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What Are the Bounds of the FCC's Authority over Broadband Service Providers?—A Review of the Recent Case Law

By Lawrence J. Spiwak

The Federal Communications Commission (FCC) has a long and distinguished history of applying a light regulatory touch to nascent technologies that can, and often do, disrupt the status quo (*see*, *e.g.*, the FCC's successful *Competitive Carrier* paradigm for long distance service).[1] Consistent with this precedent, as the Internet began to emerge as an alternative platform to traditional telecommunications services, the agency again had the foresight to apply a light regulatory touch.

What is interesting to note is the FCC's choice of legal theories under which it decided to pursue its deregulatory strategy for broadband. The Telecommunications Act of 1996 offered the FCC two broad paths.[2]

First, the FCC could have tried to regulate broadband Internet access using a "light touch" form of Title II common carrier-style regulation by using

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What Are the Bounds
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its authority under Section 10 of the 1996 Act to forbear from select portions of the Communications Act.[3] While this approach was contemplated over the years, both Democrat and Republican administrations soundly rejected this path. As the Clinton-era FCC observed in 1998, "classifying Internet access services as telecommunications services could have significant consequences for the global development of the Internet. We recognize the unique qualities of the Internet, and do not presume that legacy regulatory frameworks are appropriately applied to it."[4] Indeed, there are several fundamental legal and policy problems with such a "Title II Lite" approach: For example, as the FCC noted, this approach would foist a host of legacy regulations designed for a monopoly telephone world (including state regulation) immediately upon the Internet—a policy which on its face makes little sense, not to mention its inconsistency with FCC precedent of applying *de minimis* regulation on nascent technologies.[5]

Second, the agency's use of its Section 10 forbearance authority has a sordid past, and the agency's latest theory of forbearance—set forth in its *Phoenix Forbearance Order*—effectively neuters Section 10 as a plausible deregulatory tool.[6] Indeed, because the Commission has described each BSP as a "terminating monopoly" over access to their respective customers, Commission precedent makes it difficult for the agency to forbear from mandatory tariffing requirements and other common carrier obligations should it choose to reclassify broadband internet access as a Title II common carrier service.[7] Thus, for such a "light touch" common carrier approach to work effectively, the FCC must maintain a sufficient level of credibility for "regulatory self-restraint" with both the industry and financial markets to preserve investment incentives—a credibility which is tenuous at best.[8]

Instead, the FCC classified broadband Internet access as an "information service"[9] under Title I and decided to impose regulation (as necessary) under its long-standing "ancillary authority."[10] Not only did such an approach avoid applying legacy regulations to the Internet, but had the added benefit of effectively preempting state public utility commissions from regulating broadband.[11] The FCC eventually classified everything from cable broadband,[12] wireline broadband,[13] wireless broadband[14] and even broadband over powerline[15] as a Title I information service. The FCC's deregulatory approach is credited with the rapid pace of deployment, adoption, and innovation in the broadband ecosystem.[16]

CONCERNS ABOUT THE CURRENT LEGAL REGIME

Notwithstanding the benefits of the agency's deregulatory approach for broadband, some parties are concerned that the current legal regime fails to provide the FCC with sufficient authority over broadband Internet services to protect consumers[17] and, as such, the FCC should solidify its authority by reclassifying broadband Internet service as a Title II common carrier telecommunications service.[18] Given the FCC's current efforts to move forward with the IP Transition[19] and with its new attempt to draft legally-sustainable *Open Internet Rules*,[20] questions regarding the strength of the agency's authority under alternative legal approaches, as well as a search for the boundaries of the agency's authority, have returned to the forefront of the debate.[21]

In an effort to provide some illumination to this important question, this article reviews three recent cases from the DC Circuit—*Comcast v. FCC*,[22] *Cellco Partnership v. FCC*[23] and *Verizon v. FCC*[24]—to evaluate the current state of the law. After review, these cases indicate that the FCC has ample authority over Broadband Service Providers (BSPs) going forward under the current legal regime and, as such, reclassification of broadband Internet access as a Title II common carrier telecommunications service is unwarranted. In particular, this analysis reveals the following:

1. Where applicable, these cases hold that BSPs are still subject to direct jurisdiction under certain sections of Title II (telephone service), Title III (wireless service) and Title VI (cable service) of the Communications Act; hence, the FCC's decision to classify broadband Internet access as a Title I information service does not *a fortiori* mean that the FCC has abdicated its oversight of BSPs altogether. To the contrary, to the extent BSPs continue to engage in activities that fall

within the agency's direct subject matter jurisdiction, the FCC's ability to carry out its traditional core mandate (*e.g.*, spectrum allocation, consumer protection, public safety, universal service, etc.) remains very much intact.[25]

2. These cases hold that the FCC's ancillary jurisdiction over BSPs remains alive and well, provided that the FCC ties the use of that jurisdiction to a specific delegation of authority under Title II, Title III, or Title VI. In this sense, nothing has changed. So, while ancillary authority remains a potent and legally-sound tool in the FCC's regulatory arsenal to remedy policy-relevant harms, especially on a case-by-case basis, the agency must provide its whys-and-wherefores to the court.
3. With the DC Circuit's ruling in *Verizon*, the FCC now has an *additional hook for ancillary authority* under Section 706 to regulate BSPs, subject to two important limitations: (1) just as the FCC's use of its traditional ancillary authority, in order to invoke Section 706 the FCC must tie its actions back to a specific delegation of authority in Title II, Title III, or Title VI; and (2) the FCC also must demonstrate that any use of Section 706 is designed to promote infrastructure investment and deployment on a reasonable and timely basis. As shown below, these limitations can be meaningful. For example, because the FCC must tie its invocation of Section 706 to a specific delegation of authority, this requirement probably prevents the FCC from extending regulation to stand-alone edge providers who are not otherwise engaged in jurisdictional activities as some fear. Similarly, because the FCC must tie its use of Section 706 to a specific delegation of authority in the Communications Act, Section 706 probably does not expand the FCC's authority to preempt state laws restricting municipal broadband deployment.
4. These cases make clear that although the FCC retains jurisdiction over BSPs, the nature of the type of regulation it may impose has changed. That is to say, because the FCC classified broadband Internet access as a Title I information service, the FCC is prohibited by statute from imposing traditional Title II common carrier obligations on BSPs.[26] Specifically, the agency may not regulate broadband Internet access using the traditional "unjust and unreasonable" or "undue discrimination" standards of Title II.[27] However, these cases also hold that the FCC may regulate the conduct of BSPs under a "commercially reasonable" standard, which, the courts reasoned, permits individualized transactions and is thus sufficiently different from common carrier regulation to be lawful. Thus, in a way, the FCC's regulatory authority over BSPs actually may be *broader* than what it previously had under the traditional Title II common carrier regime. That being stated, as the D.C. Circuit noted in *Verizon*, evaluation of any new "commercially reasonable" standard will be contingent on "*how* the common carrier reasonableness standard applies in . . . context, not *whether* the standard is actually the same as the common carrier standard."[28]

THE CASE LAW

This section evaluates the current state of the law regarding the FCC's authority over BSPs, by reviewing three recent cases from the DC Circuit: (1) *Comcast v. FCC*, (2) *Cellco Partnership v. FCC*, and (3) *Verizon v. FCC*. The intention is to provide a review of the current law and to avoid any commentary about how or when the FCC should exercise this authority.

