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D.C. Circuit's Net Neutrality Ruling Leaves FCC With Broad Range of Options

INTERVIEW BY PAUL BARBAGALLO

The telecommunications world continues to watch and wait for Federal Communications Commission Chairman Tom Wheeler to respond to the U.S. Court of Appeals for the District of Columbia Circuit's decision in *Verizon v. FCC*.

Speaking at a Silicon Flatirons event Feb. 10, Wheeler said that he will, ''in the coming days,'' outline his plan for moving forward in the wake of the ruling.

However he chooses to proceed, the options for the FCC are numerous. While the court invalidated both the anti-blocking and anti-discrimination provisions of the FCC's *Open Internet Order*, it also held that Section 706 of the Telecommunications Act of 1996 *can* serve as a source of authority for the agency to regulate ''broadband providers' treatment of Internet traffic.'' Whether that will be enough for Wheeler to restore the *Open Internet Order* in a different form is still an open question.

Weighing in on the matter, Barbara S. Esbin, a former senior FCC attorney and now a partner with the Cinnamon Mueller law firm, tells Bloomberg BNA that the D.C. Circuit has actually given the FCC wide latitude to craft a response.

Bloomberg BNA: The D.C. Circuit held that Section 706 of the Telecommunications Act of 1996 does give the FCC some authority to regulate broadband Internet service providers. What can the FCC do now as a regulator in the broadband sector, based on your reading of the court's opinion?

Barbara Esbin: ''I think the FCC can do quite a lot. The authority that the majority opinion recognized under Section 706 [of the Telecommunications Act] is very, very broad. And that is the authority to regulate, effectively, the Internet. In this regard, I think the dissent was quite right. It is an extremely broad holding.

What 706 actually does is provide the commission and each state commission with regulatory jurisdiction over 'telecommunications' services and the authority to encourage the deployment, on a 'reasonable and timely basis, of advanced telecommunications capability,' to all Americans by utilizing, and this is the key phrase, 'price-cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.'

The key to the D.C. Circuit's decision was the phrase 'other regulating methods that remove barriers to infrastructure investment.' Under this view of 706 authority, the FCC can promote broadband deployment by regulating how broadband ISPs [Internet service providers] treat Internet content applications and services—the edge providers—and the FCC can restrain the economic relationship between these ISPs and edge providers. The only meaningful limitation recognized by the court—and it is meaningful—is that these restraints must not impose *per se* 'common carrier' status on the ISPs.

The court also sketched out a number of ways the FCC could achieve the fundamental goals of the net neutrality rules through means other than those used in the *Open Internet Order*, which was vacated by the court.

So, under the decision, the FCC can promulgate new rules without even the need to perform a market-power analysis. That alone confers a very broad scope for regulatory action—and it is a departure from how the commission would traditionally approach the questions 'Do I need to regulate?' and 'Is there a market failure?' Under the [court's] view, they [the FCC] don't have to do that.

So what are all the implications of this? If the *open Internet* is what is now officially recognized as the thing that spurs broadband demand and network investment, well, then you could say that anything that could improve the open Internet could also be said to go to increasing demand for broadband, therefore more investment, leading to more deployment. That's the reasoning that the court accepted, which supports the exercise of jurisdiction under 706. Indeed, under this view of section 706 authority, the FCC would have subject-matter jurisdiction over Internet content, services, and applications providers so long as they use wire or radio communications for their services . . . You could easily see Amazon.com Inc. or Hulu or Netflix Inc. coming under this definitional scheme so long as the FCC can link regulation of these upstream participants in the Internet ecosystem to consumer demand for broadband.

The only real constraint today would be that regulations not impose common carriage status on edge providers because they are classified as 'information service' providers under the Communications Act, just as ISPs are today. It's a pretty broad canvas on which to paint.''

Bloomberg BNA: Could the court's holding on 706 be read as giving the FCC broad new authority akin to that of the Federal Trade Commission?

Esbin: ''There are certainly some similarities, because the authority under each statute is quite broad, with the ultimate constraint being what the judiciary on

review is willing to accept in terms of the agency's supporting evidence and reasoning.

The FTC, under Section 5 of the Federal Trade Commission Act can challenge any 'unfair methods of competition. . .and unfair or deceptive practices in commerce.' It's an extremely broad mandate. It is considered a controversial provision . . . because it gives the FTC a lot of discretion to say what's unfair. It is notoriously difficult to distinguish what is fair and what is unfair competition. There's a line, and at some point it's crossed. But finding that line is not easy.

I know that when [the FTC] filed a complaint under Section 5 against Intel Corp. in 2009, it said that when the FTC uses Section 5, it's like a court in equity and can consider public values beyond those simply enshrined in the letter encompassed in the spirit of the antitrust laws. That's exactly what the FCC is saying here—that it is congressional policy that the Internet be open. It's going to look beyond simple antitrust competition issues to preserve that openness.

Even under Section 5, however, the FTC has to show that the entity it's seeking to move against has monopoly power in some markets. The D.C. Circuit Court's reading of Section 706 really does give the FCC expansive authority to use this otherwise undefined term 'other regulating methods'—so long as the FCC can plausibly tie the regulation to encouraging the deployment of 'advanced telecommunications capability' and as long as it avoids imposing common carrier status.''

