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## RECENT CASES

TELECOMMUNICATIONS LAW — INTERNET REGULATION — D.C. CIRCUIT HOLDS THAT FEDERAL COMMUNICATIONS COMMISSION VIOLATED COMMUNICATIONS ACT IN ADOPTING OPEN INTERNET RULES. — *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

In December 2010, after several years of watching from the sidelines, the Federal Communications Commission (FCC) entered the “Open Internet” or “net neutrality” debate over whether high-speed Internet providers (broadband providers) should be required to transmit all lawful Internet traffic to consumers indiscriminately, without regard for the source or type of traffic or for the device or person receiving it. The FCC sided with Open Internet proponents, adopting the order *Preserving the Open Internet*<sup>1</sup> (“Open Internet Order” or “the Order”), which prohibited broadband providers from engaging in Internet traffic blocking and discrimination. In January 2014, the D.C. Circuit struck down the antiblocking and antidiscrimination rules in *Verizon v. FCC*.<sup>2</sup> The court held that the FCC had the statutory authority to enact the rules, but that the agency had unreasonably interpreted sections of the Communications Act<sup>3</sup> and had regulated broadband providers as “common carriers” despite declining to classify them as such, in violation of that statute.<sup>4</sup> While the immediate result was a loss for the FCC, the court’s holding on the agency’s statutory authority charts a path for the FCC to follow in drafting new Open Internet rules that could withstand judicial review. The history of common-carrier regulation, the deference owed to agencies’ interpretations of their authorizing statutes, and Supreme Court precedent all suggest that the FCC could adopt a reasonable interpretation of the Communications Act that would permit new Open Internet rules.

On December 21, 2010, the FCC adopted the order titled *Preserving the Open Internet*, codifying three rules (Open Internet Rules).<sup>5</sup> The first rule mandated transparency, requiring that all broadband

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<sup>1</sup> See *Preserving the Open Internet*, 76 Fed. Reg. 59,192 (Sept. 23, 2011) (codified at 47 C.F.R. pts. 0, 8 (2013)).

<sup>2</sup> 740 F.3d 623 (D.C. Cir. 2014); see *id.* at 628.

<sup>3</sup> 47 U.S.C. §§ 151–621 (2006 & Supp. V 2011). As in the *Verizon* opinion, this comment refers to the codified provisions of the Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.), and the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.), as the “Communications Act.” The Telecommunications Act of 1996 amended the Communications Act of 1934, and Congress “expressly directed that the 1996 Act . . . be inserted into the Communications Act of 1934.” *Verizon*, 740 F.3d at 650 (omission in original) (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377 (1999)) (internal quotation marks omitted).

<sup>4</sup> *Verizon*, 740 F.3d at 628.

<sup>5</sup> See *Preserving the Open Internet*, 76 Fed. Reg. at 59,192.

providers “disclose . . . commercial terms of [their] broadband Internet access services.”<sup>6</sup> The second rule prevented fixed broadband providers<sup>7</sup> from blocking any “lawful content, applications, services, or non-harmful devices, subject to reasonable network management.”<sup>8</sup> The third rule addressed discrimination and prohibited fixed broadband providers from “unreasonably discriminat[ing] in transmitting lawful network traffic,” with the caveat that reasonable network management would not “constitute unreasonable discrimination.”<sup>9</sup>

The “antiblocking” and “antidiscrimination” rules were intended to prevent broadband providers from limiting or degrading consumer access to certain “edge provider” traffic — that is, providers of “content, services, and applications,” such as Amazon, Apple, Google, Hulu, and Netflix.<sup>10</sup> The Open Internet Order expressed concern that broadband providers had previously restricted consumer access to certain edge-provider traffic, such as Voice over Internet Protocol services like Skype or Google Talk, which permit telephone calls over the Internet and compete with telephony services offered by broadband providers.<sup>11</sup> The FCC also intended to prevent broadband providers from collecting certain fees from edge providers, which the FCC believed broadband providers might demand in exchange for assurances that they would permit consumers to continue accessing the edge-provider content.<sup>12</sup> The FCC’s stated overall goal for the Order was to preserve the Internet as “an open platform for innovation . . . and free expression,”<sup>13</sup> and to encourage the “reasonable and timely” deployment of Internet access to all Americans, a statutory duty of the FCC.<sup>14</sup>

On September 30, 2011, Verizon filed a petition for review pursuant to 47 U.S.C. § 402 directly with the United States Court of Appeals for the D.C. Circuit, challenging all three rules adopted in the Open Internet Order.<sup>15</sup> Verizon challenged the Order on five independent grounds: it argued that the FCC lacked the statutory authority to promulgate the rules under the FCC’s authorizing statutes, the Com-

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<sup>6</sup> *Id.* at 59,232.

