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Net Neutrality: The FCC's Authority to Regulate Broadband Internet Traffic Management

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Summary

A major debate over the government's role with respect to the regulation of the Internet is currently occurring. Legally, one of the biggest questions is to what extent the Federal Communications Commission (FCC or Commission) currently has the authority to regulate the ways in which Internet service providers (ISPs) manage Internet traffic over their networks. On December 21, 2010, the Commission adopted new open Internet rules in its Open Internet Order. The rules required broadband Internet service providers to disclose their network traffic management policies and prohibited them from blocking any lawful content from travelling over their networks. Furthermore, the rules prohibited fixed broadband Internet service providers from unreasonably discriminating against any particular content.

The rules were challenged in federal court by a number of different industry participants. Verizon, in its suit, argued that, policy considerations aside, the FCC had not asserted adequate statutory authority to issue the rules. In January of 2014, the Court of Appeals for the District of Columbia issued a decision finding that the FCC did have the authority under Section 706 of the Telecommunications Act of 1996 to issue the rules. However, the court vacated both the anti-blocking and anti-discrimination rules, nonetheless. The court found that, although the FCC had reasonably interpreted the authority granted to it by Section 706, the agency could not promulgate rules under that section that otherwise violated the Communications Act of 1934. Because the anti-blocking and anti-discrimination rules were prohibited by another portion of the Communications Act, the court struck down the rules. This report will review the Open Internet Order and the court's decision, as well as examine the FCC's authority to regulate the management of broadband Internet traffic in the wake of the decision.

For further information on the policy aspects of this issue, see CRS Report R40616, *Access to Broadband Networks: The Net Neutrality Debate*, by Angele A. Gilroy.

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Introduction

Some degree of Internet traffic management is necessary for networks to function effectively. For example, in order for voice conversations to occur over the Internet, the data packets encoding the communications must arrive in rapid sequence. Long delays between the arrival of voice data packets would make voice conversations over the Internet impossible to conduct. Prioritization of voice data packets over other packets traveling simultaneously over the same network ensures clear voice transmissions, while minimally delaying other network traffic. Logically, if network managers have the power to prioritize data packets, they also have the power to subordinate them. This means network managers have the power to render the applications that depend on packet-prioritization (like voice or video applications) useless. Accordingly, there must be a line between network management that is necessary to provide quality service to users, and network management that is anti-competitive or otherwise harmful to the free exchange of information. Some argue that it is necessary to regulate network management practices in order to ensure that Internet users are able to receive any lawful content that exists on the Internet without fear that a broadband Internet service provider might interfere to degrade the transmission of that content.[1] Others argue that such regulation is unnecessary. The Federal Communications Commission (FCC or Commission) has been attempting to address this issue for a number of years.

In 2005, the FCC issued its Internet Policy Statement.[2] The Internet Policy Statement endeavored to express the FCC's opinion that broadband consumers should have access to all lawful content on the Internet and that all lawful applications should be usable on those networks. The agency also made clear that it believed users' rights should be limited by the needs of broadband providers to reasonably manage their networks. While the Policy Statement was not promulgated into regulation, the FCC maintained that it had sufficient authority to enforce the principles should the need to do so arise.[3]

Two years after the release of the Internet Policy Statement, through various experiments by the media, most notably the Associated Press, it was discovered that Comcast Corporation (Comcast) was intermittently interfering with the use of an application called BitTorrent™ and, possibly, other peer-to-peer (P2P) file sharing programs on its network, as a method of traffic management.[4] In response to a petition from Free Press for a declaratory ruling that Comcast's blocking of P2P applications was not "reasonable network management," the FCC conducted an investigation into Comcast's network management practices.[5] The FCC determined that Comcast

[1] For more information regarding the policy debate related to net neutrality see CRS Report R40616, *Access to Broadband Networks: The Net Neutrality Debate*, by Angele A. Gilroy.

[2] In the Matters of the Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, 20 FCC Rcd 14986 (2005) [hereinafter FCC's Network Management Principles].

[3] *Id*.

[4] Peter Svensson, Comcast Blocks Some Internet Traffic, AP Testing Shows, Associated Press, October 19, 2007.

[5] In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications and Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," 23 FCC Rcd 13028 (2008) [hereinafter Comcast Decision].

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had violated the agency's Internet Policy Statement when it blocked certain applications on its network and that Comcast's practices were not "reasonable network management." Comcast disputed the FCC's authority to issue such a ruling and appealed the decision to the U.S. Court of Appeals for the D.C. Circuit. The court held that the FCC did not make a proper argument for asserting jurisdiction over network management practices and vacated the order against Comcast.[6]

Following the *Comcast* ruling, the FCC issued what has come to be known as the Open Internet Order, asserting a new primary basis for its authority to regulate broadband network management.[7] The Order codified into regulation general rules of the road for providers of broadband Internet services similar to the principles the FCC had outlined previously in the Internet Policy Statement. The rules were challenged in federal court by Verizon, and portions of the rules were recently vacated by the Court of Appeals for the D.C. Circuit.[8]

Because the reasoning of the court's opinion depends heavily upon a complicated regulatory history, this report will begin by describing the regulatory and statutory framework of the Communications Act as it applies to broadband Internet service providers. It will then describe the Open Internet Rules and the FCC's arguments for asserting the authority to issue the rules. Finally, the report will discuss the court's decision in *Verizon v. FCC* and the FCC's options for issuing regulations of broadband Internet service providers in the future.