COMCAST V. FCC

In *Comcast*, the DC Circuit was confronted with the FCC's first formal attempt to address the network management practices of BSPs,[29] an effort for which the FCC conceded it lacked any express jurisdiction to do.[30] As such, the central legal issue in *Comcast* revolved around the question of whether the FCC could exercise its ancillary jurisdiction to regulate such practices.[31] At bottom, while the court answered this question in the affirmative, it found that in this particular case the agency had failed to provide an adequate justification to warrant the exercise of its ancillary jurisdiction.

In its analysis of the law, the court looked at two types of statutes on which the FCC relied: (1) statements of Congressional policy; and (2) statutory provisions that purport to provide a grant of direct responsibility. Let's look at how the court viewed each category under the particular facts of this case below.

Statements of Congressional Policy

As many pieces of legislation, the Communications Act is replete with Congressional statements of policy expressing this desire or another.[32] In this particular case, however, the court focused on the FCC's use of policy statements contained in Section 230(b)[33] and Section 1 of the Communications Act.[34] According to the DC Circuit, however, "policy statements alone cannot provide the basis for the Commission's exercise of ancillary authority" because such "authority derives from the 'axiomatic' principle that 'administrative agencies may [act] only pursuant to authority delegated to them by Congress.'" As the court observed,

> Policy statements are just that—statements of policy. They are not delegations of authority. To be sure, statements of congressional policy can help delineate the contours of statutory authority. *** *[So, while] policy statements may illuminate [the FCC's] authority, it is Title II, Title III, or Title VI to which the authority must be ancillary.*[35] (Emphasis supplied.)

In fact, reasoned the court, not only was the FCC's use of policy statements inconsistent with Supreme Court precedent, "but, if accepted it would virtually free the FCC from its Congressional tether."[36] Ancillary authority, the court reiterated, must be tied to a specific delegation of authority in Title II, Title III, or Title VI.

Specific Delegations of Authority

As noted in the preceding discussion, the court announced that it was amenable to arguments that the FCC could exercise ancillary jurisdiction over BSPs, so long as the FCC articulates a clear nexus to a specific grant of authority found somewhere in Titles II, III, or VI of the Communications Act. In this particular case, because of both substantive and procedural infirmities, the court ruled that the FCC did not meet this requirement. The following describes three examples of such infirmities:

1. The FCC opened its argument by citing Section 706 as potential authority. However, because at the time of this decision the FCC still held that Section 706 did not provide it with an independent grant of authority, the court rejected this argument.[37]
2. The FCC also relied on Section 256, which directs the FCC to "establish procedures for … oversight of coordinated network planning … for the effective and efficient interconnection of public telecommunications networks."[38] However, because the court noted that Section 256 goes on to state that "[n]othing in this section shall be construed as expanding … any authority that the FCC" otherwise has under law"—which, in the court's view, was "precisely what the FCC attempted to do" in this case—the court similarly rejected the FCC's argument.[39]
3. The court rejected the agency's attempt to use Section 257, which directs the FCC to issue a report every three years identifying barriers to entry for entrepreneurs and small businesses in the provision and ownership of telecommunications and information services.[40] While the court found that it could "readily accept that certain assertions of Commission authority [to] be 'reasonably ancillary' to the Commission's statutory responsibility to issue a report to Congress"—for example, the court recognized that it would be permissible for the agency to impose disclosure requirements on BSPs in order to gather data needed for such a report—it also found that "the FCC's attempt to dictate the operation of an otherwise unregulated service based on nothing more than its obligation to issue a report defies any plausible notion of 'ancillariness.'"[41]

Case Summary

So, what does *Comcast* tell us? At minimum, to paraphrase Mark Twain, the reports of the demise of the FCC's ancillary authority are "greatly exaggerated." To the contrary, a plausible reading of *Comcast* (a reading that is reinforced by the dicta contained in the two cases described below) indicates that the FCC's ancillary authority is alive and well, subject to two clear limiting conditions: First, the FCC may not assert its ancillary authority by simply relying on statements of Congressional policy; and second, the FCC must tie the exercise of its ancillary jurisdiction to a specific delegation of authority contained in Title II, Title III, or Title VI[42] (a holding that is a well-established criterion of ancillary jurisdiction).[43] What

Comcast did not do, however, is address the question of what are the exact boundaries of that ancillary authority vis-à-vis the imposition of common carrier obligations on Title I services. We turn to that question next.

CELLCO PARTNERSHIP V. FCC

In *Cellco*, the DC Circuit was tasked with evaluating the legality of the FCC's *Data Roaming Order*, under which the agency mandated mobile providers to offer data roaming agreements to other such providers on "commercially reasonable" terms.[44] While the FCC's authority for its earlier efforts to impose roaming for voice services was relatively clear under Title II,[45] the *Data Roaming Order* pushed the legal envelope because not only had the FCC specifically classified mobile broadband as an "information service" under Title I, but under the plain terms of Section 332(c)(2) of the Communications Act, "a person engaged in the provision of a service that is a private mobile service *shall not,* insofar as such person is engaged, *be treated as a common carrier for any purpose under this Act*."[46] Accordingly, the court in *Cellco* was forced to resolve two legal questions: (1) did the FCC have the legal authority to issue the *Data Roaming Order* in the first instance?; and, if so, (2) did the agency unlawfully treat mobile providers as "common carriers" in this particular case? How the court resolved each question is discussed below.

Jurisdiction

In support of its action, the FCC identified three sources of regulatory authority for its *Data Roaming Order*: (1) Title III of the Communications Act, which broadly governs the FCC's authority over radio spectrum; (2) Section 706 of the Telecommunications Act of 1996; and (3) the FCC's ancillary authority under Title I. According to the court, however, in this particular case "we begin—and end—with Title III."[47]

In particular, the court focused on the agency's use of Section 303(b), which authorizes the agency to "'[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class'"[48]; and Section 303(r), which empowers the FCC, subject to the demands of the public interest, to "'[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter.'"[49] While the appellants argued that the FCC's use of these sections represented "an unprecedented and unbounded theory of regulatory power over wireless Internet service under its general 'public interest' authority", the court disagreed.

First, the court noted that while Title III does not "confer an unlimited power," it does endow the FCC with "expansive powers" and a "comprehensive mandate to 'encourage the larger and more effective use of radio in the public interest.'"[50] So, while the court held that the FCC may not rely on Title III's public-interest provisions without mooring its action to a distinct grant of authority in that Title (a finding consistent with the holding in *Comcast*), in this particular case the court found that the agency's reliance on Section 303(b) was a sufficient delegation of direct authority.

According to the court, Section 303(b) directs the FCC, consistent with the public interest, to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class." In the court's view, that is "exactly what the [*Data Roaming Order*] does—it lays down a rule about 'the nature of the service to be rendered' by entities licensed to provide mobile-data service." The appellants countered by arguing that the *Data Roaming Order* exceeded the bounds of Section 303(b) because instead of merely prescribing the nature of a service, the *Order* mandated the provision of service. Again, the court disagreed. In the court's view, wireless carriers are perfectly free to "choose not to provide mobile-internet service." As such, reasoned the court, the *Data Roaming Order* "merely defines the form mobile-internet service must take for those who seek a license to offer it."[51]

Next, the court took on the appellant's argument that the *Data Roaming Order* impermissibly resulted in a "fundamental change"—rather than a mere modification—of its existing licenses under Section 316 of the Communications Act.[52] While the court agreed that the FCC's Section 316 power to "modif[y] existing licenses does not enable it to fundamentally change those licenses," in the court's view, the *Data Roaming Order* "cannot be said to have wrought such a 'fundamental change.'" According to the court, because the *Data Roaming Order* "requires nothing more than the offering of 'commercially reasonable' roaming agreements, it hardly effects such a radical change." Indeed, reasoned the court, "imposing a limited obligation to offer data-roaming agreements to other mobile-data providers 'can reasonably be considered [a] modification [ ] of existing licenses.' "[53]