<sup>7</sup> Fixed broadband providers supply high-speed Internet access to a fixed location, in contrast to a mobile device such as a smartphone. This rule applied less stringently to providers of mobile broadband Internet, only prohibiting the blocking of “access[] [to] lawful Web sites . . . [and] applications that compete with the provider’s voice or video telephony services.” *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Verizon*, 740 F.3d at 629.

<sup>11</sup> *See* Preserving the Open Internet, 76 Fed. Reg. at 59,198.

<sup>12</sup> *Id.* at 59,195–98. The FCC also noted that broadband providers might withhold infrastructure expansion to squeeze bandwidth capacity for edge providers that refused to pay such fees. *Id.*

<sup>13</sup> *Id.* at 59,192.

<sup>14</sup> *Id.* at 59,214.

<sup>15</sup> Protective Petition for Review, *Verizon*, 740 F.3d 623 (No. 11-1356).

munications Act of 1934,<sup>16</sup> and the Telecommunications Act of 1996;<sup>17</sup> that the rules were unlawfully arbitrary and capricious; that the rules violated Communications Act sections 153(51) and 332(c)(2), which prohibit the FCC from regulating broadband providers as “common carriers” in contrast to how various other telecommunications providers are regulated by the Act;<sup>18</sup> that the rules violated Verizon’s First Amendment rights; and that the rules constituted an uncompensated taking that violated Verizon’s Fifth Amendment rights.<sup>19</sup>

The D.C. Circuit upheld the FCC’s transparency rule, but vacated both the antiblocking and antidiscrimination rules.<sup>20</sup> Writing for a split panel, Judge Tatel<sup>21</sup> held that, while the FCC had statutory authority to pass rules to encourage reasonable and timely “deployment of broadband infrastructure”<sup>22</sup> to “all Americans,”<sup>23</sup> in adopting the Open Internet Rules the agency violated the Act’s specific proscription on regulating these broadband providers as “common carriers.”<sup>24</sup>

First, the court assessed the FCC’s claim that it possessed statutory authority to adopt the Open Internet Rules under sections 1302(a) and 1302(b) of the Communications Act.<sup>25</sup> The court applied *Chevron* deference, and because it found section 1302 to be ambiguous and the FCC’s interpretation to be reasonable, it held that the statute empowered the FCC to pass the Open Internet Rules.<sup>26</sup> Quoting section 1302(a), the court noted that the section requires the FCC to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,”<sup>27</sup> and held that the FCC could meet this duty through rules that would result in broadband providers expanding their infrastructures.<sup>28</sup> It also noted that section

<sup>16</sup> Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

<sup>17</sup> Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

<sup>18</sup> See 47 U.S.C. §§ 153(51), 332(c)(2).

<sup>19</sup> See *Verizon*, 740 F.3d at 634.

<sup>20</sup> *Id.* at 659.

<sup>21</sup> Judge Tatel was joined by Judge Rogers. Judge Silberman concurred in part and dissented in part. See *id.* at 628.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 635 (quoting 47 U.S.C. § 1302(a)).

<sup>24</sup> *Id.* at 650; see *id.* at 628.

<sup>25</sup> The court in *Verizon* referred to section 1302 by its section number in the Telecommunications Act of 1996, “section 706.” See Telecommunications Act of 1996 § 706(a)–(b), 47 U.S.C. § 1302(a)–(b); see also *Verizon*, 740 F.3d at 628.

