer protection, and consumer choice in terms of broadband providers); Internet Freedom and Nondiscrimination Act of 2006, H.R. 5417, 109th Cong. (2006) (providing competitive and nondiscriminatory access to Internet). Thus far, Congress has not succeeded in passing Internet-neutrality legislation.

of its holding and began by reviewing whether the FCC had statutory authority to regulate broadband providers pursuant to section 706(a) and (b) of the Act of 1996, which requires the FCC to promote competition in the local telecommunications market.[23] The court held that the FCC had statutory authority, in accordance with the FCC's revised interpretation of section 706. The court then proceeded to review whether the Internet-neutrality rules adopted in the Open Internet Order exceeded the FCC's scope of authority.[24] The court concluded that because the FCC had classified broadband providers as information services without a telecommunications element, and because the Open Internet Order rules relative to antidiscrimination and antiblocking amounted to per se common-carrier regulations, those rules could not be imposed on broadband providers who were otherwise exempt from such regulation.[25] The FCC argued that the Open Internet Order rules did not impose common-carrier regulations on broadband providers and that they were not "carriers" as defined in the Act of 1996. Nevertheless, the court found these arguments unpersuasive, reasoning that although broadband providers were not carriers, they were obligated to act like common carriers as a practical result of the Open Internet Order rules.[26] All three Judges of the D.C. Circuit in *Verizon* agreed that the Open Internet Order rules impermissibly imposed antidiscriminatory and antiblocking regulations on broadband providers; however, Judge Silberman, dissenting in part, argued that section 706 of the Act of 1996 did not grant the FCC affirmative authority to promulgate these Internet-neutrality rules.[27]

Because broadband providers are not subject to antidiscriminatory and antiblocking rules as a result of *Verizon*, these providers are able to favor certain websites and web services over others.[28] This ability to freely

23. *See* Verizon v. FCC, 740 F.3d 623, 635 (D.C. Cir. 2014); 47 U.S.C. § 1302(a) (2012) ("The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."); 47 U.S.C. § 1302(b) ("[The Commission] shall take immediate action to accelerate deployment of such [advanced telecommunications] capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."). Instead of relying on the ancillary jurisdiction argument from *Comcast*, the FCC in *Verizon* claimed direct statutory authority to regulate broadband providers under section 706 of the Act of 1996. *See Verizon*, 740 F.3d at 635. The D.C. Circuit also acknowledged that the FCC's revised interpretation of the Act of 1996 after *Comcast* was not without a reasoned explanation. *See id.* at 636-37.

24. *See Verizon*, 740 F.3d at 637, 641, 643.

25. *See id.* at 655-56, 657-59.

26. *See id.* at 653-55 (reasoning broadband providers function as common carrier with regard to edge providers)

27. *See id.* at 659 (Silberman, J., dissenting). Moreover, Justice Silberman believed that the FCC's interpretation of its authority under section 706 violated the Administrative Procedure Act because the FCC had conducted no research to determine if the regulations would actually promote competition. *See id.* at 667 (Silberman, J., dissenting).

28. *See* Brian Fung, *Federal Appeals Court Strikes Down Net Neutrality Rules*, WASH. POST, Jan. 14, 2014, http://www.washingtonpost.com/blogs/the-switch/wp/2014/01/14/d-c-circuit-court-strikes-down-net-neut

discriminate amplifies the impact of web-service and broadband-provider agreements, such as the recent agreement between Netflix and Comcast.[29] Though on its face this transaction eliminates the intermediary backbone provider, allowing Comcast to manage the dissemination of data between Netflix and end-users directly, it also permits Comcast to both offer a fast broadband package to web services that can afford it and to slow down, or throttle, data speeds for web services unwilling or unable to pay them for faster speeds.[30] This practice will serve not only to stifle competition in the broadband market—as newer companies may not be able to afford a broadband provider's prices—but will also impose costs on the end-user who will either have to pay more or be forced to use a web service that has its data speeds throttled.[31] In addition, *Verizon* also impacts the looming Comcast and Time Warner merger, in which the resulting organization would be providing broadband to nearly one-third of the country.[32] Without any antidiscriminatory or antiblocking rules in effect, a broadband provider covering that much of the country would be in an advantageous bargaining position in the event it decides to implement discrimination and blocking practices against web services; and the web service might only be left with the choice to pay what the broadband provider is asking or risk going out of business.

