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# Verizon v. FCC

## 740 F.3d 623 (D.C. Cir. 2014)

SAPHAIPONE MARGARET DUANGPANYA\*

### BACKGROUND

“Net neutrality,” sometimes referred to as the “Open internet,” is the principle that broadband providers should treat all Internet traffic the same—regardless of the source—to give consumers the freedom to choose which applications and services to use, and what lawful content they want to create, access, and/or share with others.<sup>1</sup> The concept of net neutrality has proven to be a highly contested issue. Advocates of net neutrality fear that broadband providers may begin to offer different levels of Internet connectivity, and could begin limiting end-user subscribers’ access to certain edge providers<sup>2</sup> such as YouTube, Netflix, Amazon, and iTunes, in an effort to collect fees from certain edge providers. Thus, proponents of net neutrality argue that it promotes competition and fosters investment and innovation. Those against net neutrality contend that restricting broadband providers from giving preferential treatment to certain edge providers will impede innovation. Their argument is that broadband providers would lose potential revenue made from edge providers willing to pay for faster access on the company’s broadband network relative to other Internet traffic.

In this ongoing debate, defendant, the Federal Communications Commission (FCC), is a proponent of net neutrality and issued its own set of guidelines in 2005 in an attempt to bolster this principle of Internet openness. The FCC, which was created by the Communications Act of 1934,<sup>3</sup> has the power to regulate telecommunications, and therefore has the authority to enact net neutrality regulations. Though the FCC’s net neutrality rules have no binding legal effect, it used the guidelines in its ongoing policymaking activities to promote Internet openness. Attempting to enforce these guidelines, the FCC issued an order censuring Comcast Corporation for violating its new network neutrality policy.<sup>4</sup>

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1. See *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014).

2. “Edge providers are those who, like Amazon or Google, provide content, services, and applications over the Internet, while end users are those who consume edge providers’ content, services, and applications.” *Id.* at 629.

3. Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151–62 (2012)).

4. See *In re Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C.R. 13028 (2008).

In 2007, the FCC discovered that Comcast was interfering with its subscribers' use of peer-to-peer networking applications.<sup>5</sup> In its order, the FCC stated that it believed it had jurisdiction over Comcast's network management practices, and that Comcast's practice of interfering with consumer access directly contradicted the FCC's net neutrality guidelines.<sup>6</sup> Despite Comcast's acquiescence to the order, which required the adoption of new bandwidth management practices, it appealed the order to the D.C. Circuit Court of Appeals arguing that the FCC had no jurisdiction to regulate Comcast's network management practices. The court agreed with Comcast, and rejected the FCC's assertion of ancillary jurisdiction, concluding that the Communications Act did not give the FCC the power to regulate broadband Internet.<sup>7</sup> The court further held that the FCC failed to cite any statutory authority that would justify the issuance of its order requiring Internet service providers to comply with network neutral management practices.<sup>8</sup> Although the court found that the FCC lacked the power to enforce its regulation, it suggested that the FCC might have other jurisdictional arguments under the Communications Act.

After *Comcast*, the FCC released the "Open Internet Order."<sup>9</sup> The Open Internet Order sought to incorporate the FCC's net neutrality guidelines into the official regulations of the FCC. The proposed code included the 2005 guidelines, which were redrafted into four rules, and also contained three additional rules prohibiting Internet service providers from discriminating amongst lawful Internet connections and content.<sup>10</sup> These new rules, regarding nondiscrimination, anti-blocking, and transparency were challenged by the Plaintiff, Verizon, under a petition for review filed directly with the D.C. Circuit.<sup>11</sup> Verizon challenged the Open Internet Order on the following grounds: (1) the FCC lacked the affirmative statutory authority to create the rules; (2) the FCC's decision to enforce the rules was arbitrary and capricious; (3) the rules violated the provisions of the Communications Act that prohibits the FCC from regulating broadband providers as common carriers; and (4) the rules violated Verizon's First Amendment right prohibiting uncompensated takings.<sup>12</sup>

## ISSUE

The court limited its analysis to Verizon's first three arguments and addressed the following issues: (1) whether the FCC possess the statutory authority to impose the rules included in its Open Internet Order; (2)

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5. *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010).

6. *Id.* at 645.

7. *Id.* at 661.

8. *Id.*

9. *In the Matter of Preserving the Open Internet Broadband Indus. Practices*, 25 F.C.C.R. 17905 (2010).

10. *Id.* at 17992.

11. *Verizon v. FCC*, 740 F.3d 623, 634 (D.C. Cir. 2014).

12. *Id.*

whether the FCC's decision to impose its rules was arbitrary and capricious; and (3) whether the rules contradict statutory provisions in the Communications Act prohibiting the FCC from treating broadband providers as common carriers.

## DECISION

The court held that the Open Internet Order could not be enforced in its entirety. The court reasoned that while the FCC had the statutory authority to enforce parts of the Open Internet Order under § 706 of the Telecommunications Act of 1996 (the "Telecommunications Act"),<sup>13</sup> it could not impose requirements that expressly contradict existing statutory regulations classifying broadband providers in a way that exempted them from regulation as common carriers.