<sup>26</sup> See *Verizon*, 740 F.3d at 635–37. *Chevron* deference delineates judicial review of agency interpretations of statutes administered by a particular agency. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984). Under *Chevron*, courts are tasked with determining whether a statute is ambiguous, and if so, whether the agency’s interpretation is reasonable. See *id.* If the court finds the statute is ambiguous and the agency’s interpretation is reasonable, it is required to defer to that interpretation. See *id.*

<sup>27</sup> *Verizon*, 740 F.3d at 635 (quoting 47 U.S.C. § 1302(a)).

<sup>28</sup> See *id.* at 637–38.

1302(b) instructs the FCC to conduct regular inquiries “concerning the availability of advanced telecommunications capability,” requiring the FCC to take “immediate action to accelerate deployment of such capability” if the inquiry determined that it was not being deployed on a reasonable and timely basis to all Americans.<sup>29</sup> The FCC issued its *Sixth Broadband Deployment Report* immediately before it adopted the rules, and had determined that broadband capability was no longer being deployed in a way consistent with those standards.<sup>30</sup> The court therefore held that both sections 1302(a) and 1302(b) granted the FCC statutory authority to adopt the Open Internet Rules.<sup>31</sup>

Second, the court rejected Verizon’s claim that the rules were arbitrary and capricious and thus violated the Administrative Procedure Act.<sup>32</sup> The court accepted as reasonable the FCC’s view that the rules encouraged broadband deployment because they protected the “virtuous cycle”<sup>33</sup> where edge providers create innovative services, increasing consumer demand for broadband, and broadband providers expand infrastructure to meet that demand.<sup>34</sup> Therefore, the rules were sufficiently tailored to the goal of promoting broadband deployment to fall within the FCC’s scope of authority under section 1302.<sup>35</sup>

Last, the court analyzed whether the antiblocking and antidiscrimination rules impermissibly imposed “common-carrier” obligations<sup>36</sup> on broadband providers in violation of the Communications Act.<sup>37</sup> The court noted that definitional sections 153(51) and 332(c)(2) of the Communications Act prohibit treating providers of “information ser-

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<sup>29</sup> *Id.* at 635 (quoting 47 U.S.C. § 1302(b)) (internal quotation marks omitted).

<sup>30</sup> *See id.* at 640; *see also* FED. COMM’NS COMM’N, FCC-10-129, SIXTH BROADBAND DEPLOYMENT REPORT 28–30 (2010). The FCC stated that this finding resulted from its decision to raise the minimum speed threshold required for Internet service to qualify as “broadband.” *See Verizon*, 740 F.3d at 640.

<sup>31</sup> *See Verizon*, 740 F.3d at 641. The court also rejected Verizon’s arguments that section 1302 served merely as a “statement of congressional policy,” *id.* at 637, and would be an unconstitutionally broad delegation of power if interpreted as granting affirmative authority. *See id.* at 639–41. The court cited legislative history and the FCC’s general jurisdictional limits, which constrain the FCC’s authority to matters of “interstate and foreign communication by wire and radio.” *Id.* at 640 (quoting 47 U.S.C. § 152(a)) (internal quotation marks omitted).

<sup>32</sup> Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.); *see also* 5 U.S.C. §§ 551–559, 701–706.

<sup>33</sup> *Verizon*, 740 F.3d at 644 (internal quotation marks omitted).

<sup>34</sup> *Id.* at 644–45.

<sup>35</sup> *Id.* at 649.

<sup>36</sup> Common-carrier obligations are traditional common law requirements mandating certain industries to, among other things, serve the general public without discrimination. *See* BLACK’S LAW DICTIONARY 242 (9th ed. 2009) (stating that a common carrier is a “commercial enterprise that holds itself out to the public . . . [and] is generally required by law to transport . . . without refusal, if the approved fare or charge is paid”); *see also* 47 U.S.C. § 153(11) (defining a common carrier as “any person engaged as a common carrier for hire”).

<sup>37</sup> *Verizon*, 740 F.3d at 650–51.

