The Fate of Net Neutrality – What Will Be The FCC's Next Step?

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Net Neutrality is short-hand for an ongoing debate of over six years duration[1] about whether broadband providers should be permitted to differentiate between types of traffic flowing across their networks. For example, if a streaming video service is willing to pay more to a broadband provider, should that provider be allowed to give that video service's packets of data preferential treatment across its portion of the Internet "super highway?" Those in favor of net neutrality - regulations requiring broadband providers to treat all data on its network the same, *i.e.* with neutrality - argue that such regulation would promote innovation by treating equally content services and applications across the Internet. Proponents argue that new competitors will be more able to obtain a foothold with such "equal" treatment. Those opposed to the regulation argue, in part, that by denying broadband providers this alternative revenue source from edge providers willing to pay for preferential treatment - something like first class airfare - the public that is the end-user consumer necessarily pays more for its broadband internet access. Although the policy issue remains unresolved, while this debate has been raging, the Internet has become ever more fundamental to commerce and communication.

The January 14, 2012 decision by the United States Court of Appeal for the District of Columbia in *Verizon v. FCC*, Case No. 11-1355 provides no insight on how to resolve this political debate. The *Verizon* Court comments that its "task as a reviewing court is not to ascertain the wisdom of the *Open Internet Order* regulations [the FCC's order on Net Neutrality under review], but rather to determine whether the Commission has demonstrated that the regulations fall within the scope of its statutory grant of authority." *Verizon* at 17. In short, the *Verizon* Court concluded that the FCC had statutory authority to regulate common carriers in such a manner but, citing a prior order from the FCC, ultimately concluded that the FCC had already decided that broadband providers were not common carriers.

The *Verizon* Opinion is the D.C. Circuit's second decision holding that the FCC had exceeded its regulatory authority in enacting Net Neutrality regulation. If history is any indication, this is likely not the last time that the D.C. Circuit will confront this issue and next time it seems likely that the FCC will prevail. Interestingly, the FCC is not likely to change the scope, breadth or reach of its proposed Net Neutrality regulation, but, instead, it will finally provide the proper foundation for its authority to act.

In its 2010 decision, *Comcast Corp. v. FCC,* 600 F.3d 642 (D.C. Cir. 2010), the D.C. Circuit "held that the FCC had failed to cite any statutory authority that would justify its order compelling a broadband provider to adhere to open network management practices." *Verizon* at 4. While the FCC had cited for its authority section 706 of the Telecommunications Act, the *Comcast* Court noted that the FCC had previously determined that this provision was simply a statement of policy and not an independent grant of authority pursuant to which the FCC could enact regulations. *Verizon* at 19.

Shortly after the *Comcast* decision, the FCC reenacted its Net Neutrality regulations by issuing the *Open Internet Order - In re Preserving the Open Internet*, 25 F.C.C.R. 17905 (2010). As part of the *Open Internet Order*, the FCC reinterpreted section 706 as not limited to simply a statement of policy but instead the section provided a legislative grant of authority. The *Verizon* Court, first decided that the FCC's "current understanding of section 706(a) as a grant of regulatory authority represent[ed] a reasonable interpretation of an ambiguous statute." *Verizon* at 22. The *Verizon* Court then concluded that the *Open Internet Order* fell within the scope of that authority. *Id.* at 44.

Despite clearing the last hurdle that blocks its last promulgation of Net Neutrality regulation, the FCC again stumbled over one of its prior orders "classifying broadband providers not a ‘telecommunications services' but instead as providers of ‘information services.'" *Verizon* at 45 (quoting *In re Inquiry Concerning High-Speed Access to Internet Over Cable and other Facilities*, 17 F.C.C.R.4798 at 4824 ¶ 41 (2002). Congress grants the FCC the authority to treat a telecommunications carrier "as a common carrier under this [Act] only to the extent that it is engaged in providing telecommunications services." *Verizon*, at 45 (quoting 47 U.S.C. § 153(51)).

Seeing that the Communications Act defines a common carrier in a rather circular manner, the *Verizon* Court turned to common law for a satisfactory definition of a common carrier, "conclude[ing] that ‘the primary *sine qua non* of common carrier statutes is a quasi-public character, which arises out of the undertaking to carry for all people indifferently." *Verizon* Court at 48 (quoting *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (internal quotation marks omitted)). Since the purpose of the FCC Net Neutrality regulation is to prevent broadband providers from discriminating among edge providers utilizing the broadband providers' network to reach customers, the regulation would treat broadband providers as common carriers. Since the FCC has already determined that broadband providers do not provide telecommunication services, the FCC lacks the statutory authority to regulate them as common carriers. *Verizon* at 56.

While the *Verizon* Court determined that a limited portion of the FCC's Net Neutrality regulation did not amount to treatment of broadband providers as common carriers - in particular certain disclosure requirements, the *Verizon* Court, finally remanded the matter back to the FCC for further proceedings consistent with the court's opinion. *Verizon*, at 63.

The logical and likely next step will be for the FCC to reevaluate its prior order and decide whether it wishes to classify broadband providers as providing telecommunication services, which will allow the FCC to regulate them as common carriers, connecting what is likely the final dots for its authority to enact Net Neutrality regulations. As correctly pointed out by the *Verizon* Court, the propriety of Net Neutrality ultimately is a political or policy rather than a legal issue. Even if somehow the FCC fails again in establishing its authority to enact such regulations, if the political will remains, the FCC will go back to the drawing board, and, if that fails, the push will continue to have Congress enact laws explicitly giving the FCC the authority to regulate in this area.

As with much of the law and policy surrounding the internet, only the future can answer who is right in this debate about Net Neutrality. Will regulation of these important channels of commerce and communication enhance innovation and competition or is a "free market" best able to provide that? By the time the answer is known, however, the ability to change course will likely have passed and we may only be able to ponder what might have been, had an earlier and different decision been made.

[1]Article: *The Struggle over Net Neutrality*, New Developments Heat Up This Vital Internet and e-Commerce Issue, By Carole E. Handler.