



In a Case Hinging on Regulatory Authority, a Minor Victory for the FCC

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By Paul Barbagallo

Jan. 14 --In its decision gutting the Federal Communications Commission's net neutrality rules, the U.S. Court of Appeals for the District of Columbia Circuit managed to hand the agency a small but significant victory.

The court held, essentially, that section 706 of the Telecommunications Act of 1996 *can* serve as a source of authority for the FCC to regulate “broadband providers' treatment of Internet traffic” (*Verizon Commc'ns Inc. v. FCC*, D.C. Cir., 11-1355, 01/14/14; see related story).

“It is the first recognition by a court that the FCC has the power to protect the Internet under the existing provisions of the Act,” Pantelis Michalopoulos, a partner at Steptoe & Johnson LLP, who gave oral argument last September in defense of the FCC's *Open Internet Order* on behalf of Public Knowledge, Vonage Holdings Corp., and the National Association of State Utility Consumer Advocates, told Bloomberg BNA. “It is an important decision.”

In the end, however, the court concluded that the FCC's Open Internet rules amounted to “common carrier” regulation, and since the agency in 2002 had classified broadband Internet access service as a non-common carrier “information service,” rather than as a common-carrier “telecommunications service,” the rules themselves were invalid. In practical effect, what this means is that every company that provides a pipeline through which consumers gain access to the Internet, such as Comcast Corp., Verizon Communications Inc., and AT&T Inc., could begin blocking websites or treating their own web content better than that of rivals. It also means that the FCC could theoretically become a more effective Internet regulator.

New Jurisdiction Over Broadband Communications?

“The ruling could be read to add a whole new title to the Communications Act, giving the FCC jurisdiction over 'broadband communications,'” Geoffrey Manne, executive director of the International Center for Law & Economics, told Bloomberg BNA. “All the FCC has to do now is demonstrate that [its] regulations are designed to encourage the deployment of 'advanced telecommunications' capability. And rest assured that they [the FCC] will try to bring the floor of

permissible activity up to as high as they can ... as long as they convince three judges that it doesn't constitute common carriage.”

Berin Szoka, president of the think-tank TechFreedom, which had filed an amicus curiae brief in the case along with the Competitive Enterprise Institute, the Cato Institute, and the Free State Foundation, said the FCC could even potentially do this without “promulgating regulations,” but by taking action in a “sly,” case-by-case way.

“Section 706 covers 'advanced telecommunications,' which is pretty broad, and potentially subject to expansion in the future,” Szoka told Bloomberg BNA. “The ruling could give the FCC more leeway now to regulate not just broadband service providers, but the Internet itself.”

After Long, Hard Fight, a Win for FCC on 706

For the FCC, enforcing the concept of what is called network neutrality has tested the limits of the agency's authority.

The 333-page Communications Act of 1934, as amended by the Telecommunications Act of 1996, mentions the word “broadband” three times, and the word “Internet” only 10. The 128-page Telecommunications Act itself mentions “broadband” only once.

However, Section 706(a) of the Telecommunications Act 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 enact net neutrality rules, in part, on sections 706(a) and 706(b). In essence, the agency's legal argument was this: If internet service providers started 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 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 the most, like rural America.

Throughout the case, Verizon had argued that neither sections 706(a) nor 706(b) conferred any authority on the commission to regulate broadband ISPs' handling of Internet traffic.

The court did not agree.

'Reasonable Interpretation.'

In its final decision, which was signed by two judges and joined in part by a third, the D.C. Circuit said that the “commission's current understanding of section 706(a) as a grant of regulatory authority represent[s] a reasonable interpretation of an ambiguous statute.”

“Of course, we might well hesitate to conclude that Congress intended to grant the Commission substantive authority in section 706(a) if that authority would have no limiting principle,” Judge David S. Tatel wrote for the majority. “The commission has identified at least two limiting principles inherent in Section 706(a). First, the section must be read in conjunction with other provisions of the Communications Act, including, most importantly, those limiting the commission's subject matter jurisdiction to 'interstate and foreign communication by wire and radio.' Any regulatory action authorized by Section 706(a) would thus have to fall within the commission's subject matter jurisdiction over such communications--a limitation whose importance this court has recognized in delineating the reach of the commission's ancillary jurisdiction. Second, any regulations must be designed to achieve a particular purpose: to 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.' Section 706(a) thus gives the commission authority to promulgate only those regulations that it establishes will fulfill this specific statutory goal--a burden that ... is far from 'meaningless.'”

As for 706(b), the court said the commission has “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.’”

“As with Section 706(a), it is unclear whether section 706(b), in providing that the commission 'shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market,' vested the commission with authority to remove such barriers to infrastructure investment and promote competition,” the court explained. “But the provision may certainly be read to accomplish as much, and given such ambiguity we have no basis for rejecting the commission's determination that it should be so understood. Moreover ... nothing in the regulatory background or the legislative history either before or after passage of the 1996 Telecommunications Act forecloses such an understanding. We think it quite reasonable to believe that Congress contemplated that the commission would regulate this industry, as the agency had in the past, and the scope of any authority granted to it by section 706(b)--limited, as it is, both by the boundaries of the commission's subject matter jurisdiction and the requirement that any regulation be tailored to the specific statutory goal of accelerating broadband deployment--is not so broad that we might hesitate to think that Congress could have intended such a delegation.”

'Significant Limitations' Seen

Though the court's ruling could be seen as an affirmation of the FCC's regulatory authority over broadband ISPs, former FCC Commissioner Robert McDowell said he sees “significant limitations.”

Among the options left now for the FCC are: (1) reclassifying broadband as a common carrier “telecommunications service”; (2) petitioning for en banc rehearing; (3) appealing the decision to the Supreme Court; or (4) rewriting the rules using a different rationale under section 706.

Commenting on the FCC's fourth and final option, McDowell pointed out that in its April 2010 ruling in *Comcast Corp. v. FCC*, 2010 BL 76102, 390 U.S. App. D.C. 111, 600 F.3d 642, 49 CR 1226, D.C. Cir., No. 08-1291, 04/06/10, the D.C. Circuit deferred consideration of the agency's assertion of Section 706 authority. It noted in particular that, in 1998, the FCC itself 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 *Comcast* court, that 1998 decision and the FCC's 2008 Comcast decision were clearly contradicted one another. Despite handing a defeat to the FCC in Comcast, the court left the door open for the agency to try again.

“In *Comcast*, the court said 'you didn't explain yourself very well. You might have some authority under 706, but you need to come back and explain it better,’” said McDowell, who as commissioner dissented from the FCC's decision to enact net neutrality rules.

“We have a similar ruling this time, and it's an extremely narrow path to walk,” he added, commenting about a potential new 706 approach. “There's no guarantee that the FCC would win in court for a third time.”