VICES<sup>38</sup> as common carriers “under this [Act],”<sup>39</sup> and that because of a still-binding FCC order, broadband providers were classified as providers of information services.<sup>40</sup> Under the Communications Act, the FCC had traditionally regulated some telecommunications companies by deeming them common carriers, thereby subjecting them to Title II of the Act, which imposes extensive tariff-filing duties, permits the FCC to set maximum and minimum prices and monitor the management of the businesses, and allows consumers to bring civil suits in federal court against any regulated entity that charges unreasonable rates or otherwise violates these duties.<sup>41</sup>

The court then rejected the FCC’s argument that because section 1302 was enacted after the Communications Act of 1934 and was codified in a different act and chapter, the section 153(51) and 332(c)(2) prohibitions on treating broadband providers as common carriers “under this [Act]” did not apply to the Open Internet Rules.<sup>42</sup> The court noted that although section 1302 was not enacted in the original Communications Act of 1934, it was part of the Telecommunications Act of 1996, and that Act stated that it was an amendment to the Communications Act of 1934.<sup>43</sup> The court therefore held that sections 153(51) and 332(c)(2) apply to rules adopted under section 1302 authority.<sup>44</sup>

Applying sections 153(51) and 332(c)(2), the court then endeavored to define “common carrier” and “common carrier treatment” for purposes of those sections.<sup>45</sup> It first applied the *Chevron* test and found that the Act’s general definition of “common carrier” in section 153(11) as “any person engaged as a common carrier for hire”<sup>46</sup> was ambiguous; the court then inquired into whether the FCC’s interpretation of the term was reasonable.<sup>47</sup> The FCC argued that the antitrust and antidiscrimination rules could not constitute common-carrier obligations under the Act, because the rules did not regulate the relation-

<sup>38</sup> *Id.* at 650 (internal quotation marks omitted).

<sup>39</sup> *Id.* (alteration in original) (quoting 47 U.S.C. § 153(51)). Section 153(51) reads, “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, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.” 47 U.S.C. § 153(51). The court used an “under this [Act]” alteration, although the actual statutory language is “under this chapter.” Compare *Verizon*, 740 F.3d at 650–51, with 47 U.S.C. §§ 153(51), 332(c)(2). The former formulation is used throughout this comment to conform to the language of the opinion, and the analysis is unchanged even if assessed as “under this chapter.”

<sup>40</sup> See *Verizon*, 740 F.3d at 650.

<sup>41</sup> See 47 U.S.C. §§ 205, 206, 217, 226; SUSAN CRAWFORD, CAPTIVE AUDIENCE 53 (2013).

<sup>42</sup> *Verizon*, 740 F.3d at 650.

<sup>43</sup> See *id.*

<sup>44</sup> See *id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 651 (quoting 47 U.S.C. § 153(11)) (internal quotation marks omitted).

<sup>47</sup> See *id.*

ship between broadband providers and their primary subscription consumers, only between broadband providers and third parties, specifically edge providers.<sup>48</sup> The court held that interpretation to be unreasonable.<sup>49</sup> It noted that the FCC's position was in tension with the Supreme Court's precedent on common-carrier obligations in *FCC v. Midwest Video Corp.*<sup>50</sup> (*Midwest Video II*), as well as with circuit precedent, and held that the Open Internet Rules were directly analogous to the impermissible common-carrier obligations vacated in *Midwest Video II*.<sup>51</sup> The court then held that the antiblocking and antidiscrimination rules clearly imposed common-carrier obligations, as they precluded broadband providers from "mak[ing] individualized decisions"<sup>52</sup> regarding to whom, and with which restrictions, to sell their services, and they required broadband providers to hold their services out "indiscriminately and on general terms,"<sup>53</sup> both qualities that precedent held as common-carrier obligations.<sup>54</sup>

Because the FCC had not distinguished between the obligations imposed by the antiblocking and antidiscrimination rules, the court vacated both rules.<sup>55</sup> However, as Verizon neither argued that the transparency rule imposed common-carrier obligations nor argued that it violated the First or Fifth Amendments, the court upheld that rule.<sup>56</sup>

Judge Silberman filed a separate opinion, concurring in part and dissenting in part. He concurred in vacating the antiblocking and antidiscrimination rules, but argued that all three rules should have been vacated on the grounds that section 1302 did not grant the FCC the necessary authority to regulate broadband providers and that the rules were arbitrary and capricious.<sup>57</sup>

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<sup>48</sup> See *id.* at 652–55.

<sup>49</sup> See *id.* at 652–53.

