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COMMENT

NETWORK NEUTRALITY: VERIZON V. FCC

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The Federal Communications Commission (“FCC”) is once again locking horns with the broadband behemoth, Verizon, over the issue of network neutrality.¹ Although this conflict between the government and corporate giants is far from new, recent events have forced courts to give it close scrutiny.² Given the explosive pace at which technology has expanded and permeated citizens’ daily lives, the judgments rendered have greater significance now than ever before.

“Network neutrality” is a term coined in the past decade for a position that advocates the absence of restrictions by Internet service providers or governments on consumers’ access to their networks.³ Simply put, network neutrality is the idea that network data should roam freely, without interference from network owners (usually broadband companies), regardless of what sites the end users visit. It is a contentious position because 1) no one knows how net neutrality regulation will play out and 2) the problems it seeks to prevent have not arisen yet.

Verizon’s current suit against the FCC comes on the heels of the FCC’s new set of “broadband principles,” released in December 2010.⁴ The telecommunications giant originally filed suit on January 20, 2011, appealing the rules the FCC had issued to prevent ISPs from managing the speed at which data travels

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1. See Jonathan Stempel, *Verizon Asks Court to Halt FCC Net Neutrality Rule*, REUTERS.COM (Sept. 30, 2011, 6:19 PM), <http://www.reuters.com/article/2011/09/30/industry-fcc-netneutrality-verizon-idUSTRE78T56M20110930>.

2. See *id.*

3. Network Neutrality, WIKIPEDIA.COM, http://en.wikipedia.org/wiki/Network_neutrality (last visited Oct. 8, 2011).

4. See *In the Matter of Preserving the Open Internet Broadband Industry Practices*, GN Docket No. 09-191 (FCC Rcd. 10-201 December 23, 2010).

through their networks.⁵ The court dismissed the suit on the basis that Verizon had filed prematurely, given that the new FCC rules had not even been published in the Federal Register.⁶

However, it is important to note two things: 1) the D.C. Circuit court in Verizon's initial suit left open the question of whether the FCC's network neutrality order should be reviewed under Section 402(a) or Section 402(b) of the Communications Act,⁷ and 2) prior to Verizon's suit, the FCC was already embroiled in other litigation on the same matter. For example, in one recent case, a three-judge panel on the D.C. Circuit pushed back on the FCC's authority to regulate a huge cable company's management of peer-to-peer traffic on its network.⁸ This point is relevant and crucial because Verizon filed its current notice of appeal in the D.C. Circuit, hoping to take advantage of a relatively conservative court that has demonstrated an aversion to network neutrality. In addition, if a court concluded that Section 402(b) was the correct statute by which to read the FCC's new rules, the D.C. Circuit is more likely to hear Verizon's suit because it has sole jurisdiction over Section 402(b) claims.⁹

However, the FCC responded with a motion to dismiss Verizon's Section 402(b) claim on the basis that Section 402(b)(5) "applies only when this Court is asked to review an FCC order that modifies specific individual licenses. It does not apply to review of generally applicable Commission orders that, like the Open Internet Order, regulate a broad group of licensees as a class."¹⁰

5. See Higginbotham, Stacey, *Here's What's Hiding in Verizon's Net Neutrality Suit*, GIGAOM (Jan. 20, 2011, 3:42 PM), <http://gigaom.com/broadband/heres-whats-hiding-behind-verizons-net-neutrality-suit/>.

6. See *Verizon v. FCC*, 2011 U.S. App. LEXIS 6908 (D.C. Cir. Apr. 4, 2011) (holding that "The challenged order is a rulemaking document subject to publication in the Federal Register, and is not a licensing decision 'with respect to specific parties.' 47 C.F.R. § 1.4(b)(1) and Note.").

7. See *id.*

8. *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (emphasis added).

9. 47 U.S.C. § 402(b) (2010) ("Appeals [from this section] may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia...").

10. Motion to Dismiss at 7, *Verizon v. FCC*, FEDERAL COMMUNICATIONS COMMISSION, http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1005/DOC-310225A1.txt (last visited Oct. 8, 2011).

On October 7, 2011, the Joint Panel on Multidistrict Litigation (“JMPL”) conducted a circuit lottery (since there were five petitions for review filed by others in other circuits).¹¹ Luckily for Verizon, the panel randomly picked the D.C. Circuit as the court to review Verizon’s case.¹² Thus, to the extent that Verizon was pursuing its 402(b) claim only to ensure that the case is heard in the D.C. Circuit, Verizon may no longer feel the need to defend it. It will be interesting to see whether the D.C. Circuit court will follow its own footsteps and continue to raise obstacles against network neutrality.

11. See FHH Law, *Net Neutrality: Verizon Lucks Out in Circuit Lottery*, COMMLAWBLOG (Oct. 7, 2011), <http://www.commlawblog.com/2011/10/articles/inter-net/net-neutrality-verizon-lucks-out-in-circuit-lottery/>.

12. See *id.*