Broadband Internet Access Service Providers Under the Communications Act

No specific title of the Communications Act applies to broadband Internet access service providers. Instead, the FCC's authority to regulate broadband Internet access services has evolved over time as a result of a combination of agency decisions, statutory changes, and case law. To begin with the statute, the Communications Act of 1934, as amended by the Telecommunications Act of 1996, grants the Federal Communications Commission jurisdiction over all interstate communications via wire or radio.[9] This language is broad, and places broadband Internet access services within the jurisdiction of the Commission.[10] However, the act does not authorize the FCC to regulate all interstate communications equally. Certain forms of communication may be more tightly regulated than others.

Most relevant to this discussion is the FCC's authority to regulate pursuant to Titles I and II of the Communications Act. Title I of the Communications Act provides very little authority for the FCC to regulate directly.[11] In fact, the FCC generally cannot impose regulations under Title I of the act unless those regulations are shown to be "reasonably ancillary" to the performance of

[6] Comcast v. Federal Communications Commission, 600 F.3d 642 (D.C. Cir. 2010).

[7] In the Matter of Preserving the Open Internet, Broadband Industry Practices, FCC 10-201, GN Docket No. 09-191, WC Docket No. 07-52 (2010) (hereinafter "Open Internet Order").

[8] Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

[9] 47 U.S.C. §152(a).

[10] *Verizon*, 740 F.3d at 629.

[11] *Comcast*, 600 F.3d at 642.

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another of the Commission's statutorily obligated duties.[12] Title II of the act allows the FCC to place strict common carrier regulations on telecommunications services.[13] Common carrier regulations can include requirements that providers offer their services to all customers, that those services be offered at reasonable prices, and that providers refrain from discriminating in the provision of those services.[14] The question of whether a form of communication should be regulated under Title I or Title II is therefore an important one.

Prior to the Telecommunications Act of 1996, the FCC had faced the question of whether and how to regulate providers of Internet services.[15] Initially, the agency chose to distinguish between what it termed "basic services" and "enhanced services."[16] Basic services were "pure communications" services. That is to say that they were "virtually transparent in terms of [their] interaction with customer supplied information."[17] The most common example of a basic service would be a telephone call. Enhanced services, on the other hand, involved "computer processing applications ... used to act on the content, code, protocol, and other aspects of the subscriber's information."[18] This definition encompassed services that provided end users with a connection to the Internet. It may be worthwhile to point out that, at the time these definitions were promulgated, most connections to the Internet were accomplished via a dial-up connection. Therefore, the transmission component of a connection to the Internet was treated as distinct from the service providing the actual Internet connection. Basic services, the transmission component, were subject to common carrier requirements. Enhanced services, the connection component, were not.

This regulatory regime was in place when Congress enacted the Telecommunications Act of 1996 and, in the act, Congress preserved a similar distinction. Under the Telecommunications Act, telecommunications carriers, not unlike basic service providers, are subject to common carrier regulation, but *only to the extent* that they are providing telecommunications services.[19] Information services providers, not unlike enhanced service providers, are not subject to common carrier regulation.[20] Tracking its previous regulatory distinctions and the definitions in the Telecommunications Act, the FCC generally treated the provision of the "pure transmission" services as telecommunications services, but treated the provision of "Internet access service" as information services.[21]

The Commission apparently changed course in 2002, when deciding how to treat the provision of broadband Internet access by cable providers.[22] Rather than treating the access service portion of

[12] *Id*.

[13] 47 U.S.C. §201 *et seq*.

[14] *Id*.

[15] *Verizon*, 740 F.3d at 629.

[16] See In Re Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 F.C.C. 2d 384, 387 (1980) ("Second Computer Inquiry" or "Computer II").

[17] *Id*. at 420.

[18] *Id*.

[19] 47 U.S.C. §153.

[20] *Id*.

[21] See, e.g., In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 F.C.C.R. 24013 (1998).

[22] In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable (continued...)

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cable broadband service as an information service and the transmission service as a telecommunications service, the Commission determined that cable companies were providing an integrated information service when they provided cable broadband Internet service. As a result of this interpretation, cable broadband service providers were exempt from Title II common carrier regulations.

The Supreme Court upheld the FCC's decision to classify cable broadband service as an information service.[23] The Court found that the definitions of telecommunications service and information service in the Communications Act were ambiguous, and that the FCC had reasonably interpreted these ambiguous provisions. As a result, it was within the FCC's discretion to determine whether Internet access services should be regulated under Title II as telecommunications services, subject to common carrier regulation, or, less onerously, under Title I as information services.

The FCC ultimately decided to treat all types of broadband Internet access services, both fixed and mobile, as information services, effectively limiting its own authority to directly regulate broadband Internet service providers.[24] Nonetheless, the FCC maintained that, regardless of the services' classification as information services, the agency still possessed statutory authority to impose regulations on Internet service providers if necessary.[25] As discussed above, the FCC's first attempt to assert the authority to implement regulations of broadband Internet traffic management practices was unsuccessful. Despite its loss in the *Comcast* case, the agency continued to argue that it possessed the requisite authority to issue the rules without reclassifying the services as telecommunications services. It was with this in mind that the FCC issued its Open Internet Order.

The Open Internet Rules

On December 21, 2010, the FCC adopted its Open Internet Order.[26] As noted above, the FCC does not possess direct authority to regulate services classified under Title I,[27] and was unsuccessful in its initial attempt to assert authority over broadband Internet network management in the *Comcast* case. As a result, the agency considered a number of options for moving forward with issuing network management rules.[28] Among them was the potential reclassification of broadband services to bring them under the umbrella of telecommunications services, which the FCC does have direct authority to regulate.[29] In the end, however, the FCC

(...continued)

Facilities, 17 F.C.C.R. 4798, 4824 (2002). [hereinafter "Cable Broadband Order"]

[23] National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005).

[24] See, e.g., In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 F.C.C.R. 14853 (2005), In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, 22 F.C.C.R. 5901 (2007).

[25] See Cable Broadband Order, 17 F.C.C.R. at 4842.

[26] Open Internet Order, *supra* note 7.

[27] *Id*.

[28] Press Release, Chairman Julius Genachowski, FCC, The Third Way: A Narrowly Tailored Broadband Framework (May 6, 2010). ["Genachowski Statement"]. Press Release, Austin Schlick, FCC, A Third-Way Legal Framework for Addressing the *Comcast* Dilemma (May 6, 2010). ["Schlick Statement"].

[29] *Id.*

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ultimately decided not to reclassify broadband services.[30] Instead, the FCC argued that it had sufficient authority to regulate broadband network management under Section 706 of the Telecommunications Act. The rules and the FCC's justification of its authority to issue them are discussed in this section.

The Rules

The FCC adopted what it termed "basic rules of the road" for broadband Internet access services and traffic management.[31] The Commission contended that the rules were necessary to keep the Internet open to all and to spur investment in new technologies and broadband infrastructure deployment. While the Commission acknowledged that there is only "one Internet," it also conceded that there may be differences in network structure and capabilities. Particularly, the Commission recognized the difference between the technological capabilities of wireline or fixed broadband access providers and wireless broadband access providers.[32] Wireless, in the Commission's view, is still in the development stages and does not have the large capacities that wireline providers have. For that reason, more content management may be necessary on the part of wireless providers. As a result, the rules the Commission would have applied to wireline and wireless were slightly different.

Application

The term "broadband Internet access service" is defined as,

> A mass market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.[33]

This definition applies to all broadband Internet access providers, be they cable, fiber, wireless, or some other access method, that offer their services to retail customers. In other words, they offer their services to residential customers, small businesses, and other end users. The term does not include access services offered to large-scale enterprise customers. Furthermore, the rules apply to all Internet traffic, not just to voice and video services.[34]

It is important to note that the rules apply only to Internet access services. They do not apply to so-called "edge service" providers, which are application and Internet content providers.[35] Edge services could encompass anything from blogs, to Google, to so-called app stores. The

[30] Federal Communications Commission, Chairman Julius Genachowski, Remarks on Preserving Internet Freedom and Openness (December 1, 2010). Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-303136A1.pdf.

[31] Open Internet Order, *supra* note 7, at ¶ 1.

[32] *Id*. at ¶ 49.

[33] *Id*. at ¶ 44.

[34] *Id*. at ¶ 45.

[35] *Id*. at ¶ 46.

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Commission noted that the Communications Act grants the FCC jurisdiction over "the utilization of networks and spectrum to provide communication by wire or radio."[36]

Wireline Rules

The Commission imposed three basic rules on wireline (fixed) broadband service providers: a transparency rule, a rule against blocking, and a rule against unreasonable discrimination. The Commission characterized the rules as general principles, but gave guidance to industry regarding what might be considered in compliance and in violation of the rules.

Disclosure

The Commission adopted a transparency rule requiring fixed broadband service providers to supply to customers, both on their websites and at the time of sale, disclosure regarding the network management practices the providers employ.[37] This rule is geared toward providing the Commission and the public with a barometer by which to gauge network management. The goal appears to be to empower the public to hold broadband companies accountable to their own descriptions of their network management practices. The final rule reads,

> A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market and maintain Internet offerings.[38]

The rule is intended to allow discretion to broadband providers in determining exactly what information the providers will disclose. However, the Commission did provide suggestions for the type of information it would expect to see in these disclosures. Specifically the Commission identified three main topics the disclosures likely should cover: network practices, performance characteristics, and commercial terms.[39] Within the network management disclosures the Commission suggested that companies provide information regarding their congestion management practices, their application-specific management practices, and their device attachment rules. Within the performance characteristics section, the Commission suggested including a service description, including the expected performance level of the service, and the impact of specialized services that may be offered. Within the commercial terms section, the Commission has suggested inclusion of information such as pricing; privacy policies, including information regarding how the data collected by the provider is utilized; and redress options for resolving disputes.

The Commission stressed that these suggestions were neither mandatory nor all-inclusive of what a broadband service provider should include in its disclosure. Rather, each broadband provider should consider its own network and services and tailor information to fit its particular service.

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[36] *Id*. at ¶ 50.

[37] Open Internet Order, *supra* note 7, at ¶ 53.

[38] *Id*. at ¶ 54.

[39] *Id* at ¶ 56.

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Furthermore, the Commission stressed that this rule does not require broadband providers to disclose proprietary information.

No Blocking Rule

The no blocking rule was intended to ensure that end users can access any lawful content or application they wish over the Internet.[40] The Commission contended that the rule was necessary to ensure openness and competition in the provision of broadband Internet access services. Moreover, most, if not all, major broadband providers currently claim that they do not block any lawful content over their networks. The rule read,

> A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or nonharmful devices, subject to reasonable network management.[41]

The rule covers all lawful communication over the Internet, including those communications that may not fit cleanly into the definition of application, services, or any other listed item. Furthermore, "no blocking" also means "no impairing or degrading" lawful content so as to render the content unusable, subject to reasonable network management.[42] As an example, applications that deliver video streaming over the Internet require a great deal of Internet capacity. Slowing down the speed at which the video is delivered to the end user may make the video unwatchable or otherwise disrupt the experience. Broadband service providers have the capability to intentionally slow down these delivery speeds. The Commission makes clear that such intentional slowing to the point that the video cannot be watched is a violation of the open Internet rules. However, the rule is subject to reasonable network management. As an example, at times of high volume of Internet traffic, in order to allow all of their customers to have Internet access in a given area, the broadband provider may find it necessary to slow the delivery of online products such as streaming video. Such slowing, when necessary as a management tool, likely would not be considered to be a violation of the no blocking rule, according to the Commission.

No Unreasonable Discrimination Rule

The rule against unreasonable discrimination was distinct from, yet closely related to, the rule against blocking. The unreasonable discrimination rule recognized that many fixed broadband access providers are also Internet content providers; furthermore, they may have affiliations with some Internet content providers, but not all. As a result, fixed broadband Internet providers have both the capability and the incentive to favor the delivery of their own and their affiliates' Internet content over that of non-affiliated content to their subscribers. The rule, therefore, stated,

> A person engaged in the provision of fixed broadband internet access service, insofar as such person is so engaged, shall not unreasonably discriminate in transmitting lawful network traffic over a consumer's broadband Internet access service. Reasonable network management shall not constitute unreasonable discrimination.[43]

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[40] *Id*. at ¶ 62.

[41] *Id*. at ¶ 63.

[42] Open Internet Order, *supra* note 7, at ¶ 66.

[43] *Id*. at ¶ 68.

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The more transparent an access provider is about traffic management, the more likely it would have been to be considered reasonable.[44] Furthermore, the more control granted to the end user to manage the content he or she wished to receive, the more likely the management would have been considered to be reasonable. Also, the rule did not preclude fixed broadband Internet providers from developing tiered levels of service, where heavy Internet users could pay more for faster speeds, and lighter users might pay less.[45] Nonetheless, the Commission expressed concern for "pay for priority" agreements wherein a broadband provider and a third party (i.e., an edge service provider) might agree to favor some traffic over other traffic.[46] An example of this might be if a cable broadband Internet access provider accepted money from Netflix to ensure Netflix would be delivered over the cable provider's network more quickly than any other online video service provider, such as Hulu or Amazon. The Commission indicated that pay for priority agreements between edge service providers and Internet access service providers might violate the unreasonable discrimination prohibition.

Reasonable Network Management

To provide greater guidance as to what is permissible, the Commission also developed a definition for what activities would be considered to be reasonable network management. The definition read,

> A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.[47]

Legitimate purposes included, but were not limited to, ensuring network security and integrity, addressing traffic that is unwanted by end users, and reducing or mitigating the effects of congestion on the network.

Wireless / Mobile Broadband

The rules the Commission established for mobile broadband were somewhat different than those for fixed broadband services. In the Commission's view, mobile broadband is at an earlier stage of development than fixed broadband, and is evolving rapidly.[48] Not only is it at an earlier development stage, but it also currently has less overall capacity for delivery of advanced Internet services, like streaming video, than fixed broadband services. As a result, the Commission has applied to mobile broadband only the transparency and no blocking rules, subject to reasonable network management.[49]

[44] *Id*. at ¶ 70.

[45] *Id*. at ¶ 72.

[46] *Id*. at ¶ 76.

[47] Open Internet Order, *supra* note 7, at ¶ 82.

[48] *Id*. at ¶ 94.

[49] *Id*. at ¶ 96.

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Disclosure

The transparency rule applies to mobile broadband in much the same way that the rule applies to fixed broadband services.[50] Mobile broadband providers are not required to allow all third-party devices and applications to attach to their network, but mobile broadband providers must disclose their certification procedures for such devices and applications.

No Blocking Rule

The rule against blocking was slightly different for mobile broadband providers than it was for fixed broadband providers. The no blocking rule for mobile broadband read,

> A person engaged in mobile broadband Internet access service, insofar as such person is so engaged, shall not block consumers from accessing lawful websites, subject to reasonable network management; nor shall such person block applications that compete with the provider's voice or video telephony services, subject to reasonable network management.[51]

This rule was narrower than the no blocking rule that had been applied to fixed services in that it only prevented blocking of lawful websites, rather than preventing the blocking of all lawful Internet content. Importantly, it also prevented blocking of Internet services that might compete with a wireless provider's voice and video telephony services.[52] This likely would have meant that wireless broadband providers could not block applications like Skype from operating over their wireless networks.

Furthermore, the rule was subject to reasonable network management. Reasonable network management had the same meaning as the definition above. The Commission stated that the definition was broad enough to encompass different network architectures, and did not believe it necessary to develop a different definition for mobile and fixed network management.[53]

The FCC's Authority to Issue the Rules

The FCC centered its jurisdictional argument on Section 706 of the Telecommunications Act of 1996.[54] Section 706(a), the Commission's main source of authority under the section, reads,

> In general, the Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) 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.[55]

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[50] *Id*. at ¶ 97.

[51] *Id*. at ¶99.

[52] Open Internet Order, *supra* note 7, at ¶¶ 101 - 102.

[53] *Id*. at ¶ 103.

[54] Codified at 47 U.S.C §1302.

[55] 47 U.S.C. §1302(a).

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Advanced telecommunications capability is defined as follows:

> without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.[56]

The Commission argued that this provision "provides the Commission with the specific delegation of legislative authority to promote the deployment of advanced services, including by means of the open Internet rules."[57] In the *Comcast* decision, cited above, the D.C. Circuit acknowledged that Section 706 contains what could arguably be a "direct mandate."[58] Nonetheless, the D.C. Circuit believed that the Commission had already foreclosed on this possibility by finding that Section 706 granted the Commission no new regulatory authority.

In addressing the court's concerns that the agency had previously found Section 706 granted no new regulatory authority, the FCC clarified that its previous interpretation of Section 706(a) found only that Section 706 did not grant the FCC new forbearance authority.[59] However, the agency had never meant to find that Section 706 granted no new regulatory authority at all. Instead, the FCC noted that the language of the statute directs the Commission also to use "price cap regulation ... and other regulating methods that remove barriers to infrastructure investment."[60] It is this language that the FCC contended grants it the regulatory authority to issue and enforce the open Internet rules.

The Commission argued that Congress "necessarily invested the Commission with the statutory authority to carry out" price cap regulation, regulatory forbearance, and other measures that promote competition in the telecommunications market, as well as other regulatory methods that would promote infrastructure investment when it enacted 706.[61] The Commission, therefore read Section 706(a) as an authorization "to address practices, such as blocking VoIP communications, degrading or raising the cost of online video, or denying end users material information about their broadband service, that have the potential to stifle overall investment."[62]

The Commission further cited Section 706(b) as a source of authority for issuing the open Internet rules. Section 706(b) reads,

> The Commission shall, within 30 months after the date of enactment of this Act [enacted Oct. 10, 2008], and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely

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[56] 47 U.S.C. §1302(d).

[57] Open Internet Order, *supra* note 7, at ¶ 122.

[58] *Comcast*, 600 F. 3d at 658.

[59] Open Internet Order, *supra* note 7, at ¶ 119. The Commission argued that it previously had found that Section 706(a) did not grant the FCC the power to forbear from regulation above and beyond the authority already granted to the Commission under Section 10 of the act. In other words, Section 706(a) directed the Commission to use its existing forbearance authority and forbearance process to encourage the deployment of advanced services

[60] 47 U.S.C. §1302(a).

[61] Open Internet Order, *supra* note 83, at ¶ 120.

[62] *Id*.