<sup>50</sup> 440 U.S. 689 (1979).

<sup>51</sup> See *Verizon*, 740 F.3d at 652. The court noted that the impermissible rules in *Midwest Video II* had similarly regulated the relationship between cable providers and third parties, specifically channel programmers. See *id.* at 652–56.

<sup>52</sup> *Id.* at 651 (quoting Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 641 (D.C. Cir. 1976)).

<sup>53</sup> *Id.* at 652 (quoting *Cellco P'ship v. FCC*, 700 F.3d 534, 547 (D.C. Cir. 2012)).

<sup>54</sup> See *id.* at 652–55.

<sup>55</sup> See *id.* at 658–59.

<sup>56</sup> See *id.* As the court vacated the antiblocking and antidiscrimination rules on statutory grounds, it did not address Verizon's constitutional challenges. See *id.* at 634.

<sup>57</sup> See *id.* at 659–61 (Silberman, J., concurring in part and dissenting in part). Judge Silberman narrowly construed section 1302 and argued that the FCC had neither appropriately identified and removed a "barrier[] to infrastructure investment" nor adopted a measure that "promote[s] competition" as required by the statute. See *id.* at 662 (alterations in original) (quoting 47 U.S.C. § 1302(a) (2006 & Supp. V 2011)). He also argued that the rules were arbitrary and capricious, because without a showing of market power, the FCC could not reasonably have believed the Open Internet Rules would remove a barrier to infrastructure investment or promote competition. See *id.* at 663–66.

The court's holding on the reach of section 1302 and its determination that "common carrier," as defined in section 153(11) and used in sections 153(51) and 332(c)(2), is an ambiguous term, opens the door for the FCC to pursue new Open Internet rules.<sup>58</sup> The history of common-carrier regulation, the deference owed to agency interpretations of ambiguous statutes under *Chevron*, and Supreme Court precedent all support the FCC's argument that the "under this [Act]" language can reasonably be interpreted as creating a distinction that permits the adoption of such rules. This permissible interpretation is not, however, the FCC's rejected interpretation that section 1302 falls outside the Communications Act of 1934. Instead, the "under this [Act]" language can reasonably be interpreted as prohibiting the subjection of broadband providers to the heightened common-carrier regulatory scheme of Title II of the Communications Act — such as rate regulation, tariff filing, and civil liability for discrimination — but not precluding lesser rules similar to the historical common-carrier obligations, like nondiscrimination, imposed by state common law that preceded the Communications Act's regulatory scheme.

First, an interpretation of common carrier "under this [Act]" in sections 153(51) and 332(c)(2) as only prohibiting the FCC from applying the heightened Title II common-carrier regulatory scheme to broadband providers — rather than also prohibiting rules resembling state common law common-carrier obligations — is supported by the history of common-carrier regulations and the Communications Act's distinct departure from the common law. Historically, under the common law, certain businesses — such as couriers, blacksmiths, inns, ports, railroad companies, and telecommunications companies — were deemed "common carriers" because they were of a public nature or benefited from public facilities, such as public roads.<sup>59</sup> As these businesses were seen as deriving private profit from public resources, they were required to benefit the public as a whole by providing their services to anyone who could pay a reasonable fee.<sup>60</sup> In the late nineteenth and early twentieth centuries, Congress expanded the regulation

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<sup>58</sup> An agency may reinterpret a statute and adopt new rules consistent with that new interpretation. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); see also *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). While the FCC did address the "under this [Act]" language, it did not clearly advance any interpretation of that language beyond asserting that it permitted any and all common-carrier obligations adopted under section 1302. See Brief for Appellee/Respondents, *Verizon*, 740 F.3d 623 (No. 11-1355).

<sup>59</sup> See Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156, 159–61 (1903); see also *Budd v. New York*, 143 U.S. 517, 541–43 (1892) (discussing common law common-carrier obligations, including the obligations of telephone companies); *R.R. Co. v. Lockwood*, 84 U.S. (17 Wall.) 357, 359–60 (1873) (discussing common law common-carrier obligations of railroads).