Common Carriage

Having ruled that Title III authorized the FCC to promulgate the *Data Roaming Order,* the court next turned to the other central legal question of the case—did the *Data Roaming Order* contravene the Communications Act's prohibition against treating providers of mobile data service as common carriers?[54]

The Communications Act defines "common carrier" as "any person engaged as a common carrier for hire"[55]—a definition which the court found to be "unsatisfyingly circular."[56] Complicating matters, reasoned the court, was the fact that "over the years…the Commission has relaxed the duties of common carriers in certain respects, and the line between common carriers and private carriers, *i.e.*, entities that are not common carriers, has blurred."[57] Accordingly, the difficult task before the court was "to pin down the essence of common carriage in the midst of changing technology and the evolving regulatory landscape."[58]

As a first step, the court reviewed the relevant case law and discerned the following three "basic principles" to guide its analysis to determine whether a BSP is acting as a "common carrier." They are as follows:

> Principle No. 1—If a carrier is forced to offer service indiscriminately and on general terms, then that carrier is being relegated to common carrier status.
>
> Principle No. 2—The FCC has significant latitude to determine the bounds of common carriage in particular cases.
>
> Principle No. 3—There is an important distinction between the question of whether a given regulatory regime is *consistent* with common carrier status and the question of whether that regime *necessarily confers* common carrier status. (Emphasis in original.)[59]

While Principles Nos. 1 and 2 are rather straightforward and reflect years of administrative law precedent, it is Principle No. 3 which is the interesting holding of law. According to the court,

> …even if a regulatory regime is not so distinct from common carriage as to render it inconsistent with common carrier status, that hardly means it is so fundamentally common carriage as to render it inconsistent with private carrier status. In other words, common carriage is not all or nothing—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*. It is in this realm—the space between *per se* common carriage and *per se* private carriage—that the FCC's determination that a regulation does or does not confer common carrier status warrants deference. Such is the case with the data roaming rule.[60]

Having derived these principles—and, in particular, having identified a permissible "gray area"—the court then used these principles to evaluate whether the *Data Roaming Order* improperly imposed common carriage requirements. After review, the court found that it did not.

In particular, the court focused on the fact that the *Data Roaming Order* provided substantial room for individualized bargaining and discrimination in terms by expressly permitting providers to adapt roaming agreements to "individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms." Given the FCC's phraseology, reasoned the court, the *Data Roaming Order* does "not amount to a duty to hold out facilities *indifferently* for public use." (Emphasis in original.) Moreover, reasoned the court, while the *Data Roaming Order* requires carriers to offer terms that are "commercially reasonable," the *Data Roaming Order* imposes no presumption of "reasonableness" (in contrast to the traditional "just and reasonable" standard under Title II); instead, the FCC will evaluate commercial reasonableness via 16 different subjective factors plus a catch-all "other special or extenuating circumstances" factor. According to the court, because the *Order* provides "considerable flexibility for providers to respond to the competitive forces at play in the mobile-data market" via commercial negotiation, the *Data Roaming Order* does not contravene the statutory exclusion of mobile providers who provide data service from common carrier status.[61]

Case Summary

After review, there are several interesting aspects of *Cellco* which merit further discussion. First, notwithstanding its holding in *Comcast* affirming the validity of the FCC's ancillary authority, it is interesting to note that the court in *Cellco* went out of its way to find a direct delegation of authority in this case, *i.e.*, although mobile broadband is classified as a Title I service, the court permitted the FCC to regulate the service under Title III. In so doing, *Cellco* tells us that the FCC's decision to reclassify broadband Internet access as a Title I service does not *a fortiori* mean that the FCC abdicated its general jurisdiction altogether.[62] To the contrary, to the extent that Broadband Service Providers engage in some sort of activity governed by Title II, Title III, or Title VI, *Cellco* is a plain reminder that the FCC's plenary jurisdiction over BSPs remains very much in force. As such, *Cellco* can be read for the proposition that the FCC's ability to carry out its traditional core mandate (*e.g.*, spectrum allocation, consumer protection, public safety, universal service, etc.) remains very much intact.[63]

The court also identified a permissible "gray area" where the FCC, subject to some limitations, may impose regulations that resemble—but are not *per se*—common carriage obligations on BSPs. So, while the FCC may not use the traditional "just and reasonable"[64] or "undue discrimination"[65] standards contained in Title II to regulate BSPs, *Cellco* holds that the agency may use a "commercially reasonable" standard to do so. The holding sends a clear signal that while the FCC cannot impose formal Title II price regulation on Title I BSPs, the agency retains the authority to impose *de facto* rate regulation, albeit under a "softer" standard that permits some individualization of terms and conditions across transactions.

VERIZON V. FCC

In the last case of the trilogy, the DC Circuit in *Verizon* was again tasked with determining whether the FCC could impose "net neutrality" regulations on BSPs.[66] This case makes two significant holdings of law. First, *Verizon* was the first case in which a court affirmatively held that Section 706 provided the FCC with an independent source of regulatory authority over BSPs (albeit subject to several limitations).[67] Second, notwithstanding this newfound independent authority, the court reaffirmed the principle that because the agency made the affirmative decision to classify broadband Internet access as an "information service" under Title I, it is bound by its prior policy choices—that is, having classified broadband Internet access as an "information service" under Title I, the Communications Act expressly prohibits the imposition of traditional common carriage regulation upon such services.[68] Each holding is discussed more fully below.

Section 706 as an Independent Grant of Authority

Section 706 is made up of two relevant sections. Under Section 706(a),

> The FCC 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.[69]

Section 706(b), in turn, requires the FCC to conduct a regular inquiry "concerning the availability of advanced telecommunications capability."[70] It further provides that should the FCC find that if "advanced telecommunications capability is [not] being deployed to all Americans in a reasonable and timely fashion," then 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."[71] The statute defines "advanced telecommunications capability" to include "broadband telecommunications capability."[72]

Turning first to Section 706(a), the court held that this provision did in fact provide the FCC with an affirmative grant of authority. In the court's view, Congress intended Section 706(a) to act as a backstop to the deregulation intended by the Telecommunications Act of 1996. As the court observed, "Section 706(a)'s legislative history suggests that Congress may have, somewhat presciently, viewed that provision as an affirmative grant of authority to the FCC whose existence would become necessary if other contemplated grants of statutory authority were for some reason unavailable."[73]

That said, the court was careful to point out that the FCC's authority under Section 706(a) was not unfettered. In fact, the court found that there are at least two limiting principles inherent to Section 706(a). The first limiting principle, according to the court, is that Section 706(a) "must be read in conjunction with other provisions of the Communications Act including, most importantly, those limiting the Commission's subject matter jurisdiction to 'interstate and foreign communication by wire and radio." Thus, reasoned the court, "any regulatory action authorized by Section 706(a) [must] fall within the Commission's subject matter jurisdiction over such communications—*a limitation whose importance this court has recognized in delineating the reach of the Commission's ancillary jurisdiction*."[74] In other words, Section 706 is not a direct delegation of authority rather, Section 706 should be viewed as an alternative source of ancillary jurisdiction.

