Verizon v. Federal Communications Commission ('FCC')

United States Court of Appeals for the District of Columbia Circuit

The court ruled that the FCC could not impose anti-discrimination and anti-blocking requirements on broadband internet providers, in view of its 'Open Internet Order,' in a decision that could significantly impact net neutrality.

On 14 January 2014, the US Court of Appeals for the District of Columbia Circuit issued its long-awaited decision in the 'net neutrality' case, otherwise known as Verizon v. FCC[1].

In 2005, the FCC reviewed how it should classify digital subscriber line ('DSL') services, deciding to classify DSL services as 'information services,' which meant a lighter regulatory scheme. Under the federal Communications Act, telecommunications services are subject to stringent 'common carrier' regulations mandating, among other things, that such carriers provide services on a non-discriminatory basis, on just and reasonable conditions, treating similarly-situated customers the same. Information services, on the other hand, are subject to a much 'lighter' regulatory scheme. The FCC had previously categorised cable modem services as an 'information service.'

However, the FCC wanted to create certain protections in the emerging broadband marketplace. The agency stated that consumers were entitled to certain rights regarding broadband services, including the right to:

- access the lawful internet content of their choice;
- run applications and use 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.

As broadband services flourished, the FCC sought to solidify the internet's openness. At the end of 2010, the FCC issued its 'Open Internet' (or 'Net Neutrality') rules.

The Open Internet rules encompass three main principles:

- Transparency: Broadband providers must disclose accurate information regarding their network management practices, performance, and the commercial terms of their broadband services.
- No blocking: Fixed broadband providers may not block lawful content, applications, services, or non-harmful devices. Mobile broadband providers may not block lawful websites, or applications that compete with their voice/video telephony services.
- No unreasonable discrimination: Fixed broadband providers may not unreasonably discriminate in transmitting lawful network traffic over a consumer's broadband internet access service. Unreasonable discrimination of network traffic could take the form of particular services or websites appearing slower or degraded in quality. The FCC's 2010 order also provided that 'as a general matter, it is unlikely that pay for priority would satisfy the "no unreasonable discrimination" standard.'

However, the no blocking and no discrimination rules are subject to 'reasonable network management.' A network management practice is 'reasonable' if 'it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.'

Verizon appealed the FCC's rules to the US Court of Appeals for the District of Columbia Circuit. Verizon challenged the Open Internet rules on various grounds, including the agency's lack of authority to treat broadband internet services like common carrier services. Verizon also asserted that the FCC lacked statutory authority from Congress. The court heard oral arguments in September, where the three judge panel seemed skeptical of the FCC's ability to prohibit internet service providers from discriminating against service providers on their networks.

The DC Circuit's decision

The FCC has authority to issue Open Internet rules

The court rejected Verizon's arguments as to the FCC lacking authority to issue Open Internet rules. The court concluded that Section 706 of the Telecommunications Act of 1996 provides the FCC with the authority to adopt regulations over broadband services. Specifically, Section 706 provides that the FCC 'shall 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."[2]

The statutory provision also requires the FCC to conduct a regulatory inquiry 'concerning the availability of advanced telecommunications capability."[3] If the FCC finds that advanced telecommunications capability is not 'being deployed to all Americans in a reasonable and timely fashion,' then the agency 'shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[4]

Verizon argued that Section 706 was more of a congressional statement of policy. However, the court applied the precedent of Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.[5], which generally grants deference to

agency interpretations of statutory authority, concluding, 'if we determine that the Commission's interpretation of section 706 represents a reasonable resolution of a statutory ambiguity, we must defer to that interpretation.' Here, the court reviewed the legislative history of Section 706. The court concluded that the Senate Report describing Section 706 characterised it as a 'necessary fail-safe...intended to ensure that one of the primary objectives of the [Act]- to accelerate deployment of advanced telecommunications capability – is achieved.'[6] The court reasoned, then how could something designed as a 'fail-safe' ensure the FCC's ability to promote advanced services if there were no actual authority concurred by Congress to the agency?

Further, the court held that the agency 'reasonably interpreted section 706(b) to empower it to take steps to accelerate broadband deployment if and when it determines that such deployment is not "reasonable and timely."' The court noted that the FCC had conducted its annual survey of broadband deployment and concluded in July 2010 that broadband deployment to all Americans was neither reasonable nor timely. This conclusion triggered Section 706(b)'s mandate that the Commission take action, according to the FCC's interpretation.

The FCC cannot impose certain common carrier-type rules on broadband providers

Verizon raised an alternative argument on appeal that even if Section 706 granted the FCC affirmative authority to promulgate rules governing broadband providers, the Open Internet rules exceeded that authority. The FCC claimed that the open internet rules encourage deployment of advanced telecommunications capability by preventing broadband providers from blocking or discriminating against 'edge' (content) providers.

The court seemed to be tilting in the FCC's favour, holding that the FCC 'has more than adequately supported and explained its conclusion that edge-providers innovation leads to the expansion and improvement of broadband infrastructure.' Further, according to the court, the FCC had supported and explained its conclusion that absent Open internet-type rules, 'broadband providers represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment.'

However, 45 pages into the court's decision, the court took a detour and ruled in Verizon's favour. The court reasoned that the anti-discrimination and anti-blocking rules subject broadband providers to common carrier treatment. Since the FCC had classified broadband providers as information service providers rather than common carriers, the regulations could not stand.

First, requiring broadband providers to serve all edge providers without 'unreasonable discrimination' was *per se* common carriage since it required broadband providers 'to hold themselves out "to serve the public indiscriminately"'. Second, as to the anti-blocking rules, the court concluded that the anti-blocking rules establish a minimal level of service. Further, the FCC's order issued with the Open Internet rules stated that broadband providers could not charge edge providers any fees for the minimum level of service. Requiring a minimum level of service for free imposed common carrier obligations on that minimum level of service.

The court upheld the Open Internet order's disclosure rules, vacated the anti-discrimination and anti-blocking rules, and remanded the case to the FCC for further proceedings 'consistent with this opinion.' The court did suggest that certain prospective rules might withstand scrutiny, if they 'left sufficient "room for individualized bargaining and discrimination in terms"' so as not to contravene the prohibition on common carrier treatment.

What's next?

Many stakeholders were upset with the court's ruling and vowed their commitments to 'net neutrality.' FCC Chairman Wheeler has indicated his support for an open internet and has suggested he may use the FCC's enforcement powers to go after broadband providers' abusive practices. Bills have already been introduced by Democrats in Congress to protect net neutrality while the FCC utilises the authority the DC Circuit held over broadband providers. And the FCC could appeal the decision to the US Supreme Court, though that seems unlikely. Alternatively, the FCC could re-classify broadband services as telecommunications services, and subject them to common carrier regulation. Such reclassification would likely face a huge political firestorm, as broadband providers do not wish to return to what they view as antiquated telecom rules.

Michelle W. Cohen Member and Chair of the E-Commerce Practice
Ifrah PLLC, Washington DC
michelle@ifrahlaw.com

1. http://www.cadc.uscourts.gov/internet/opinions.nsf/3AF8B4D938CDEEA685257C6000532062/$file/11-1355-1474943.pdf
2. 47 U.S.C. Sec. 1302(a).
3. Ibid. at Sec. 1302(b).
4. Ibid.
5. 467 U.S. 837 (1984).
6. S. Rep No. 104-23 at 50-51.