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### **Some Initial Reflections on the D.C. Circuit's *Verizon v. FCC* Net Neutrality Decision**

by

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#### **Introduction**

On January 14, 2014, the U.S. Court of Appeals for the D.C. Circuit handed down its eagerly anticipated decision in *Verizon v. FCC*, in which the court assessed the legality of the Federal Communications Commission's (FCC's) 2010 *Open Internet Order*. The result is that the FCC's order was struck down with respect to the nondiscrimination and nonblocking rules, although the transparency rule was left in place. The fact that the D.C. Circuit deviated from its usual practice of simply remanding noncompliant agency actions and instead vacated portions of the FCC's order arguably reflects skepticism that the agency could find an alternative justification for those rules.

That said, the opinion contains language likely to serve as sources of both encouragement and anxiety to the Order's proponents and opponents alike. On the one hand, Part II of the opinion upheld the FCC's conclusion that section 706 of the Telecommunications Act of 1996 represents an affirmative grant to the FCC of authority to regulate broadband providers.<sup>1</sup> On the other hand, Part III of the opinion imposed strict limits on the ways in which the FCC may exercise that authority.<sup>2</sup> Most notably for the network neutrality debate, the prohibition of common carriage obligations appears to leave little room for the FCC to impose a nondiscrimination mandate. Speculation about the opinion's implications for the future has only just begun.

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<sup>1</sup> *Verizon v. FCC*, No. 11-1355, slip op. at 19–27 (D.C. Cir. Jan. 14, 2014).

<sup>2</sup> *Id.* at 27–31.

Much can (and surely will) be said about the implications of the D.C. Circuit's decision. For the time being, I thought I would offer a few quick observations about the statutory source of the FCC's authority over broadband providers, which may well prove to be the most important aspect of the D.C. Circuit's decision.

### **The Missing Argument**

The D.C. Circuit first concluded that section 706(a) represents an affirmative grant of authority to the FCC. The FCC ruled in 1998 that section 706(a) did not represent an affirmative grant of authority,<sup>3</sup> and the D.C. Circuit relied on that determination in 2010 when holding that section 706(a) did not give the FCC the statutory authority to sanction Comcast for using TCP resets to rate-limit BitTorrent,<sup>4</sup> widely regarded as the most high-profile violation of network neutrality principles to date. The D.C. Circuit revisited that determination in *Verizon v. FCC*, observing quite properly that agencies are allowed to change their minds so long as they acknowledge that they are changing their positions and set forth their reasons for doing so. So long as the agency properly explains its change of heart, courts will defer to any reasonable interpretation that is not precluded by the language of the statute.<sup>5</sup>

The threshold question is whether Congress has directly spoken to the precise question at issue.<sup>6</sup> This inquiry naturally requires an examination of the statutory text. Section 706(a) provides:

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 (including, in particular, elementary and secondary schools and classrooms) 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.*<sup>7</sup>

The D.C. Circuit focused on the last phrase, holding that ordering the FCC to utilize “regulating methods” represented an affirmative grant of authority.<sup>8</sup>

This last phrase, “other regulating methods that remove barriers to infrastructure investment,” is a classic “catchall” clause. As a result, the traditional canon of statutory construction known as *ejusdem generis* “limits general terms [that] follow specific ones to matters similar to those specified.”<sup>9</sup> In other words, the scope of the catchall phrase is limited by the terms that precede it. The joint brief submitted by Verizon and MetroPCS raised precisely this argument.<sup>10</sup> A related

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<sup>3</sup> Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd. 24012, 24047 ¶ 77 (1998).

<sup>4</sup> Comcast Corp. v. FCC, 600 F.3d 642, 658 (D.C. Cir. 2010).

<sup>5</sup> *Verizon v. FCC*, slip op. at 19–22.

<sup>6</sup> Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

<sup>7</sup> 47 U.S.C. § 1302(1) (emphasis added).

<sup>8</sup> *Verizon v. FCC*, slip op. at 22.

<sup>9</sup> Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2171 n.19 (2012).

<sup>10</sup> Joint Brief for Verizon and MetroPCS at 30, *Verizon v. FCC* (D.C. Cir. Jan. 14, 2014) (No. 11-1355).

canon known as *noscitur a sociis* “counsels that a word is given more precise content by the neighboring words with which it is associated.”<sup>11</sup> In other words, if an ambiguous statutory term is embedded in a list, courts should construe it in light of the other terms in the list.

The first two items in the list contained in section 706(a), “price cap regulation” and “regulatory forbearance,” are deregulatory in focus. The third item, “measures that promote competition in the local telecommunications market,” also does not at first blush lend itself to a reading that would impose heavier regulatory obligations on broadband providers. The FCC concluded that promoting competition in access and content would ultimately stimulate demand for greater investments in infrastructure.<sup>12</sup> The FCC based this conclusion on a single empirical study, and one that focused on the cable television industry (not broadband) and was unable to find clear evidence of discrimination.<sup>13</sup> Against this is arrayed the growing corpus of empirical studies showing that access requirements deter investment and competition in local telecommunications services.<sup>14</sup> Even more importantly, this construction would be significantly out of step with the other terms contained in the list.

