

**The Tenth Circuit Appeal**  
**Focusing on FCC Authority to Regulate Information Services Provided By ETCs**

LSI Seminar, Seattle, Washington 2014

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**Introduction**

If you've followed even casually the FCC's process leading up to its 2011 Connect America Fund Order, you know of the many challenges raised by at the Tenth Circuit by dozens of appellants. Briefs killed forests and still there were not enough words allotted. Oral argument took a full day, and still most appellants got shortchanged (although by the end, the panel heard all they wanted to hear).

This paper will provide a brief overview of the issue of FCC authority to impose common carrier regulations on eligible telecommunications carriers ("ETCs"), hopefully providing an easy map for you to dig into the cases and arguments for future reference. On the panel discussion, we'll talk more about arguments, possible outcomes, and the policy choices facing the FCC and Congress.

**Background**

For a federal agency, stretching the limits of jurisdiction conferred by Congress is both a legal and political act. In 2009, a new administration decided that improving broadband in rural, high-cost areas, in schools and libraries, and in rural health care facilities, was a national priority, to assist the economic recovery and help the United States maintain competitive on the world stage. With taxing authority provided by Congress in the universal service mechanism, it possessed a tool to move policy.

In the midst of a tanking economy, waiting for Congress to provide helpful clarification as to whether the FCC had authority to advance this priority would have been political malpractice. Even in a good economy, who among us, sitting in the Chairman's seat, would do nothing, because the 1996 Act did not clearly authorize the agency to use \$8 billion in annual universal service funds to build broadband infrastructure? As one would expect, the Commission moved forward, challenging courts to undo a massive and complex order with huge economic implications for our nation, relying largely on Chevron deference to win the day, including the Supreme Court's recent ruling that an agency gets deference when interpreting a statute's jurisdictional provisions.<sup>1</sup>

While perhaps understanding the necessity of the FCC's political act, appellants disagreed with the Commission's legal basis on a number of fronts. In order to understand the Tenth Circuit, a short history of the 1996 Act and relevant cases follows.

#### FCC Jurisdiction Over the Internet – A Brief History.

In 1996, Congress understood the nascent Internet, but like most of us, did not envision broadband as it is today. Within Title II, Congress established clear FCC jurisdictional authority over common carriers providing telecommunications services. Title II sets forth our nation's common carrier regime, including for example, a prohibition on unreasonable discrimination among customers,<sup>2</sup> a requirement to not engage in unreasonable business practices,<sup>3</sup> a

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<sup>1</sup> City of Arlington v. FCC, 133 S.Ct. 1863 (2013).

<sup>2</sup> 47 U.S.C. Section 202.

<sup>3</sup> 47 U.S.C. Section 201.

common carrier complaint mechanism,<sup>4</sup> and, important for this discussion, the entire universal service mechanism.<sup>5</sup>

Congress set up a simple universal service compact, providing support to, “a **common carrier** designated as an *eligible telecommunications carrier*” that commits to the common carrier regime set forth in Title II.<sup>6</sup> In addition, Congress defined universal service as “an evolving level of **telecommunications services.**”<sup>7</sup> Incidentally, Congress specifically authorized the use of universal service funds for information services only for schools, libraries, and rural health care providers.<sup>8</sup>

Congress envisioned that the provision of public money to build and maintain infrastructure in rural and high-cost areas would be provided only if the FCC and the states could ensure that consumers received access to high-quality services and affordable rates that are reasonably comparable to those available in urban areas.<sup>9</sup> Nothing in the four corners of the 1996 Act can be construed to authorize the FCC to break the universal service compact by providing universal service funding to, or imposing common carrier obligations on, an unregulated information service provider.

As broadband services over a variety of technologies began to develop following the 1996 Act, the Commission in a series of decisions, classified broadband as an unregulated

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<sup>4</sup> 47 U.S.C. Section 208.

<sup>5</sup> 47 U.S.C. Sections 214 and 254.