The second limiting principle, according to the court, is that "any regulations must be designed to achieve a particular purpose: to 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.' Section 706(a) thus gives the FCC authority to promulgate only those regulations that it establishes will fulfill this specific statutory goal . . . ."[75]

Thus dispensing with Section 706(a), the court next turned to Section 706(b). Whether Section 706(b) presented the FCC with an affirmative source of authority was a particularly intriguing question for the court because for the agency's first five *Section 706 Reports*, the FCC always had found that broadband was being deployed on a "reasonable and timely basis."[76] Yet, subsequent to *Comcast* and prior to *Verizon,* the FCC in its *Sixth Section 706 Report* suddenly decided otherwise. While the court conceded that the "timing of the FCC's timing is certainly suspicious,"[77] the court upheld the FCC's use of Section 706(b) for essentially the same reason it provided for the FCC's use of Section 706(a), namely,

> that Congress contemplated that the Commission would regulate this industry, as the agency had in the past, and the scope of any authority granted to it by section 706(b)—limited, as it is, both by the boundaries of the Commission's subject matter jurisdiction and the requirement that any regulation be tailored to the specific statutory goal of accelerating broadband deployment—is not so broad that we might hesitate to think that Congress could have intended such a delegation.[78]

Having determined that both Section 706(a) and Section 706(b) provide an affirmative source of authority (subject to the limitations highlighted above), the court next turned to whether the FCC properly invoked this authority. According to the court, the FCC's "virtuous cycle of investment" model was sufficient justification of a market failure for the use of Section 706.

Under the FCC's "virtuous cycle of investment" model, regulations are required to "protect and promote edge-provider development for more and better broadband technologies, which in turn stimulates competition among broadband providers to further invest in broadband."[79] Stating the agency's model another way, "broadband providers' potential disruption of edge-provider traffic to be itself the sort of 'barrier' that has 'the potential to stifle overall investment in Internet infrastructure'" and, therefore, could "limit competition in telecommunications markets."[80] In buying this argument, however, the court issued dicta which will be a point of contention in the broadband debate for some time.

For example, the court found that BSPs "represent a threat to Internet openness and could act in ways that ultimately would inhibit the speed and extent of future broadband deployment."[81] To support such a conclusion, the court found that BSPs are "motivated to discriminate against and among edge providers" who provide similar services such as VoIP or video. Moreover, the court found that BSPs have "powerful incentives to accept fees from edge providers, either in return for excluding their competitors or for granting them prioritized access to end users." Should such conduct occur, reasoned the court, "the resultant harms to innovation and demand will largely constitute 'negative externalities': any given broadband provider will 'receive the benefits of . . . fees but [is] unlikely to fully account for the detrimental impact on edge providers' ability and incentive to innovate and invest.'" Notwithstanding the ample literature showing that such a universal conclusion is not true,[82] the court adamantly held that these potential outcomes are "based firmly in common sense and economic reality."[83]

But the court did not stop there, the court also found that BSPs "have the technical and economic ability to impose such restrictions." To support this conclusion, the court provided several rationales. First, the court found that because "all end users generally access the Internet through a single broadband provider, that provider functions as a 'terminating monopolist,' with power to act as a 'gatekeeper' with respect to edge providers that might seek to reach its end-user subscribers."[84] Second, the court found that this "terminating monopoly" was reinforced by the facts that not only do consumers have "limited" competitive options because "only one or two wireline or fixed wireless firms" provide service in most markets,[85] but that consumers face high switching costs for such services such as "early termination fees; the inconvenience of ordering, installation, and set-up, and associated deposits or fees; possible difficulty returning the earlier broadband provider's equipment and the cost of replacing incompatible customer-owned equipment; the risk of temporarily losing service; the risk of problems learning how to use the new service; and the possible loss of a provider-specific email address or website."[86] Finally, the court found that consumers may not be sufficiently sensitive to BSP conduct for competition, if it exists, to protect them from bad conduct. In the court's view:

> Broadband providers' ability to impose restrictions on edge providers does not depend on their benefiting from the sort of market concentration that would enable them to impose substantial price increases on end users—which is all the Commission said in declining to make a market power finding. Rather, broadband providers' ability to impose restrictions on edge providers simply depends on end users not being fully responsive to the imposition of such restrictions.[87]

Yet, oddly, in the *Open Internet Order*, the FCC never made an affirmative finding of market power to justify the imposition of regulation in fact, the FCC made it expressly clear that competition plays *no role* in its application of net neutrality regulation.[88] In so doing, the court went beyond the *Open Internet Order* on competition, further trivializing the role of market power in the analysis of net neutrality regulation.

Issues of Common Carriage

Having found that Section 706 provides an affirmative grant of authority to the FCC (subject to the limitations outlined above), the court next turned to the question of whether the specific rules proposed in the *Open Internet Order*—the anti-discrimination, the "no blocking" and the transparency requirements—constituted an impermissible imposition of common carriage requirements on Title I services.[89] Using the principles detailed in *Cellco,* the court found that the non-discrimination and anti-blocking provisions certainly did.

What is interesting is that the court appeared to focus on the fact that for both the anti-blocking and non-discrimination rules, such prohibitions essentially amounted to the imposition of uniform price regulation to all comers (regardless of customer class), albeit "zero price" regulation.[90] Again, remembering from *Cellco* that a major element of common carriage is the requirement to carry all traffic indiscriminately (as opposed to private carriage, where the practice is to make individualized decisions about whether, and on what terms, to deal), the court found that "the Commission may not claim that the *Open Internet Order* imposes no common carrier obligation simply *because it compels an entity to continue furnishing service at no cost*."[91]

For example, in determining the validity of the non-discrimination requirement the court observed that:

> the *Open Internet Order* makes no attempt to ensure that its reasonableness standard remains flexible. Instead, with respect to broadband providers' potential negotiations with edge providers, the *Order* ominously declares: "it is unlikely that pay for priority would satisfy the 'no unreasonable discrimination' standard." *If the Commission will likely bar broadband providers from charging edge providers for using their service, thus forcing them to sell this service to all who ask at a price of $0, we see no room at all for "individualized bargaining."*[92]

The court's focus on uniform "zero price" regulation applied equally to the FCC's attempt to impose an anti-blocking rule, finding that:

> The anti-blocking rules establish a minimum level of service that broadband providers must furnish to all edge providers: edge providers' "content, applications [and] services" must be "effectively [ ]usable." The *Order* also expressly prohibits broadband providers from charging edge providers any fees for this minimum level of service. *In requiring that all edge providers receive this minimum level of access for free, these rules would appear on their face to impose per se common carrier obligations with respect to that minimum level of service.*[93]

So, while *Verizon* makes clear that the FCC cannot mandate that BSPs universally charge a uniform price to all comers (in this case a "zero" price), the court was ambiguous as to the exact contours of a standard that would pass legal muster. Although the court did hint that a *Cellco*-type "commercially reasonable" test might work going forward, the court suggested that the evaluation of any new rule will be contingent on "*how* the common carrier reasonableness standard applies in … context, not *whether* the standard is actually the same as the common carrier standard."[94]

Finally, the court (as appellate courts often do) provided the FCC with a plausible, alternative path for an anti-blocking rule going forward. Specifically, the court hypothesized if the relevant "carriage" BSPs provide "might be access to end-users more generally"—as opposed to a "minimum required service"—then the "anti-blocking rule would permit broadband providers to distinguish somewhat among edge providers" and not result in common carriage. To illustrate this point, the court provided the following hypothetical:

> 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. In theory, moreover, not only could Verizon negotiate separate agreements with each individual edge provider regarding the level of service provided, but it could also charge similarly-situated edge providers completely different prices for the same service. Thus, if the relevant service that broadband providers furnish is access to their subscribers generally, as opposed to access to their subscribers at the specific minimum speed necessary to satisfy the anti-blocking rules, then these rules, while perhaps establishing a lower limit on the forms that broadband providers' arrangements with edge providers could take, might nonetheless leave sufficient "room for individualized bargaining and discrimination in terms" so as not to run afoul of the statutory prohibitions on common carrier treatment.[95]

While we do not know at the time of this writing how the FCC will ultimately proceed with its new *Open Internet Rules*, it is important to note that the Commission acknowledged the viability of this legal approach in its *2014 Open Internet NPRM*.[96]

Disclosure Rules Upheld

Finally, we come to the court's treatment of the FCC's transparency/disclosure rules. The court upheld these rules in a single perfunctory sentence: The appellant did "not contend that these rules, on their own, constitute *per se* common carrier obligations, nor do we see any way in which they would."[97] So that, as they say, is that.