Bloomberg BNA: The D.C. Circuit 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 vacated. So even with the court's holding on 706, what can the FCC do to try to restore the Open Internet Order, short of reclassification?

Esbin: ''At several points in the majority's decision, the court all but invited the FCC to reclassify broadband Internet access service as a [Communications Act] Title II common carrier telecommunications service. That would be a discretionary step, in some people's opinion, on the part of the FCC—whether they should do that; whether they can do that.

But, at the same time, the court provided the FCC with a virtual road map for adopting nondiscrimination and non-blocking rules that might not violate the prohibition on treating broadband ISPs as common carriers. Here the court was making a distinction between obligations that may use the word ''discrimination'' but still not rise to the level of *per se* common carrier status. It's a fine distinction, but this is the way the D.C. Circuit is viewing it.

The court more or less invited the FCC to re-adopt some form of the vacated rules but with a different form and different rationale. The court suggested that a nondiscrimination rule that requires offering connectivity on commercially reasonable terms and conditions that are negotiated individually with edge providers might not, at least as written, be *per se* common carrier regulations. That was the rationale that allowed the D.C. Circuit Court in 2012 to uphold the FCC's data-roaming rules, where the standard was that service has to be on 'commercially reasonable' terms and conditions.

The other suggestion that the majority made in this case was that [the FCC] could have a no-blocking rule that simply requires the broadband provider to offer edge providers access to their subscribers at a basic level of required service that slightly exceeds the level of service at which edge services are considered effectively usable by end users. (That was the FCC's standard for when you're blocking. If you render a service effectively unusable, then you would be found guilty of blocking. As long as your broadband leaves the edge service usable by end users, it'll be okay.) This form of no-blocking would nonetheless leave the providers free to negotiate on a individual basis with edge providers for higher levels of service, which the edge provider may be willing to pay for the privilege of better, faster, more assured delivery. The court said to the FCC, 'you didn't use this rationale, ... so we can't uphold your rules on this basis.' That is also a hint that if the FCC came back using this rationale, the court will give it another look.

I don't agree that because the vacated net neutrality rules are inherently identical to common-carriage obligations, there's no wiggle room here.''

Bloomberg BNA: Tom Wheeler has suggested that he may propose a 'case-by-case' approach to policing violations of network neutrality. Is that possible, in your view? And would Wheeler have to call for a vote by the full five-member commission on such a proposal?

Esbin: ''In some ways, a case-by-case approach is good, because the FCC may not be adopting overly proscriptive rules in a dynamic industry. However, I don't know how the commission could work on a case by case without first engaging in rulemaking activity. The FCC, like any administrative agency, can enforce statutory provisions that provide clear commands for provider behavior without the need to promulgate implementing regulations, publish them in the *Federal Register*, and codify them in the Code of Federal Regulations. So, for example, Section 201(b) of the Communications Act states that 'all charges, practices, classifications, and regulations for and in connection with [providing] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.' That's a self-executing statutory command to providers, telling them what they can and can't do. In some ways, it's like section 5 of the Federal Trade Commission Act.

But when you look at Section 706, it's not directed at service provider behavior at all. It's directed at the FCC and state commissions with authority over telecommunications service. So without the adoption of an intervening rule of conduct telling service providers what behavior is permitted and what behavior is prohibited, how is a broadband provider going to be put on notice as to what the law requires of them? I think that's a big problem under Section 706.

So what could the FCC do? In my view, you cannot enforce a 'policy statement' that was not adopted with the intent of also adopting some binding rules of behavior for the industry and that was codified and put in the *Federal Register*. If Chairman Wheeler decides that the best way to proceed is to adopt new policy principles to guide behavior, that's probably a very good thing to do and I imagine it would garner some support. But you cannot then enforce that policy statement as if it were a

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rule with binding legal effect unless you adopted it in a rulemaking. And that was the problem when the FCC tried to enforce a 2005 policy statement [on net neutrality] against Comcast Corp. in 2008.

In the end, if you're going to enforce something, you need a rule of law, one with binding legal effect—and for the FCC, that means a rule adopted pursuant to the Administrative Procedure Act.

As a partner with Cinnamon Mueller, Esbin advises clients on the FCC's broadband Internet regulations, cable and telecommunications regulatory matters, and access to content, both traditional and online. Prior to joining Cinnamon Mueller, Esbin spent two years as senior fellow at The Progress & Freedom Foundation, a Washington, D.C.-based think tank studying communications law and policy in the digital age. She also served for over 14 years at the FCC, most recently as special counsel in the FCC Enforcement Bureau's Market Disputes Resolution Division. Before joining the Enforcement Bureau, she spent four years as associate bureau chief in the commission's Media Bureau. She also has served as associate bureau chief of the FCC's Cable Services Bureau, special counsel for competition and senior policy advisor in the Wireless Telecommunications Bureau, and attorney-advisor and assistant tariff division chief in the Common Carrier Bureau.