<sup>6</sup> 47 U.S.C. Section 214(e)(1); 47 U.S.C. Section 254(e) (“only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support.”)

<sup>7</sup> 47 U.S.C. Section 254(c)(1).

<sup>8</sup> 47 U.S.C. Section 254(h)(2)(A) (“to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries”).

<sup>9</sup> 47 U.S.C. Section 254(b)(3).

service, freeing it from Title II common carrier regulation.<sup>10</sup> Along the way, the Supreme Court affirmed the FCC's authority to classify broadband as an unregulated information service.<sup>11</sup>

### Comcast v. FCC

Following the 2008 election, a new FCC attempted to regulate Comcast's broadband network management practices, citing its ancillary authority under 4(i) of the Act to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."<sup>12</sup> The FCC failed to convince the DC Circuit that barring Comcast from interfering with its customers' use of peer-to-peer networking applications—was "reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities."<sup>13</sup>

A key jurisdictional takeaway from Comcast: The Court pointed to the FCC's own decision (still binding at the time) that Section 706 does not constitute an independent grant of authority.<sup>14</sup> So the court ruled, "[S]ection 706(a) does not constitute an independent grant of forbearance authority *or of authority to employ other regulating methods*."<sup>15</sup>

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<sup>10</sup> See generally, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities Universal Service Obligations of Broadband Providers, Notice of Proposed Rulemaking*, 17 FCC Rcd 3019 (2002); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (2002). *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853, 14862 (2005); *In re United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, 21 FCC Rcd 13281 (2006); *In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, 5901–02 (2007).

<sup>11</sup> *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

<sup>12</sup> 47 U.S.C. § 154(i).

<sup>13</sup> *Comcast v. FCC*, 600 F.3d 642, 646 (DC Cir., 2010).

<sup>14</sup> *Comcast*, 600 F.3d at 659 (quoting *Advanced Services Order*, 13 F.C.C.R. at 24047 ¶ 77).

<sup>15</sup> *Id.*, at 658-9, citing *Wireline Deployment Order*, 13 F.C.C.R. at 24,044, ¶ 69 (emphasis added).

## Verizon v. FCC

In January of 2014, the D.C. Circuit again turned back the FCC's attempt to regulate the Internet, vacating anti-discrimination and anti-blocking rules, and taking a different view of Section 706 that many believe to be a big win for the agency. The Court confirmed the FCC's lack of jurisdiction to impose *per se* common carrier regulations on a broadband service:

***We think it obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers.*** Given the Commission's still-binding decision to classify broadband providers not as providers of "telecommunications services" but instead as providers of "information services," ... such treatment would run afoul of section 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." 47 U.S.C. § 153(51); see also Wireless Broadband Order, 22 F.C.C.R. at 5919 ¶ 50 (concluding that a "service provider is to be treated as a common carrier for the telecommunications services it provides, ***but it cannot be treated as a common carrier with respect to other, non- telecommunications services it may offer, including information services***") (emphasis added).

Likewise, because the Commission has classified mobile broadband service as a "private" mobile service, and not a "commercial" mobile service, see Wireless Broadband Order, 22 F.C.C.R. at 5921 ¶ 56, treatment of mobile broadband providers as common carriers would violate section 332: "A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this [Act]." 47 U.S.C. § 332(c)(2); see Cellco, 700 F.3d at 538 ("***[M]obile-data providers are statutorily immune, perhaps twice over, from treatment as common carriers.***") (emphasis added).<sup>16</sup>

While rebuking the FCC's imposition of common carrier regulation of information service providers, the Court sympathized with the FCC's plight, that left unfettered, Internet service providers present "a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment."<sup>17</sup> So, it allowed the

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<sup>16</sup> Verizon slip op at 45-46.

<sup>17</sup> Verizon at slip op. pp. 36-44.