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> fashion. If the Commission's determination is negative, 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.[63]

Recently, the Commission found that broadband services are not being deployed to all Americans in a reasonable and timely fashion.[64] In light of its determination that broadband deployment has been unsatisfactory, the Commission cited Section 706(b)'s mandate to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market" as another source of authority for issuing the rules.[65] The Commission argued that the rules would promote competition in the market by preventing anticompetitive activity such as blocking of unaffiliated applications or discrimination against unaffiliated content providers, and that this would in turn have the effect of increasing demand for broadband Internet services which would drive infrastructure investment.

Verizon v. FCC

Following the publication of the rules in the *Federal Register*, Verizon and others filed appeals in various courts challenging the rules.[66] The appeals were consolidated in the D.C. Circuit.[67] In January 2014, the court issued its ruling vacating the anti-discrimination and anti-blocking rules, but upholding the disclosure rules.[68] In its decision the Court found that Section 706 did grant the FCC direct authority to regulate broadband Internet service providers. The Court also found that the agency had reasonably concluded, based upon available evidence, that the Open Internet rules would "protect and promote edge-provider investment and development, which in turn drives end-user demand for more and better broadband technologies, which in turn stimulates competition among broadband providers to further invest in broadband."[69] The court found, therefore, that the FCC had reasonably interpreted its Section 706 authority to regulate broadband Internet access service providers to include the authority to regulate their network management practices. However, the court also found that the authority granted by Section 706 did not allow the FCC to issue regulations that expressly contradicted another portion of the Communications Act.[70]

As it applies to fixed broadband Internet access service providers, the Communications Act provides that telecommunications carriers will be treated as common carriers, but only to the extent that they are providing telecommunications services.[71] Because fixed broadband Internet

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[63] 47 U.S.C. §1302(b).

[64] Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to §706 of the Telecommunications Act of 1996, 25 FCC Rcd 9556, 9558 (2010).

[65] Open Internet Order, *supra* note 7, at ¶ 123.

[66] *See* Notice of Multicircuit Petitions for Review, Pet. for Rev. of FCC's *In the Matter of Preserving the Open Internet*, *GN Docket No. 09-191; Broadband Industry Practices, WC Docket No. 07-52*, Report and Order. 25 FCC Rcd 17905 (2010), MDL No. ___, DC/1:11 -ca-01356, (J.P.M.L., October 5, 2011).

[67] Order Granting Mot. Cons., DC/1:11 -ca-01356, (J.P.M.L., October 6, 2011).

[68] Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

[69] *Id*. at 642.

[70] *Id*. at 649.

[71] 47 U.S.C. 153(51) ("A telecommunications carrier shall be treated as a common carrier under this [Act] only to the extent that it is engaged in providing telecommunications services.").

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access services were classified by the FCC as information services, and not as telecommunications services, it would violate the Communications Act to apply common carrier regulations to broadband Internet services.[72] Furthermore, as it applies to mobile services, the Communications Act prohibits the treatment of providers of private mobile services as common carriers insofar as they are providing such services.[73] Because mobile Internet access services are classified as private mobile services,[74] it would violate the Communications Act to regulate mobile broadband as common carriers, as well. The court, therefore, found it necessary to examine whether the rules imposed by the Open Internet Order treated broadband Internet access service providers as common carriers.

The act defines common carriers as those entities providing a common carrier service.[75] Commission interpretation, court decisions, and common law have been used to further develop the meaning of common carrier regulation. Generally, common carriage refers to a requirement that all customers be offered service on a standardized and non-discriminatory basis, and may include a requirement that those services be priced reasonably.[76] There are reasonable limits to the requirement that services be offered indiscriminately. Common carriers, for example, are not required to provide service where such offering could damage or degrade the provision of that service.[77] Common carrier regulation is not monolithic, however. The court noted that "there is a gray area in which, although a given regulation might be applied to common carriers, the obligations imposed are not common carriage *per se*."[78] In the space between clear common carriage regulation and clear private carriage regulation, the court gives deference to the FCC's interpretation of whether the rule confers common carriage status. In other words, while the FCC cannot impose *per se* common carriage regulations on information services like broadband Internet access services, the court will grant deference to the agency's interpretation of whether a rule is treating a service provider as a common carrier if that rule is not *per se* a common carriage regulation.

Turning to the individual rules in the Open Internet Order, the court had little trouble finding that the FCC's antidiscrimination rule regulated fixed broadband Internet services providers as common carriers *per se*, because "by its very terms [it] compels those providers to hold themselves out to 'serve the public indiscriminately.'"[79] The Commission had argued that the rule was not a common carrier requirement because it allowed service providers to engage in reasonable network management. The court disagreed finding that the allowance for reasonable network management, instead, merely preserved "a common carrier's traditional right to 'turn away [business] either because it is not of the type normally accepted or because the carrier's capacity has been exhausted."[80] The court also found that the anti-discrimination rule did not allow for flexibility sufficient to interpret the rule as being more relaxed than common carrier discrimination prohibitions. The Court observed that, as the Open Internet Order had intimated, if

[72] *Verizon*, 740 F.3d at 650.

[73] See 47 U.S.C. §332 ("A person engaged in the provision of a service that is a private mobile services shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under" the Communications Act.).

[74] See Wireless Broadband Order, 22 F.C.C.R. at 5921.

[75] 47 U.S.C. §153(11).

[76] *Verizon*, 740 F.3d at 651.

[77] See, *Id.* at 657.

[78] *Id*. at 652 (citations omitted).

[79] *Id*. at 656.

[80] *Id.* at 657.

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the Commission likely would not allow an edge provider to pay an access provider for faster delivery to end users, because doing so would violate the anti-discrimination rules, that rule would effectively force all access providers to provide edge service providers with delivery services to end users at a uniform cost of $0. Such a rule left no room for the individual bargaining and flexibility usually associated with regulations of private carriers. Furthermore, the rule strongly resembled Section 202 of the Communications Act which imposes non-discrimination requirements on telecommunications services, a statute that is clearly a common carrier regulation.[81] Because the anti-discrimination rules applied a common carrier obligation on the provision of an information service in violation of the Communications Act's prohibition on regulating any service except telecommunications services as common carriers, the court vacated the rule.

Less clear to the court was whether the rule prohibiting blocking of any lawful Internet traffic by fixed and mobile broadband access service providers was common carrier regulation *per se*.[82] In support of finding that the anti-blocking rule was a common carrier regulation the court noted that the rules "establish a minimum level of service that broadband providers must furnish to all edge providers,"[83] requiring, essentially that all edge provider services be, at a minimum, usable. Furthermore, the order prohibited the charging of a fee for that minimum level of service. For these reasons, the court found that the anti-blocking rule was a *per se* common carriage regulation. However, the court acknowledged that there may be an acceptable counterargument to its conclusion, as long as the anti-discrimination rule was eliminated. The anti-blocking rule requires only that a minimum level of service be provided to edge service providers free of charge. Nothing in the rule would prohibit access service providers from charging edge service providers for something more than the basic level. "For example, Verizon might, consistent with the anti-blocking rule—and, again, absent the anti-discrimination rule—charge an edge provider like Netflix for high-speed, priority access while limiting all other edge providers to a more standard service."[84] Under this example, the anti-blocking rule could establish a minimum level of service while allowing room for the individualized bargaining that might allow the rule to avoid running afoul of the prohibition on common carrier regulation. The court did not accept this reasoning, however, because the Commission did not assert it either in the Open Internet Order or in its briefs to the court and the court was "unable to sustain the Commission's action on a ground upon which the agency itself never relied."[85] The court vacated the anti-blocking rule as a result.

The disclosure rules, however, were clearly not common carrier regulations and therefore did not violate the prohibition. The Court upheld the rules because Section 706 of the Communications Act granted the Commission the authority to promulgate them and the rules did not violate any other provision of the Communications Act.

[81] 47 U.S.C.§202.

[82] *Verizon*, 740 F.3d at 657-58.

[83] *Id.*

[84] *Id.*

[85] *Id.* at 658-59.

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Current Regulatory Options

Following the court's decision in *Verizon v. FCC*, it is clear that the FCC does have some authority to promulgate regulations pursuant to Section 706 that encourage the deployment of advanced telecommunications services. Included in the FCC's authority to encourage deployment, in the court's estimation, is the authority to regulate providers of broadband Internet access service to some extent. While the FCC has so far only attempted to assert Section 706 as a source of authority for implementing regulations that would govern broadband Internet traffic management practices, it is conceivable that Section 706 might be reasonably interpreted to allow the FCC to regulate other practices of broadband Internet access service providers in such a way that the agency believes broadband deployment would be encouraged. The agency has yet to explore these options, however, and appears to currently be focusing on imposing regulations on broadband Internet traffic management.

To that end, Chairman Thomas Wheeler has announced that the FCC would not appeal the court's decision in *Verizon*. Rather, the agency plans to enforce the rules upheld by the court, and reexamine its options for legally imposing the rules vacated by the court.[86] The Chairman indicated that the FCC does not plan to reclassify broadband Internet access services as telecommunications services, though the Chairman maintains that reclassification is an option that remains "on the table."[87] Some of the FCC's options for achieving its goals of imposing rules of the road on the management of broadband Internet traffic follow. They are by no means an exhaustive list of the agency's options.

Enforce the Disclosure Rules

As noted above, the court upheld the agency's authority to enforce disclosure rules related to broadband Internet traffic management. The disclosure rules require broadband Internet access service providers to disclose accurate information regarding their network management practices.[88] Such rules could be a useful tool for the Commission in the future. For example, if an Internet access service provider had disclosed a policy of refraining from blocking any lawful content, and it was later determined that the provider was actively blocking certain legal web sites or software, as previously happened in the *Comcast* case, the access service provider could arguably be in violation of these disclosure rules, because the disclosures provided by the company were not accurate. The Commission would then be able to penalize the access service provider for violating the Commission's disclosure rules.

