

# The Legal Gamesmanship Begins

by [David Sohn](#) [1]  
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Verizon yesterday [launched the widely expected legal battle](#) [2] over the FCC's Internet openness rules. The main surprise was the timing -- Verizon actually jumped the gun in a legal maneuver aimed at getting the case assigned to the same court and even the same panel of judges that last year shot down the FCC's order in the Comcast-BitTorrent affair. Instead of waiting for the FCC's open Internet order to be published in the Federal Register, Verizon filed now on the theory that the FCC's order amounts to a modification of Verizon's spectrum licenses -- a type of agency action that arguably is subject to different rules regarding the timing of challenges. Verizon then went on to say that the DC Circuit is the only court that can hear the appeal (FCC orders generally can be challenged in any federal appeals court) and that the case is so intimately linked with the earlier Comcast case that it should go back to the same judges. Clearly, this is Verizon fishing for the most favorable possible venue. Give points for creativity in trying to characterize the order as a spectrum license modification, but it seems like a stretch to me.

Legal gamesmanship aside, it's troubling that Verizon has chosen all-out opposition to any FCC authority with respect to broadband Internet access services. Remember, the FCC bent over backward in an effort to find a compromise path forward, one that communications carriers would be able to live with. The agency refrained from taking the legal step that carriers had most feared: reclassifying broadband Internet access services as "telecommunications services" subject to Title II of the Communications Act. The agency also refrained from applying much of its framework to wireless services. And the rules offer plenty of flexibility to accommodate "reasonable network management" and non-Internet, "specialized" services. The framework is neither overly prescriptive nor rigid. Thus, the other biggest carriers, AT&T and Comcast, have publicly made their peace with the FCC's framework.

Indeed, the substance of the framework [isn't all that different](#) [3] from the principles that Verizon itself put forward jointly with Google back in August. The main difference is that it is the agency, not Congress, that is adopting the principles. Yes, that's a significant difference. But realistically, this issue (like many others) has become so relentlessly partisan on the Hill that no constructive solution will emerge from Congress any time soon. Like it or not, the ball was in the FCC's court.

In rejecting the FCC's attempt at compromise, Verizon is effectively opting to push for an outcome in which the FCC has no authority over broadband Internet access networks. Think about that for a moment: The nation's communications regulator would have zero authority over the communications network that, increasingly, is going to be the only one that matters.

That would be an absurd result and a radical repudiation of the FCC's longstanding role. To be clear, the FCC's jurisdiction does not and should not extend to "all things Internet" -- the endless variety of commerce and speech riding on top of the Internet is not for the FCC to oversee, any more than the agency should try to regulate telephone conversations. But the provision of the underlying communications network that makes all this activity possible fits squarely within the FCC's intended mission.

CDT's [reply comments](#) [4] back in April spelled out exactly why denying the FCC any authority over broadband networks would be an absurd result. With citations omitted, here are three key paragraphs:

Ensuring that operators of physical communications infrastructure do not abuse their position has been a central purpose of communications regulation dating back to the days when nondiscrimination requirements were applied to telegraph operators. It is reflected in

Section 1 of the Communications Act, which says the Commission exists to ensure access to efficient, multi-purpose communications "to all the people of the United States, without discrimination" -- and to do so by "regulating . . . commerce in communication by wire and radio." The Communications Act, in other words, established the Commission in order to promote the ability of the entire public to use and benefit from the nation's basic, general-purpose communications infrastructure.

From the start of the computer era, the Commission recognized that its mandate enabled it to act to prevent operators of the general purpose, two-way communications architecture of the day -- the telephone networks -- from exerting undue leverage over emerging, computer-based services that rode on top of those networks. Beginning in 1971 in the Computer Inquiries, the Commission enacted a variety of rules aimed in large part, in the words of the Ninth Circuit Court of Appeals, at addressing the risk that "carriers would gain an unfair competitive edge by discriminating in favor of their own enhanced service offerings in providing access." Thus, there is a "long history of FCC attempts to guard against . . . potential abuses of communications carriers' monopoly power." The 1996 Telecommunications Act did nothing to interrupt this history and indeed essentially carried forward the Computer Inquiries regime.

Thus, while Congress and the Commission may have intended for information services themselves to remain unregulated as a general matter, they emphatically did not envision that there might be no oversight regarding the provision of such services by entities controlling the physical transmission facilities. To the contrary, preventing providers of physical transmission links from exercising undue influence over the data- and computer-related services that use those links is a longstanding function of the Commission. There is no evidence that Congress intended for the Commission to be stripped of its authority to guard against such abuse at the very time that those data- and computer-related services are assuming an unprecedented role in the nation's commerce, civic discourse, education, and government. Indeed, it would hardly be worth having a communications regulator at all if it were to have zero ability to address the Internet access connections upon which the bulk of 21st-century communications are likely to rely. Such a result is not a plausible outcome; the Communications Act does not contemplate that the shift to broadband Internet access should render the Commission powerless to play its longstanding role of ensuring that independent information services have nondiscriminatory access to the nationwide communications network.

The ironic thing is that if Verizon's lawsuit is successful in the end, the FCC, in order to continue to play its longstanding and traditional role with respect to communications networks, may have no choice but to reclassify broadband Internet access as telecommunications -- the step the agency avoided precisely to mollify Verizon and the other carriers.

The FCC left open its inquiry concerning the classification of Internet access, presumably to signal that the reclassification option can be taken up again if need be. The only other route to a reasonable result would be for Congress to clarify the agency's authority in this area, but any such Communications Act reform would likely be many years in the making. In saying "no way" to the FCC's attempt to chart a moderate course, Verizon may invite action that, from its perspective, would likely be worse. Of course, that would prompt a new round of legal challenges. So Verizon has fired the first shot, but the legal battle could rage on and on.

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