The D.C. Circuit's conclusion in *Verizon* was practical and well-rooted in the law when it struck down the FCC's Internet-neutrality rules for broadband providers because the FCC's own classification system with respect to information service providers exempted them from such regulations.[33] Moreover, the FCC's classification between telecommunication services and

rality-rules (discussing impact of *Verizon* on net neutrality and future of bandwidth providers).

29. *See* Bret Swanson, *Netflix, Comcast Hook Up Sparks Web Drama*, FORBES (Feb. 26, 2014, 7:28 AM), http://www.forbes.com/sites/bretswanson/2014/02/26/netflix-comcast-hook-up-sparks-web-drama (reflecting on circumstances of Netflix-Comcast deal).

30. *See* Timothy B. Lee, *Comcast's Deal with Netflix Makes Network Neutrality Obsolete*, WASH. POST, Feb. 23, 2014, http://www.washingtonpost.com/blogs/the-switch/wp/2014/02/23/comcasts-deal-with-netflix-makes-network-neutrality-obsolete (describing implications of deal on Internet neutrality). The deal explains that most bandwidth transactions utilize a backbone provider that acts as a pipeline between the consumer, broadband provider, and web service. *See id.* This deal removes the backbone provider from the process. *See id*.

31. *See* Elise Hu, *4 Takes on Netflix's Streaming Deal with Comcast*, NPR (Feb. 24, 2014, 4:46 PM), http://www.npr.org/blogs/alltechconsidered/2014/02/24/281995910/four-takes-on-netflixs-streaming-deal-with-comcast (discussing potential impacts of Netflix-Comcast deal); Eric Limer, *How Comcast's Netflix Bullying Could Cost Us All*, GIZMODO (Feb. 23, 2014, 6:04 PM), http://gizmodo.com/how-comcasts-netflix-bullying-is-going-to-cost-us-all-1529227229 (stating how Comcast's future practices could affect consumers).

32. *See* Tim Wu, *The Real Problem with the Comcast Merger*, NEW YORKER, Feb. 14, 2014, http://www.newyorker.com/online/blogs/elements/2014/02/the-real-problem-with-the-comcast-merger.html (discussing impact of merger on market); Liana B. Baker, *Comcast Takeover of Time Warner Cable To Reshape U.S. Pay TV*, REUTERS (Feb. 13, 2014, 3:21 PM), http://www.reuters.com/article/2014/02/13/us-comcast-timewarnercable-idUSBREA1C05A20140213 (stating potential market share of Comcast and Time Warner after merger).

33. *See supra* note 16 and accompanying text (explaining information service providers not subject to common-carrier regulations).

information services was upheld by the Supreme Court, and prior attempts to apply common-carrier regulations upon broadband providers have similarly been struck down by the courts.[34] Nevertheless, the Court's decision leaves the future of net neutrality and a free and open Internet uncertain. Congressional action is now the only solution to this problem. Congress must legislate in the area of Internet neutrality or reclassify broadband providers as common carriers. Although previous congressional attempts aimed at achieving this result have been defeated, the looming megamerger of Comcast and Time Warner, as well as the web-service and broadband-provider agreements between key providers such as Comcast and Netflix should have an impact. Indeed, it is clear that the ramifications of not having Internet-neutrality laws are now becoming more apparent to Congress than ever before.

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34. *See* Nat'l Cable & Telecomm. Ass'n. v. Brand X Internet Servs., 545 U.S. 967, 979 (2005) (upholding FCC's classification of telecommunications services and information services); Verizon v. FCC, 740 F.3d 623, 659 (D.C. Cir. 2014) (striking Internet-neutrality rules imposed on information services providers); Comcast Corp. v. FCC, 600 F.3d 642, 661 (D.C. Cir. 2010) (striking Internet-neutrality principles applied to Comcast).