Case Summary

While some maintain that Section 706 was never intended to provide the agency with an independent source of regulatory authority, with the DC Circuit's ruling in *Verizon* that question is now moot.[98] As the invocation of Section 706 therefore breaks new legal ground, *Verizon* perhaps raises more questions than provides answers.

Are 706(a) and 706(b) Independent of Each Other? An interesting question raised by *Verizon* is whether Section 706(a) and Section 706(b) may be read independently of each other or whether Section 706(b) is the affirmative trigger for the use of delineated powers contained in 706(a)? Again, Section 706(a) provides that the FCC "shall encourage … deployment on a reasonable and timely basis" either by regulatory forbearance or by imposing additional regulation. Read alone, therefore, a reasonable interpretation would be that Section 706(a) provides the FCC with a continuing independent duty to encourage broadband deployment using the various regulatory powers delineated in that provision. Yet, there also is Section 706(b), which requires the FCC to conduct a regular inquiry and a clear mandate that if the agency finds after such inquiry that broadband is not being deployed "on a reasonable and timely basis," then it "shall take immediate action."

Clearly, at the time the FCC promulgated its original *Open Internet Order*, the agency believed that Section 706(b) was required to trigger the use of its authority in Section 706(a) given the fact that the FCC decided—(in the court's words) "suspicious[ly]"—post-*Comcast* and pre-*Verizon* to find in its *Sixth 706 Report* that broadband was no longer being deployed on a reasonable and timely basis. This view of Section 706 is reasonable given that it is a "fundamental canon of statutory construction that the words in a statute must be read in their context and with a view to their place in the overall statutory scheme."[99] However, if the FCC's original reading of Section 706 was accurate, then the Achilles heel of the legal theory is exposed, *i.e.*, what one FCC finds to be "reasonable and timely" in one *Section 706 Report*, the next FCC can find differently later.

Yet, for whatever reason, the court never looked at how the agency defined the terms "reasonable and timely" for either Section 706(a) or Section 706(b). (Had it done so, given the FCC's naked gerrymandering of its own cost data, we probably would have been looking at a different result.[100]) Instead, the court reasoned that because BSPs—as "terminating monopolists"—*always* have both the incentive and ability to discriminate and, therefore, absent regulation BSPs will *always* will adversely affect the virtuous cycle of investment. With such logic, we can infer that the court takes the view that Section 706(a) is independent from Section 706(b), because the court seemed to say that the defined trigger of Section 706(b) is irrelevant to the FCC's on-going (and independent) effort to promote broadband deployment under Section 706(a) under foreseeable market conditions. If this is the correct reading of *Verizon*, however, then the implications are significant.

To start, a "virtuous cycle," by definition, has no beginning or end. Thus, by endorsing the FCC's "virtuous cycle of innovation" hypothesis and ignoring the "reasonability" (*i.e.*, cost of deployment) requirement part of the statute, the court allows the agency to move the goal posts at whim to ensure its jurisdiction under Section 706 continues indefinitely.[101] To illustrate this point, consider the following hypothetical: Assume *arguendo* the agency has achieved its "Broadband Nirvana," i.e., that every home in every hamlet in America has broadband.[102] Under this scenario, broadband is now "deployed." Yet, if the *speed* of this broadband is deemed insufficient, then under *Verizon* the FCC may continue to impose regulation until the new speed threshold is satisfied, even though the costs of deploying such an upgrade may not be under any legitimate scenario "reasonable."[103] Furthermore, even if a "Broadband Nirvana" is achieved, then the agency may reason that its realization is a direct consequence of regulation, thereby providing justification for the perpetual regulation of the Internet.[104] Given the potential expansion of its powers by viewing Section 706(a) as independent of Section 706(b), it should come as no surprise that the FCC has now embraced this latter view.[105]

Are There Limits on the FCC's Section 706 Authority? Perhaps the clearest message from *Verizon* is that because the FCC made the deliberate policy choice to classify broadband Internet access as a Title I information service, it is prohibited from applying traditional Title II common carriage telephone regulation on Broadband Service Providers. Yet, with the invocation of Section 706, the FCC now has the authority to promulgate "measures that promote competition in the local telecommunications market" via a variety of tools, including "other regulating methods that remove barriers to infrastructure investment." The question at hand, therefore, is whether there are limits to that authority? According to *Verizon*, the answer is yes.

In particular, *Verizon* makes clear that Section 706 does not provide the FCC with a direct delegation of authority. To the contrary and as noted above, *Verizon* holds that Section 706 is really another form of the FCC's ancillary authority—that is, as with any use of its traditional ancillary authority (see discussion of *Comcast*), *Verizon* requires the FCC to tie its use of Section 706 to a specific delegation of authority in Title II, Title III, or Title VI. On top of that, the FCC also must find that its actions are designed to promote additional broadband investment (a requirement, as demonstrated herein, is a bit squishier).

These limitations can be meaningful. For example, *Verizon's* requirement that the FCC tie its use of Section 706 to a specific delegation of authority probably prevents the FCC from extending its regulation to stand-alone edge providers who are not otherwise engaged in jurisdictional activities as some fear (although an aggressive FCC could certainly try).[106] Similarly, *Verizon's* requirement that the FCC tie its use of Section 706 to a specific delegation of authority probably does not enhance the FCC's ability to preempt state laws restricting municipal broadband deployment.[107]

CONCLUSION

This article seeks to answer a straightforward legal question: What are the bounds of the FCC's authority over BSPs? Based on the three cases reviewed here, it is clear that the FCC retains ample jurisdiction over BSPs under current law and, as such, reclassification of broadband Internet access as a Title II common carrier telecommunications service is unwarranted. Indeed, the three recent cases reviewed in this article focused directly on the agency's authority and made a number of significant determinations.

First, where applicable, these cases hold that BSPs are still subject to direct jurisdiction under certain portions of Title II, Title III, and Title VI, hence, the FCC's decision to classify broadband Internet access as a Title I information service does not *a fortiori* mean that the FCC has abdicated its authority over BSPs altogether. To the contrary, to the extent BSPs continue to engage in activities that fall within the agency's direct jurisdiction, the FCC's ability to carry out its traditional core mandate (*e.g.*, spectrum allocation, consumer protection, public safety, universal service, etc.) remains very much intact.

Second, these cases hold that the FCC's ancillary jurisdiction over BSPs remains alive and well, provided that the FCC ties the use of that jurisdiction to a specific delegation of authority under Title II, Title III, or Title VI. In this sense, nothing has changed. So, while ancillary authority remains a potent and legally-sound tool in the FCC's regulatory arsenal to remedy policy-relevant harms, especially on a case-by-case basis, the agency must provide its whys-and-wherefores to the court.

Third, with the DC Circuit's ruling in *Verizon*, the FCC now has an *additional hook for ancillary authority* under Section 706 to regulate BSPs, subject to two important limitations: (1) just as with the FCC's use of its traditional ancillary authority, in order to invoke Section 706 the FCC must tie its actions back to a specific delegation of authority in Title II, Title III, or Title VI; and (2) the FCC also must demonstrate that any use of Section 706 is designed to promote infrastructure investment and deployment on a reasonable and timely basis. As shown below, these limitations can be meaningful. For example, because the FCC must tie its invocation of Section 706 to a specific delegation of authority, this requirement probably prevents the FCC from extending regulation to stand-alone edge providers who are not otherwise engaged in jurisdictional activities as some fear. Similarly, because the FCC must tie its use of Section 706 to a specific delegation of authority in the Communications Act, Section 706 probably does not expand the FCC's authority to preempt state laws restricting municipal broadband deployment.

Finally, these cases make clear that because the FCC classified broadband as a Title I information service, the FCC is prohibited by statute from imposing traditional Title II common carrier obligations on BSPs. That is, the agency may not regulate using the traditional "unjust and unreasonable" or "undue discrimination" standards. However, these cases also hold that the FCC may regulate the conduct of BSPs under a "commercially reasonable" standard, which, the courts' reasoned, permits individualized transactions and is thus sufficiently different from common carrier regulation to be lawful. That being said, as the D.C. Circuit held in *Verizon*, evaluation of any new "commercially reasonable" standard will be contingent on "*how* the common carrier reasonableness standard applies in … context, not *whether* the standard is actually the same as the common carrier standard."

While this article is limited to the *legal question* of what are the bounds of the FCC's authority over BSPs, the more salient *policy question* of how the FCC should exercise that authority always looms large in the background. Certainly, there are those who argue that there is no longer a need for an "expert" agency and, as such, the FCC should be stripped of most, if not all of its regulatory functions and to leave resolution of competitive issues to the antitrust authorities.[108] This author disagrees. While the Federal Communications FCC definitely can and should do more to remove prescriptive regulation over BSPs,[109] given both the limits of a traditional antitrust analysis for industries characterized by high fixed and sunk costs and the significant social obligations imposed on the industry by Congress (*e.g.*, universal service), an expert agency with significant oversight to resolve policy problems and disputes on a case-by-case basis remains important.[110] As these cases indicate, the FCC's ability to act in this capacity remains strong.

Accordingly, the real question—as always—is whether the agency will exercise its authority wisely.

NOTES

1. *See*, *e.g.*, In re Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier, FCC 95-427, 11 FCC Rcd. 3271 (1995) and citations therein.
2. Indeed, it should be noted that prior to the enactment of the 1996 Act, the Communications Act did not contain any provisions that would expressly allow the agency to forbear lawfully from applying portions of the Act. Thus, for example, when the FCC tried to eliminate tariff requirements for non-dominant long-distance carriers, the Supreme Court held that the agency lacked this authority. *See* MCI v. AT&T, 512 U.S. 218 (1994).
3. 47 U.S.C. § 160.
4. In the Matter of Federal-State Joint Board on Universal Services, Federal Communications Commission, FCC 98-67, 13 FCC Rcd 11,830, Report to Congress (rel. April 20, 1998) (available at *http://www.fcc.gov/Bureaus/Common_Carrier/Reports/fcc98067.pdf*) at ¶82.
5. For a detailed list of potential regulatory obligations that would be triggered by reclassification, *see*, *e.g.*, AT&T Ex Parte, FCC GN Docket No. 14-28 (May 9, 2014) (available at *http://apps.fcc.gov/ecfs/document/view?id=7521120564*).
6. *See*, *e.g.*, G.S. Ford and L.J. Spiwak, *Section 10 Forbearance: Asking The Right Questions To Get The Right Answers*, 23 CommLaw Conspectus 126 (2014) (available at: *http://scholarship.law.edu/commlaw/vol23/iss1/5*);
7. *See* G.S. Ford and L.J. Spiwak, *Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service*, Phoenix Center Policy Bulletin No. 36 (September 2014) (available at: *http://www.phoenix-center.org/PolicyBulletin/PCPB36Final.pdf*) and forthcoming Federal Communications Law Journal 2015; Section 10 Forbearance, *id.*
8. *See* G.S. Ford, L.J. Spiwak and M. Stern, "The Broadband Credibility Gap," 19 *CommLaw Conspectus* 75 (2010) (available at *http://www.phoenix-center.org/papers/CommlawConspectusBroadbandCredibilityGap.pdf*) (hereinafter "Broadband Credibility Gap"); G.S. Ford and L.J. Spiwak, "What is the Effect of Regulation on Broadband Investment? Regulatory Certainty and the Expectation of Returns," *Phoenix Center Policy Perspective No. 12-05:* (September 19, 2012) (available at *http://www.phoenix-center.org/perspectives/Perspective12-05Final.pdf*).
9. 47 U.S.C. § 153(24) defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." This definition is a near-perfect description of Internet access services.
10. *See* Communications Act Section 4(i), 47 U.S.C 154(i), which provides that the FCC "may 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." For a good summary of the FCC's ancillary authority, *see* B. Esbin and A. Marcus, " 'The Law Is Whatever the Nobles Do:' Undue Process at The FCC," 17 *CommLaw Conspectus* 1 (2009) (available at *http://commlaw.cua.edu/res/docs/Esbin-Marcus-Revised-2.pdf*).
11. *See*, *e.g.*, In re Petition for Declaratory Ruing that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, FCC 04-27, 19 FCC Rcd 3307, Memorandum and Order (rel. February 19, 2004) (hereinafter the "Pulver Order").
12. National Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).
13. *See* In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, FCC 05-150, 20 FCC Rcd 14853, 14862, Report and Order and Notice of Proposed Rulemaking (rel. September 23, 2005), *aff'd* Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007).
14. In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, FCC 07-30, 22 FCC Rcd 5901, Declaratory Ruling (rel. March 23, 2007).
15. 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, FCC 06-165, 21 FCC Rcd 13281, 13281, Memorandum Opinion and Order (November 7, 2006).
16. *See*, *e.g.*, K. High, "Digital Pioneers Remember Past, Forecast Future of the Internet," *Politics365* (December 6, 2013) (available at *http://politic365.com/2013/12/06/digital-pioneers-remember-past-forecast-future-of-the-internet/v*).
17. For example, one argument in favor of reclassification is that Title II would bar "fast lanes" versus "slow lanes." However, a basic review of both the case law and economic theory would demonstrate this to be a false argument. *See* G.S. Ford and L.J. Spiwak, "Non-Discrimination or Just Non-Sense: A Law and Economics Review of the FCC's New Net Neutrality Principle," *Phoenix Center Perspective No. 10-03* (March 24, 2010) (*http://www.phoenix-center.org/perspectives/Perspective10-03Final.pdf*).
18. *See*, *e.g.*, M. Ammori, "Net Neutrality's Legal Binary: an Either/Or With No 'Third Way' " (May 13, 2014) ("If we want a rule against discrimination and against new access fees, we need Title II.") (available at *http://ammori.org/2014/05/13/net-neutralitys-legal-binary-an-eitheror-with-no-third-way*); Comments of Public Knowledge and Common Cause, FCC Docket No. 14-28 (March 21, 2014) ("Title II is the proper regulatory framework for telecommunications services such as broadband.") (available at *http://apps.fcc.gov/ecfs/document/view?id=7521094713#page=1&zoom=auto,-265,547*); Comments of Voices for Internet Freedom, FCC Docket No. 14-28 (March 21, 2014) ("Title II cannot just be on the table; Title II needs to be the main course.") (available at *http://apps.fcc.gov/ecfs/document/view?id=7521094791*).
19. In the Matter of Technology Transitions, AT&T Petition to Launch a Proceeding Concerning the TDM to IP Transition; Connect America Fund; Structure and Practices of the Video Relay Service Program; Telecommunications Relay Services And Speech to Speech Services for Individuals with Hearing and Speech Disabilities; Numbering Policies for Modern Communications, FCC 14-5, 29 FCC Rcd 1433, Order, Report And Order And Further Notice Of Proposed Rulemaking, Report And Order, Order And Further Notice Of Proposed Rulemaking, Proposal For Ongoing Data Initiative (rel. January

31, 2014) (available at *http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0131/FCC-14-5A1.pdf*).

20. In the Matter of Protecting and Promoting the Open Internet, FCC 14-61, 29 FCC Rcd 8305, Notice of Proposed Rulemaking (rel. May 15, 2014) (hereinafter "2014 Open Internet NPRM").
21. Significantly, the Supreme Court recently strengthened the Chevron Doctrine to give the FCC—as the "expert agency"—great deference to interpret the Communications Act in the digital age. *See* City of Arlington, Texas v. FCC, 133 S.Ct. 1863 (2013). For an interesting examination of this case, *see* S.L. Feder, M.E. Price, A.C. Noll, "*City of Arlington v. FCC*: The Death of Chevron Step Zero?," 66 *Federal Communications Law Journal* 47 (2013).
22. Comcast v. FCC, 600 F.3d 642 (D.C. Cir. 2010).
23. Cellco Partnership v. Verizon, 700 F.3d 534 (D.C. Cir. 2012).
24. Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).
25. Given that national security and law enforcement issues often are governed by other statutes (*e.g.,* CALEA) which have a "wholly distinct legislative history and Congressional purpose" from that of the Communications Act, *see*, *e.g.*, Time Warner Telecom v. FCC, 507 F.3d 205, 119-220 (3d Cir. 2007), any discussion about how the FCC's decision to classify broadband Internet access as an information service impacts the FCC's authority to comply with these type of statutes is beyond the scope of this article.
26. *See* 47 U.S.C. § 153(51) ("A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services…")
27. For a good general overview of the "just and reasonable" and "unreasonable discrimination" standards, see L. J. Spiwak, *Understanding the Net Neutrality Debate: A Basic Legal Primer,* Bloomberg BNA (July 23, 2014) (available at: *http://www.phoenix-center.org/BloombergBNA23July2014.pdf*).
28. *Verizon,* 740 F.3d at 657 (citations omitted and emphasis in original).
29. In re Formal Complaint of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, FCC 08-183, 23 FCC Rcd. 13,028, Memorandum and Order (rel. August 20, 2008).
30. *Comcast*, 600 F.3d at 644.
31. *See supra* n. 10.
32. *See*, *e.g.*, the preamble of the Telecommunications Act of 1996, which provides that the Act is intended "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced information technologies and services to all Americans by opening all telecommunications markets to competition." Conference Report, Telecommunications Act of 1996, House of Representatives, 104th Congress, 2d Session, H. Rpt. 104-458, at p. 1.
33. Section 230(b), 47 U.S.C. § 230(b), provides that:

    It is the policy of the United States—

    (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

    (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

    (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

    (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

    (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.
34. Section 1, 47 U.S. Code § 151, provides, in relevant part, that: "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States… a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges… there is created a commission to be known as the 'Federal Communications Commission'…"
35. *Comcast*, 600 F.3d at 654.
36. *Id.* at 655 (citations omitted).
37. *Comcast*, 600 F.3d at 658-659. As noted *infra*, subsequent to this decision, the FCC reversed course and found that Section 706 did, in fact, provide it with a separate source of authority.
38. 47 U.S.C. § 256(b)(1).
39. *Comcast*, 600 F.3d at 659.
40. 47 U.S.C. § 257.
41. *Comcast*, 600 F.3d at 659-660.
42. For example, University of Pennsylvania Professor Kevin Werbach argued that a better legal strategy for the FCC would have been to use its ancillary authority under Section 251 of the Telecommunications Act. Kevin D. Werbach, "Off the Hook," 95 *Cornell L. Rev.* 535 (2010). While I thought Professor Werbach perhaps went a bit too far with the application of his theory, I readily conceded that the argument had some merit. *See* The Broadband Credibility Gap, *supra* n. 8.
43. *See generally*, Esbin and Marcus, *supra* n. 10.
44. Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile data services, FCC 11-52, 26 FCC Rcd 5411, Second Report And Order (rel. April 7, 2011) (hereinafter "Data Roaming Order").
45. In re Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, FCC 07-143, 22 FCC Rcd. 15817, Report And Order And Further Notice Of Proposed Rulemaking (rel. August 16, 2007) (hereinafter "2007 Voice Roaming Order") (codifying that automatic roaming is a common carrier service subject to the protections of Sections 201 and 202 of the Communications Act); In re Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile data services, FCC 10-59, 25 FCC Rcd. 4181, Order on Reconsideration and Second Further Notice of Proposed Rulemaking (rel. April 21, 2010) (hereinafter "2010 Voice Roaming Order").
46. 47 USC § 332(c)(2) (emphasis supplied).
47. *Cellco*, 700 F.3d at 541.
48. 47 U.S.C. § 303(b).
49. 47 U.S.C. § 303(r).
50. *Cellco*, 700 F.3d at 542.
51. *Id.* at 542-543.
52. 46 U.S.C. § 316.
53. *Cellco*, 700 F.3d at 543-544.
54. As noted above, under Section 332 of the Communications Act, providers of "commercial mobile services," such as wireless voice-telephone services, are common carriers, whereas providers of other mobile services are exempt from common carrier status. *See* 47 U.S.C. § 332(d)(2), 46 U.S.C. § 332(c)(2).
55. 47 U.S.C. § 153(11).
56. Cellco, 700 F.3d at 538.
57. *Id.* at 546.
58. *Id.*