Whether the catchall can support the regulation of broadband providers thus depends on whether a court is willing to accept a fairly indirect argument that is in considerable tension with the empirical findings of the majority of the peer-reviewed literature and with the text and structure of section 706(a). The D.C. Circuit was willing to do so.<sup>15</sup> Should the FCC decide to appeal the decision, it remains to be seen whether the Supreme Court will agree.

### **The Missing Section 706 Report**

The D.C. Circuit held that section 706(b) also gave the FCC statutory authority to regulate broadband providers. If the FCC concluded that “advanced telecommunications capability is [not] being deployed to all Americans in a reasonable and timely fashion,” it “shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”<sup>16</sup> Again, the specified means of “removing barriers to infrastructure investment and by promoting competition in the telecommunications market” mirror the language of the third and fourth clauses of section 706(a). Thus, the same arguments advanced above apply.

More importantly, the FCC is only authorized to act under section 706(b) if it finds that advanced telecommunications capability, defined by the statute to include broadband,<sup>17</sup> is not being deployed to all Americans in a reasonable and timely fashion. The first five of the annual

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<sup>11</sup> Freeman v. Quicken Loans, 132 S. Ct. 2034, 2042 (2012).

<sup>12</sup> Preserving the Open Internet, Report and Order, 25 FCC Rcd. 17905, 17910–11 ¶ 14, 17922 ¶ 28, 17927–31 ¶¶ 38–42 (2010).

<sup>13</sup> *Id.* at 17918 ¶ 23 n.60 (citing Austan Goolsbee, *Vertical Integration and the Market for Broadcast and Cable Television Programming*, Paper for the Federal Communications Commission 31–32 (Sept. 5, 2007)).

<sup>14</sup> Christopher S. Yoo, *Comparing U.S. and European Broadband Deployment* (forthcoming 2014).

<sup>15</sup> *Verizon v. FCC*, slip op. at 31–40.

<sup>16</sup> 47 U.S.C. § 1302(b).

<sup>17</sup> *Id.* at § 1302(d)(1).

reports issued pursuant to section 706 had concluded that broadband deployment did meet this standard. Only in the sixth report, the last one issued prior to the *Open Internet Order*, did the FCC find broadband deployment to be inadequate.

Under the previous Administration, the FCC was criticized for its tardiness in issuing annual reports. As a general matter, the current Administration has better adhered to the statutory deadlines, consistently issuing its annual section 706 reports somewhere between May and August and with the last report being issued in August 2012. If the FCC had held to its current pattern, it should have issued its most recent section 706 report no later than August 2013. Five months have passed since that date with no sign of the report.

One can only speculate as to why. Interestingly, the primary basis for the FCC's finding in its last report that broadband deployments was not reasonable and timely was the fact that as of June 2011, 19 million Americans (or 6% of the population) lacked access to broadband, which the FCC defined as service providing download speeds of 4 Mbps.<sup>18</sup> Commissioner Pai pointed out, however, that if wireless broadband were included, the number of unserved Americans dropped to 5.5 million or 1.7% of the population.<sup>19</sup> Moreover, the last section 706 report was based on data reflecting the earliest stages of the deployment of the fourth-generation wireless technology known as LTE. Since that time, Verizon has completed its LTE buildout. AT&T's LTE network now reaches 80% of the U.S. population and is scheduled for completion by the end of 2014. Sprint and T-Mobile are racing to catch up, each reaching 200 million by the end of 2013.<sup>20</sup> In addition, recent studies indicate that Verizon's, AT&T's, and T-Mobile's LTE offerings provide an average download speed of 12 to 19 Mbps and peak download speeds of 49 to 66 Mbps.<sup>21</sup> The near ubiquity of LTE suggests that the number of people who cannot access broadband that meets or exceeds the FCC's 4 Mbps standard is now likely to be considerably less than the 1.7% reported as of June 2011. And if broadband deployment is reasonable and timely, section 706(b) provides the FCC no authority to act.

## Conclusion

These are a few initial thoughts about the D.C. Circuit's opinion itself. There are doubtlessly some important responses to the concerns I have raised, and I look forward to exploring the nuances of the various arguments. In the meantime, one of the few clear implications is that the lull that had settled over Capitol Hill, the FCC, the public interest community, and the industry while waiting for the D.C. Circuit to render its opinion is now over. The next round of the debate over network neutrality has only just begun.

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<sup>18</sup> Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, Eighth Broadband Progress Report, 27 FCC Rcd. 10342, 10344 ¶ 1, 10370 ¶ 46 10400-01 ¶ 135 (2012).

<sup>19</sup> *Id.* at 10519-20 (Pai, Comm'r, dissenting).

<sup>20</sup> Christopher S. Yoo, *Technological Determinism and Its Discontents*, 127 HARV. L. REV. 914, 923-24 (2014).

<sup>21</sup> *Id.* at 923.

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The Free State Foundation is an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland.