Neutrality decision could empower FCC

By Bennett L. Ross

The reaction to Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014), in which the U.S. Court of Appeals for the D.C. Circuit vacated two of the three “neutrality” rules promulgated by the Federal Communications Commission, has been fairly predictable. Many who believe net neutrality regulation is essential to an open Internet lamented the decision as the end of the Internet as we know it. For others who view it as a solution in search of a problem, the case was hailed as a check on regulatory overreach. Largely lost in the hand-wringing and fist-pumping, however, has been an assessment of the legal framework adopted by the court — a framework that could vest the FCC with potentially expansive powers. As a result, the case represents the possibility for regulatory mischief that should be of concern to both sides of the net neutrality debate.

Background on Net Neutrality

Net neutrality traces its roots back more than a decade to requests by high-tech firms (“edge providers”) for the FCC to ensure the continued ability of consumers to enjoy unfettered Internet access. The FCC’s initial response was to adopt its 2005 Broadband Policy Statement, which set forth four principles to which broadband providers were expected to adhere.

The FCC sought to enforce its Broadband Policy Statement against Comcast after it allegedly interfered with its broadband customers’ ability to use peer-to-peer networking applications. Finding that Comcast’s practices were discriminatory and arbitrary and did not constitute reasonable network management, the FCC directed Comcast to make certain disclosures and submit a compliance plan. However, the D.C. Circuit vacated the FCC’s order in Comcast v. FCC, 600 F.3d 642 (D.C. Cir. 2010), holding that the FCC had not established statutory authority to regulate Comcast’s network management practices.

After Comcast v. FCC, the agency adopted net neutrality rules. These rules required that both fixed and mobile broadband Internet access providers disclose certain information about their practices and services (the “transparency rule”). Subject to reasonable network management practices, both fixed and mobile broadband providers were prohibited from blocking websites and applications, although this prohibition only extended to mobile providers insofar as the application being blocked was personally identifiable information because doing so would be at odds with the more restrained approach the courts generally have taken in considering the FCC’s authority.

A majority of the court rejected arguments that the FCC lacked authority to adopt net neutrality rules, upholding the rules under Section 706 of the Telecommunications Act of 1996, which generally directs the FCC to encourage broadband deployment. The D.C. Circuit recognized that the FCC’s Section 706 authority would be untenable if it had “no limiting principle.” The court concluded that regulation under section 706 was limited in two respects: first, any regulation would have to fall within the FCC’s subject matter jurisdiction over “interstate and foreign communication by wire and radio”; and, second, any regulation would have to be designed to encourage broadband deployment.

Finally, the D.C. Circuit was persuaded that the FCC’s net neutrality rules were within the agency’s Section 706 authority. The court agreed with the FCC that the rules were necessary to promote investment by edge providers, which would increase broadband demand by end users, which in turn would promote competition by broadband providers and thereby drive investment in broadband infrastructure. The D.C. Circuit concluded that the FCC’s theory was adequately explained and supported by the record.

In dissent, Senior Judge Laurence Silberman took issue with the majority’s Section 706 analysis. In Silberman’s view, the FCC’s net neutrality rules were not intended to accomplish either of the goals specified in the statute — “promote competition in the local telecommunications market” or “remove barriers to infrastructure investment.” Rather, the rules were designed to “‘protect[] consumer choice, free expression, end-user control, and the ability to innovate without permission,’” which, according to Silberman, evidenced “a Commission objective that exceeds the statutory authority granted in [Section 706].”

Silberman also was dismissive of the majority’s “limiting principles” on section 706 authority, which he labeled “illusory.” According to Silberman, neither principle would prevent the FCC from using Section 706 “carte blanche to issue any regulation that the Commission might believe to be in the public interest.”

The FCC’s New Section 706 Powers

The D.C. Circuit’s interpretation of Section 706 will encourage opportunistic efforts by some to seek expansion of the FCC’s regulatory powers. Indeed, almost immediately after Comcast and Netflix announced their paid peering agreement in February, there were calls for the FCC to regulate Internet backbone arrangements. The FCC’s net neutrality rules exempt the backbone from their reach, and the agency has noted previously that “[i]nterconnection between Internet backbone providers has never been subject to direct government regulation,” during which time such arrangements “thrived.” Nonetheless, those with an economic axe to grind or with an insatiable desire for regulation seek to mold the D.C. Circuit’s reasoning in support of FCC oversight of peering arrangements by framing the issue as a matter of promoting broadband deployment.

Missing from Verizon v. FCC and from the FCC’s order on review were meaningful limits on the potential reach of Section 706. For example, because surveys reflect that many adults who are not online decide not to buy broadband because of concerns about Internet privacy, some conceivably may argue that Section 706 authorizes the FCC to regulate edge providers’ privacy policies and their use of personally identifiable information because doing so could increase broadband adoption and thus promote broadband deployment. Similar arguments could be made to justify a host of proposed Internet regulations ostensibly tied to broadband deployment, such as restrictions on the unlawful access to copyrighted material on the Internet.

An expansive interpretation of Section 706 would be at odds with the more restrained approach the courts generally have taken in considering the FCC’s authority. For example, courts have held that the FCC’s “ancillary authority” does not vest the agency with “plenary authority” over cable providers or, as the D.C. Circuit held in Comcast v. FCC, broadband providers, rejecting regulation predicated on promoting “statutory objections.” As the court recognized then, Congress gave the FCC no express authority to regulate the Internet. To read Section 706 as a grant of plenary authority for the FCC to regulate the Internet as long as such regulation promotes broadband deployment would adopt a sweeping view of agency power previously eschewed by the courts in the ancillary authority context and could be vulnerable to challenge if the issue reached the Supreme Court.

Conclusion

Verizon v. FCC is not necessarily the last word on Section 706. Although the FCC declined to seek rehearing en banc or Supreme Court review, the scope of Section 706 is an issue before the 10th U.S. Circuit Court of Appeals in challenges to the FCC’s universal service and intercarrier compensation reform. If the 10th Circuit (or another court of appeals) disagrees with the majority’s reasoning, the Supreme Court may have the opportunity to address the proper interpretation of Section 706.

Even if Section 706 is construed to vest the FCC with potentially expansive power, politics may constrain its exercise. The FCC historically has been loath to “regulate” the Internet, both as a matter of congressional policy and domestic and international politics. Much of the Internet’s success has been attributed to this light touch approach. Perhaps for this reason, the FCC has gone out of its way to disclaim that its net neutrality rules constitute regulation of the Internet. However, it would be impossible for the FCC to continue taking this position if it were to seek to regulate backbone arrangements, privacy policies, or other aspects of the Internet under the guise of promoting broadband deployment.

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