

# **The Tenth Circuit Appeal**

## **Focusing on FCC Authority to Regulate Information Services Provided By ETCs And the Bigger Picture**

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# Universal Service is a Title II Program

- The jurisdictional issues are relatively straightforward.
- Congress authorized the FCC to provide USF to common carriers providing telecommunications services.
- Common carriers providing telecommunications services are regulated under Title II.
- For example, 201, 202, 208, 214, 251, 252, 253, 254. 2

# The FCC's Classification Problem

- The FCC's GC recommended reclassifying information service providers (broadband) to be Title II common carriers. The FCC rejected this.
- Instead, the FCC claims they are not funding broadband directly. They are funding telecom services over facilities that could be used for broadband.
- Question: Why would the FCC say it is not funding broadband, when the primary purpose of USF reform, as set forth in the National Broadband Plan is funding broadband expansion?
- Answer: If the FCC had jurisdiction, it would have just funded broadband. It wanted to placate Congress by not reclassifying broadband to Title II.

# Can the FCC Regulate the Internet in the Name of Universal Service?

- In the CAF, the FCC adopted two dozen rules regulating the provision of broadband, including for example, minimum throughput speed.
- All of the FCC's regulations can fairly be characterized as *per se* common carrier regulation, which courts have repeatedly blocked (Comcast/Verizon).
- The FCC has two arguments:
  - Carriers voluntarily agree to be regulated and
  - Section 706.

# Rules are Rules – Until They are Not

- The FCC argues that these two dozen rules, adopted through notice and comment, are not really rules.
- Instead, they are voluntary commitments made voluntarily by voluntary carriers who voluntarily seek voluntary money (voluntarily of course).
- If affirmed, the FCC would be authorized to adopt notice and comment rules irrespective of statutory authority, as long as they are tied to a voluntary act of the regulated party.

# Rules are Rules – Until They are Not

- Virtually every act a carrier takes is voluntary - applying for a license, asking for a waiver, submitting a report.
- Question: Traditionally, when is the FCC's rulemaking power known to be at its apex?
- Answer: Applications for assignments of licenses.
- Why? Extrajudicial power. Regulated carriers are asking for something and the FCC has leverage.

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# Section 706 – The Fallback

The FCC argued:

- 706 is an independent grant of authority to regulate and it authorized the FCC to regulate broadband providers as set forth in the CAF Order.
- Appellants argued:
  - Congress placed Section 706 outside the Act, so it cannot be an independent grant of FCC regulatory authority.
  - 706 contemplates actions solely with respect to telecommunications services.
  - 706 does not authorize *per se* common carrier regulation.

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# Verizon v. FCC

## DC Circuit

### Decided January, 2014

- Court ruled that 706 is a source of FCC authority to regulate.
- Court also ruled that 706 does not permit FCC to impose *per se* common carrier regulation on information service providers.
- On 706, the court understood that tying FCC's hands without hope of Congressional help could harm marketplace.
- Even allowed FCC to argue exactly the opposite of what it argued for many years – that 706 is NOT a grant of authority.
- Even though it “lost,” the FCC won a significant victory, so much so that it did not appeal.



# What Will the Tenth Circuit Do?

- Vacate all common carrier rules? (you can fund it, but you can't regulate it)
- Affirm the rules as “voluntary commitments?”
- Offer a view of 706 that is different from the DC Circuit in Verizon?
- Will they read the Free State Foundation 3/31 blog post summarizing Commissioner O’Rielly’s epic rant on why a Republican Congress did not create in Section 706 a “secret loophole” allowing the FCC to regulate the Internet?

# A Few Observations from Oral Argument

- The number of petitioners and arguments was overwhelming.
- Over two dozen lawyers, a whole day of argument, mind numbing.
- Jurisdiction:
  - Liked FCC's Section 706 argument (pre-Verizon).
  - Liked the FCC's voluntary argument.
  - Did not appear attracted to petitioners' Title II jurisdiction argument.
- Other issues:
  - Lots of time spent on FCC authority over intra-state interconnection.
  - Lots of time asking whether bill and keep is a rate or a methodology?
  - Skeptical that the FCC made a record to impose reforms directed at RLECs.

# Why All This Matters (Maybe)

- For an agency, stretching jurisdiction is a legal and political act.
- Consider 2009: The economy is terrible and improving broadband is a national priority.
- USF: A huge tool to increase broadband availability.
- Even in the face of prior FCC action exempting broadband from Title II, who among us wouldn't shift those funds to broadband?
- Yet, there's a bigger reason why the FCC is fighting so hard – relevance.

# The FCC's Real Jurisdictional Problem: All-IP Networks

- Assuming, (1) the FCC does not reclassify broadband to be a Title II service and (2) Congress does not update the 1996 Act, carriers might argue:
  - They do not want to contribute to USF because they offer no telecommunications service;
  - They do not want to interconnect with other networks, because 251 does not apply to information service;
  - They are not subject to state jurisdiction because all-IP networks are interstate. No rate regulation, no COLR, no tariffs.
  - They are free of all common carrier obligations, per Comcast/Verizon.

# What Signals is the FCC Giving?

- Commissioner Rosenworcel set out her marker awhile back: Public Safety, Universal Service, Competition, and Consumer Protection.
- Chairman Wheeler set out his: The importance of networks and competition.
- Until Congress acts to decide how broadband should be regulated, the FCC will be under increasing attack regarding its attempts to “regulate the Internet.”
- At the same time, M&A activity continues to shrink the number of broadband competitors – that’s DOJ’s problem.
- Make no mistake, unless Congress acts, or the FCC reclassifies broadband to be a Title II service, it is fair to ask:
- How is the FCC relevant in an all-IP world?

# Questions

## Section 706

Communications Statutes & Federal Legislation > Statutes > TITLE 47—TELECOMMUNICATIONS  
> CHAPTER 12—BROADBAND > Sec. 1302. Advanced telecommunications incentives

Sec. 1302. Advanced telecommunications incentives

### 1302(a) 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.

### 1302(b) Inquiry

The Commission shall, within 30 months after February 8, 1996, 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 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.

### 1302(c) Demographic information for unserved areas

As part of the inquiry required by subsection (b), the Commission shall compile a list of geographical areas that are not served by any provider of advanced telecommunications capability (as defined by subsection (d)(1) and to the extent that data from the Census Bureau is available, determine, for each such unserved area—

#### 1302(c)(1)

the population;

#### 1302(c)(2)

the population density; and

#### 1302(c)(3)

the average per capita income.

### 1302(d) Definitions

For purposes of this subsection:

#### 1302(d)(1) Advanced telecommunications capability

The term “advanced telecommunications capability” is defined, without regard to any transmission media or technology, as highspeed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

#### 1302(d)(2) Elementary and secondary schools

The term “elementary and secondary schools” means elementary and secondary schools, as defined in section 7801 of title 20.