FCC to reverse its prior ruling, and accepted its new argument, that that Section 706 constitutes an affirmative grant of regulatory authority.<sup>18</sup>

This decision breathed new life into the FCC, perhaps because the court understands that Congress is broken and a necessary legislative fix is nowhere in sight. Judge Silberman's strongly worded dissent argued that while Section 706 is a grant of regulatory authority, the majority's view that Section 706 can be used to promote competition confers upon the FCC wide latitude never contemplated by Congress.

Evidently the FCC agrees. Despite losing the case and now conceding that it has no authority to impose common carrier regulations on broadband providers, the Commission decided to forego an appeal and take the Court up on its invitation to use Section 706 to impose new regulation on the Internet.<sup>19</sup>

### The Tenth Circuit Case

Among other things, the Tenth Circuit panel must decide whether prior decisions, prohibiting the FCC from imposing *per se* common carrier regulation on broadband service should extend to carriers receiving universal service support. Not surprisingly, the wireless carriers argued that Congress conferred no authority to impose common carrier regulation in information service providers who are ETCs.<sup>20</sup> In response, the FCC made the following arguments:

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<sup>18</sup> Verizon at slip op. p. 22. Recall from the discussion above that the FCC previously found that 706 is not a grant of authority to regulate.

<sup>19</sup> See, <http://www.fcc.gov/document/statement-fcc-chairman-tom-wheeler-fccs-open-internet-rules>.

<sup>20</sup> And, citing the Cellco decision, *supra*, the wireless carriers claim to be "immune twice over" from such regulation.

- A request for universal service funding is a voluntary act.
- The Commission is not regulating, it is merely imposing conditions on a party voluntarily requesting universal service funds. A carrier that does not wish to be regulated may decline to become an ETC.
- The FCC is not funding broadband – it is merely requiring participants to deliver broadband as a condition of receiving universal service funding for telecommunications services.
- Even if the FCC lacks Title II jurisdiction to regulate information service providers, Section 706 provides an independent grant of authority to regulate.

Appellants responded by noting that unlike the FCC’s network neutrality policy statement, here we have no less than 24 rules, adopted through the notice and comment proceedings that impose *per se* common carrier regulations on broadband service that is not being offered on a common carrier basis.<sup>21</sup> Congress made no exception for rules the FCC unilaterally deems to be “voluntary.” Pretty much any action, such as an application for a license or a transfer of control, can be characterized as voluntary, greatly expanding the FCC’s power in ways Congress did not authorize.

With respect to Section 706, appellants argued:

- Section 706 is not a part of the Communications Act of 1934, as amended. If Congress had intended 706 to be an independent grant of authority, it would have placed it inside the Act.
- The FCC is limited under Section 706 is to taking actions under the authority Congress had previously given it in the Act. Section 706 does not authorize common carrier regulation, a principle affirmed by the Verizon court.
- Even if 706 is a grant of authority, Section 706 contemplates FCC action with respect to telecommunications services, not information services.

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<sup>21</sup> See, e.g., 47 C.F.R. Section 54.1006(a)(1) and (b)(1) (minimum throughput regulation); 47 C.F.R. Section 1006(d) (infrastructure sharing obligation).

### A Few Closing Thoughts.

Far from being a model of statutory draftsmanship, the 1996 Act has spawned 18 years of litigation concerning what Congress really meant on a wide variety of issues. The Tenth Circuit case is no different. Yet, as we approach the end of the second decade, hard issues are coming to the fore. Today, a wide variety of content, application, and service providers, compete to access fixed and mobile devices, people, and things. As we move to all-IP networks, is anything a telecommunications service anymore? What should be regulated, and how? Will carriers operating all-IP networks declare that they need not contribute to universal service? Will they declare themselves to be outside of the reach of state and federal regulators?

So, irrespective of what the Tenth Circuit may decide, we are in need of a Telecom Act rewrite, but don't hold your breath. To paraphrase Don Rumsfeld, you regulate with the Congress you have, not the one you wish you had. Expect the FCC to continue to stretch its authority under Section 706 as far as it can, and if it is rebuffed by the Tenth Circuit, it will have to consider reclassifying broadband to be a Title II service. If for no other reason than to prompt Congress to step in.