59. *Id.* at 547.
60. *Id.* at 547 (citations omitted).
61. *Id.* at 548.
62. *See* Pulver Order, *supra* n. 11.
63. *C.f.*, In re FCC 11-161, 753 F.3d 1015 (10th Cir., May 23, 2014) (upholding FCC's plan to allocate Universal Service Funds to pay for broadband, rather than traditional POTS, networks under Title II).
64. *See*, *e.g.*, 47 U.S.C. §201(b) ("All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful").
65. *See*, *e.g.*, 47 USC § 202(a) ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.")
66. *See* In re Preserving The Open Internet, FCC 10-201, 25 FCC Rcd 17905, Report and Order (rel. December 23, 2010) (hereinafter "Open Internet Order").
67. Recalling from the discussion of *Comcast*, supra, the FCC had originally attempted to rely on Section 706, but the court shot down that argument on the grounds that because the agency, at the time of *Comcast*, had stated that Section 706 did not grant it independent authority. Subsequent to *Comcast* and prior to *Verizon*, however, the FCC reversed course and found that, in fact, Section 706 did grant it authority. The court accepted the FCC's change in policy, noting that "even a federal agency is entitled to a little pride." *Id.* at 636-637.
68. *See supra* n. 26.
69. 47 U.S.C. § 1302(a).
70. 47 U.S.C. § 1302(b).
71. *Id.*
72. 47 U.S.C. § 1302(d)(1).
73. *Verizon*, 740 F.3d at 638-639.
74. *Id.* at 639-640 (emphasis supplied).
75. *Id.* at 640.
76. *See* In the Matter of 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 Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, FCC 10-129, 25 FCC Rcd 9556, Sixth Broadband Deployment Report (rel. July 20, 2010) (available at *https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-129A1_Rcd.pdf*).
77. *Id.* at 642.
78. *Id.* at 641.
79. *Id.* at 642.
80. *Verizon*, 740 F.3d at 642-643 (citations omitted).
81. *Id.* at 645.
82. *See*, *e.g.*, G.S. Ford, T.M. Koutsky and L.J. Spiwak, "The Welfare Impacts of Broadband Network Management: Can Broadband Service Providers be Trusted?" *Phoenix Center Policy Paper No. 32* (March 2008) (available at *http://www.phoenix-center.org/pcpp/PCPP32Final.pdf*).
83. *Verizon*, 740 F.3d at 645-646.
84. *Id.* at 646. In the same vein, the court upheld the FCC's reasoning that the "ability to act as a 'gatekeeper' distinguishes broadband providers from other participants in the Internet marketplace—including prominent and potentially powerful edge providers such as Google and Apple—who have no similar 'control [over] access to the Internet for their subscribers and for anyone wishing to reach those subscribers.'" *Id.*
85. Noticeably, the court ignored the presence of multiple mobile broadband providers. Unfortunately, the DC Circuit is not the only court of general jurisdiction to discount the effect of wireless substitution. *See*, *e.g.*, Qwest v. FCC, 689 F.3d 1214 (10th Cir. 2012) (upholding FCC's Phoenix Forbearance Order).
86. *Verizon*, 740 F.3d at 646-647.
87. *Id.* at 648 (citations omitted).
88. *See*, *e.g.*, Open Internet Order, *supra* n. 66 at ¶ 32 ("… these threats to Internet-enabled innovation, growth, and competition do not depend upon broadband providers having market power with respect to end users …") and at n. 87 ("Because broadband providers have the ability to act as gatekeepers even in the absence of market power with respect to end users, we need not conduct a market power analysis.").
89. *See* 47 U.S.C. § 153(51), *supra* n. 26.
90. *See*, *e.g.*, G.S. Ford and M. Stern, "*Sabotaging Content Competition: Do Proposed Net Neutrality Regulations Promote Exclusion?" Phoenix Center Perspective No. 10-02*: (March 4, 2010) (available at *http://www.phoenix-center.org/perspectives/Perspective10-02Final.pdf*).
91. *Verizon*, 740 F.3d at 654 (emphasis supplied).
92. *Id.* at 657 (citations omitted and emphasis in original).
93. *Id.* at 658 (emphasis supplied).
94. *Id.* at 657 (emphasis in original).
95. *Id.* at 658.
96. 2014 Open Internet NPRM, *supra* n. 20 at ¶¶ 91-109.
97. Verizon, 740 F.3d at 659.
98. *See*, *e.g.*, M. O'Rielly, "FCC's Grab For New Regulatory Power Could Go Beyond Broadband Providers," *The Hill* (May 5, 2014)

    ("Congress never intended to give the FCC that authority. I know because I was in the room, as a congressional staffer, when that deal was made.") (available at *http://thehill.com/special-reports/technology-may-5-2014/205260-fccs-grab-for-new-regulatory-power-could-go-beyond*).
99. *See*, *e.g.*, Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989).
100. G.S. Ford and L.J. Spiwak, "*Justifying the Ends: Section 706 and the Regulation of Broadband*," 16 *Journal of Internet Law* 1 (January 2013) (available at *http://www.phoenix-center.org/papers/JournalofInternetLawSection706.pdf*); L. Spiwak, "The FCC Contradicts Their Facts (Again) To Justify Expanded Broadband Regulation," *@lawandeconomics* (February 20, 2013) (available at *http://phoenix-center.org/blog/archives/1185*).
101. *See Verizon*, 740 F.3d 640-641, where the court noted that when the FCC first established its definition of broadband of 200 kps in 1999, "the Commission recognized that technological developments might someday require it to reassess the 200 kbps threshold. In the Sixth Broadband Deployment Report, the Commission decided that day had finally arrived." (Citations omitted.)
102. For an additional exploration into the fallacies of a "Broadband Nirvana", *see*, *e.g.*, T.R. Beard, G.S. Ford, L.J. Spiwak, M. Stern, "The Broadband Adoption Index: Improving Measurements and Comparisons of Broadband Deployment and Adoption," 62 *Federal Communications Law Journal* 343 (2010).

103. *See*, *e.g.*, G.S. Ford, "Sloppy Research Sinks Susan Crawford's Book," *@lawandeconomics* (January 18, 2013) (available at *http://phoenix-center.org/blog/archives/1075*) (demonstrating that Professor Susan Crawford's claims that the cost of building ubiquitous fiber to be only $50-$90 billion was based on a failure to quote sources correctly and that a legitimate estimate of ubiquitous fiber was around $350 billion).

104. *See* 2014 Open Internet NPRM, *supra* n. 20___ at ¶ 143. (According to the FCC, it now views "sections 706(a) and (b) as independent and overlapping grants of authority that give the FCC the flexibility to encourage deployment of broadband Internet access service through a variety of regulatory methods, including removal of barriers to infrastructure investment and promoting competition in the telecommunications market, and, in the case of section 706(b), giving the FCC the authority to act swiftly when it makes a negative finding of adequate deployment.")

105. *Id.* at ¶ 145 ("[W]e note that Congress did not define 'deployment.' We believe Congress intended this term to be construed broadly, and thus, consistent with precedent, we have interpreted it to include the extension of networks as well as the extension of the capabilities and capacities of those networks.")

106. As noted *supra* in n. 84, the court in Verizon went out of its way to note that if the FCC wanted to extend its Section 706 authority to edge providers, then the agency would have to demonstrate that such edge providers are able to act in a "gatekeeper" capacity.

107. For a full explanation of this point, *see,* L.J. Spiwak, *FCC Has No Authority to Preempt State Municipal Broadband Laws,* Bloomberg BNA (August 6, 2014) (available at *http://www.phoenix-center.org/BloombergBNAMuniBroadband.pdf*).

108. *See*, *e.g.*, R. Bennett, J.A. Eisenach, J.K. Glassman, B.E. Howell, J. Hurwitz, R. Layton and B. Swanson, "Comments on Communications Act Modernization" (January 31, 2014) (available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2388723*); R.E. Litan and H.J. Singer, "The Need for Speed: A New Framework for Telecommunications Policy for the 21st Century" (Brookings Institution Press 2013).

109. *See, e.g.*, "The Impossible Dream: Forbearance After the Phoenix Order," *supra* n. 6; T. Randolph Beard, George S. Ford and Lawrence J. Spiwak, *Market Definition and the Economic Effects of Special Access Price Regulation,* 22 CommLaw Conspectus 237 (2014) (available at: *http://scholarship.law.edu/commlaw/vol22/iss2/10*).

110. *See*, *e.g.*, "A Fresh Analytical Start at the FCC," *@lawandeconomics* (October 11, 2013) (available at *http://phoenix-center.org/blog/archives/1518*); G.S. Ford and L.J. Spiwak, "*Equalizing Competition Among Competitors: A Review of the DOJ's Spectrum Screen Ex Parte Filing,*" *Phoenix Center Policy Bulletin No. 33* (May 2013) (available at *http://www.phoenix-center.org/PolicyBulletin/PCPB33Final.pdf*); T.R. Beard, G.S Ford, L.J. Spiwak and M. Stern, "*Wireless Competition Under Spectrum Exhaust*," 65 *Federal Communications Law Journal* 79 (2012); T.M. Koutsky and L.J. Spiwak, "*Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of The 'Public Interest' Standard*," 18 *CommLaw Conspectus* 329 (2010); G.S. Ford, T.M. Koutsky, L.J. Spiwak, "*Competition After Unbundling: Entry, Industry Structure and Convergence*," 59 *Federal Communications Law Journal* 331 (2007).