## REASONING

### I. STATUTORY AUTHORITY

The FCC cited a myriad of statutory provisions to support its authority to enact the rules contained in its Open Internet Order. The FCC argued that § 1302 of the Telecommunications Act gave it the requisite authority to enforce its rules because the statute requires it to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."<sup>14</sup> The statute continues that should the FCC find that "'advanced telecommunications capability is [not] being deployed to all Americans in a reasonable and timely fashion,' it 'shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.'"<sup>15</sup>

In response, Verizon argued that the provisions cited by the FCC do not grant them statutory authority, but rather are mere statements of congressional policy. Verizon further asserted that even if the sections granted the FCC substantive authority, the scope of such authority does not allow the FCC to regulate broadband providers in the manner the provided in the Open Internet Order.

In assessing whether the FCC had the requisite statutory authority to enact the Open Internet Order, the court deferred to the Supreme Court's reasoning in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,

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13. Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C. (2012)).

14. 47 U.S.C. § 1302(a) (2012).

15. *Id.* § 1302(b).

*Inc.*<sup>16</sup> to evaluate the language of §§ 1302(a) and 1302(b) of the Telecommunications Act.<sup>17</sup> The court concluded that since the FCC's interpretation of § 1302 was reasonable in light of the statute's ambiguity, it would defer to the Supreme Court's interpretation and hold that §1302 grants the FCC the requisite statutory to promulgate the Open Internet Order.

## II. ARBITRARY & CAPRICIOUS

Pursuant to the Administrative Procedure Act ("APA"),<sup>18</sup> the court also ascertained whether the FCC's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>19</sup> The court once again deferred to the judgment of the FCC, holding that its rules encouraging net neutrality in order to promote innovation and protect consumer interests were "sufficiently tailored" to the goal of promoting broadband deployment—which fell within the FCC's scope of authority under §1302.<sup>20</sup>

## III. COMMUNICATIONS ACT

The final issue before the court was whether the nondiscrimination and anti-blocking rules in the Open Internet Order contravened statutory provisions in the Communication Act by allowing the FCC to regulate broadband and Internet service providers as common carriers.

Sections 153(51) and 332(c)(2) of the Communications Act restrict the FCC from treating providers of information services—or broadband providers—as common carriers.<sup>21</sup> The FCC claimed preventing broadband providers from discriminating against edge providers would promote investment and development, and stimulate competition, which legitimizes the Open Internet Order rules and the actions of the FCC.<sup>22</sup> Verizon argued that the ability of the FCC to create and enforce these rules fell outside the scope of the statutory authority granted to it under §1302 of the Telecommunications Act.

The court agreed with Verizon, holding that the FCC's classification of broadband and providers of information services as common carriers directly contradicted portions of the Communications Act, which only allows telecommunication service providers to be regulated as common carriers.<sup>23</sup>

The FCC highlighted that Congress passed the Telecommunications

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16. 467 U.S. 837 (1984).

17. *Verizon*, 740 F.3d at 635.

18. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C. (2012)).

19. 5 U.S.C. § 706(2)(A) (2012).

20. *Verizon*, 74 F.3d at 637.

21. *Id.* at 650; *see also* 47 U.S.C. §§ 153(51), 332(c)(2) (2012).

22. *Verizon*, 74 F.3d at 635.

23. *Id.* at 650.

Act after the Communications Act, thus when it acted under § 1302, it was not subject to the §§ 153(51) and 332(c)(2) restrictions prohibiting it from classifying entities other than telecommunication service providers as common carriers.<sup>24</sup> The court quickly dismissed the FCC's argument, and reminded it that since § 153(51) was also included in the Telecommunications Act, it was still subject to the elucidated restrictions.

The court proceeded to evaluate the §§ 153(51) and 332(c)(2) restrictions to determine if the Open Internet Order treated broadband service providers as common carriers within the definition of the section. After concluding the statutory language was ambiguous, the court again deferred to the Supreme Court's reasoning in *Chevron* to appraise whether the FCC's interpretation of the term "common carrier" was reasonable. The court held that it was not.

The FCC argued that an entity is not a common carrier if it is given the freedom to decide how to negotiate with its customers. Since the Open Internet Order only regulated the relationships between broadband providers and edge providers, the rules could not be classified as regulating common carriers if the broadband providers' autonomy remained intact.<sup>25</sup> The court disagreed, holding that the broadband providers had the freedom to, "make individualized decisions . . . whether and on what terms to deal."<sup>26</sup> The court concluded that since the anti-blocking and nondiscrimination rules in the Open Internet Order unduly regulated the broadband providers' network management practices, the provisions clearly regulated common carriers and could not be enforced.

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24. *Id.*

25. *Id.* at 653.

26. *Id.* at 651 (internal quotation omitted).