Reinstate the Anti-Blocking Rule

In the *Verizon* case, the FCC did not attempt to distinguish between the anti-blocking and anti-discrimination rules when arguing that the rules were not common carriage regulations *per se*. The D.C. Circuit indicated in its opinion that the anti-blocking rule, if enforced without the anti-

[86] Statement, Chairman Thomas Wheeler, FCC, The FCC's Open Internet Rules (February 19, 2014) available at http://www.fcc.gov/document/statement-fcc-chairman-tom-wheeler-fccs-open-internet-rules.

[87] *Id*.

[88] Open Internet Order, *supra* note 6, at ¶ 54.

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discrimination rule, might not be common carriage regulation *per se*.[89] The FCC could attempt to reestablish the anti-blocking rule without the antidiscrimination rule and could argue, as the court explained, that "while perhaps establishing a lower limit on the forms that broadband providers arrangements with edge providers could take," it nonetheless leaves "sufficient room for individualized bargaining and discrimination in terms so as not to run afoul of the statutory prohibition against common carrier treatment."[90] While prohibiting access service providers from blocking the delivery of legal content, this interpretation of the rule might allow Internet access service providers to charge edge service providers for faster delivery speeds to end users. "For example, Verizon might, consistent with [this interpretation of] the anti-blocking charge an edge provider like Netflix for high-speed, priority access while limiting all other edge providers to a more standard service."[91] If a reviewing court agrees that the rule provides enough leeway to access service providers for individualized bargaining such that it falls into the gray area between common carriage and private carriage regulation, the court would give the FCC's interpretation of the rule deference[92] and would likely uphold the rule.

Reinstate the Anti-Discrimination Rule

While the *Verizon* court found that the anti-discrimination rule in the Open Internet Order was common carrier regulation *per se*, the court did not say that all anti-discrimination rules are common carrier regulations *per se*.[93] In fact, the D.C. Circuit has previously found that a requirement that mobile data providers offer data roaming services to other mobile data providers on a "commercially reasonable" basis was not an unlawful application of a *per se* common carriage regulation.[94] The Commission interpreted "commercially reasonable" to mean that the rule permitted mobile data providers to negotiate the terms of each data roaming services contract on an individualized basis, responding to market forces in particular situations. In the court's opinion, the rule, therefore, did not require mobile data providers to offer their services indiscriminately or on standardized terms, as a common carrier would, and did not constitute common carrier regulation.

With this standard as a reference, the FCC arguably could impose a more flexible anti-discrimination rule under Section 706. If the rule allowed for sufficient individualized bargaining and flexibility on the part of Internet access providers in their dealings with edge service providers, it is possible that the regulation would not be classified as *per se* common carriage regulation.[95] However, it should be noted that if the FCC reinstated both the anti-blocking rule and a more flexible version of the anti-discrimination rule, it would be important to craft the rules in such a way that, taken together, they did not amount to *per se* common carriage regulation.

[89] *Verizon*, 740 F.3d at 657-59.

[90] *Id*.

[91] *Id*.

[92] *Id*. at 656.

[93] *Id*. at 657 (citing Cellco P'ship v. FCC, 700 F.3d 534 (D.C. Cir. 2012) (finding that a standard permitting "commercially reasonable" discrimination was not a *per se* common carrier regulation)).

[94] See *Cellco*, 700 F.3d at 534.

[95] See *Verizon*, 740 F.3d at 657.

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Reclassification of Broadband Internet Access Services

The Chairman of the FCC has stated that the agency does not currently plan to reclassify broadband Internet access services as telecommunications services.[96] However, the FCC has also said that reclassification "remains on the table" and the Commission's docket on its Title II authority as it relates to broadband Internet access services remains open.[97] As noted by the *Verizon* court, Section 706 did grant the FCC authority to impose both the anti-blocking and anti-discrimination rules in the Open Internet Order; however, it was broadband Internet access services' classification as information services instead of telecommunications services that made the imposition of those rules illegal.[98] If the FCC were to use its established discretion to reclassify broadband Internet access services as telecommunications services, and the agency's reasons for reclassifying the services were reasonable,[99] it appears that the agency then likely could reinstate both the anti-blocking and anti-discrimination rules, consistent with the principles set out in *Verizon*.

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[96] Statement, Chairman Thomas Wheeler, FCC, The FCC's Open Internet Rules (February 19, 2014) available at http://www.fcc.gov/document/statement-fcc-chairman-tom-wheeler-fccs-open-internet-rules.

[97] *Id*.

[98] *Verizon*, 740 F.3d at 657.

[99] See *Brand X*, 545 U.S. at 967.

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