<sup>60</sup> See sources cited *supra* note 59; see also *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976).

of railroad and communications carriers by passing the Interstate Commerce Act of 1887 and the Communications Act of 1934, both of which apply licensing, minimum and maximum rate-setting, tariff-filing, merger-approval, and other regulations to common carriers in these industries.<sup>61</sup> Notably, these statutes are grants of power to federal agencies, permitting them to regulate these common carriers beyond the requirements of state common law.<sup>62</sup> Common-carrier treatment “under this [Act]” therefore naturally refers to the unique Title II common-carrier regulatory scheme contained within the Communications Act, not to the nondiscrimination obligations long imposed on common carriers at common law.

Second, because the D.C. Circuit held the term “common carrier” was ambiguous as used in sections 153(51) and 332(c)(2), future interpretations will receive highly deferential treatment under *Chevron*.<sup>63</sup> Under *Chevron*, future D.C. Circuit review of new FCC interpretations of these provisions must apply canons of statutory construction to assess the reasonableness of the interpretation, and to uphold *any* reasonable interpretation.<sup>64</sup> Thus, a court should defer to a reasonable agency interpretation even if it is not “the reading the court would have reached if the question initially had arisen in a judicial proceeding,”<sup>65</sup> and even if a court or the agency acknowledged statutory ambiguity and had previously interpreted the statute differently.<sup>66</sup>

In light of this historical distinction between common law common-carrier treatment and Title II’s heightened common-carrier regulatory scheme, the reasonableness of this interpretation of the “under this [Act]” language in sections 153(51) and 332(c)(2) — as imposing legally distinct prohibitions in comparison to the Act’s other common-carrier

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<sup>61</sup> See, e.g., *R.R. Comm’n v. Chi., Burlington & Quincy R.R. Co.*, 257 U.S. 563, 582–87 (1922) (discussing generally the history and reach of the Interstate Commerce Act); *Orloff v. FCC*, 352 F.3d 415, 418–19 (D.C. Cir. 2003) (discussing the Communications Act and noting that the “centerpiece” of the Act was that telephony common carriers file tariff rate schedules with the FCC and charge customers only those rates, *id.* at 418 (internal quotation marks omitted)).

<sup>62</sup> See, e.g., *ICC v. Balt. & Ohio R.R. Co.*, 145 U.S. 263, 275 (1892) (noting that, prior to the Interstate Commerce Act, “the principles of the common law applicable to common carriers . . . demanded little more than that they should carry for all persons who applied . . . and that their charges for transportation should be reasonable”).

<sup>63</sup> Although the D.C. Circuit discussed the ambiguity of the common-carrier definition in section 153(11), and did not state that sections 153(51) and 332(c)(2) were ambiguous, the court would not have needed to analyze section 153(11) if sections 153(51) and 332(c)(2) were unambiguous. The court analyzed section 153(11) for clarification on what sections 153(51) and 332(c)(2) meant by common carrier “under this [Act].” See *Verizon*, 740 F.3d at 650–51.

<sup>64</sup> See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 387–91 (1999) (holding an agency interpretation of a provision as unreasonable because it violated the canon against surplusage, discussed *infra*, by making other provisions inapplicable and redundant); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

<sup>65</sup> *Chevron*, 467 U.S. at 843 n.11.

<sup>66</sup> See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).



treatment prohibitions — is supported by the statutory construction “canon against surplusage,” which “give[s] effect, if possible, to every clause and word of a statute.”<sup>67</sup> Distinguishing between the provisions prohibiting all common-carrier treatment and those prohibiting treatment as common carriers only “under this [Act]” gives full meaning to the language of the Communications Act. Notably, sections 153(51) and 322(c)(2) forbid treating broadband providers as common carriers only “under this [Act],” whereas sections 153(11) and 541(c), for example, omit this language, stating that “a person engaged in radio broadcasting shall not . . . be deemed a common carrier”<sup>68</sup> and “[a]ny cable system shall not be subject to regulation as a common carrier.”<sup>69</sup> These distinctions can be given meaning by an interpretation that bars the FCC from applying the Title II rate regulation, tariff filing, and heightened liability to broadband providers but permits common law common-carrier treatment, such as prohibitions on discrimination, through rules passed under section 1302 or similar provisions.

Third, an interpretation construing common carrier “under this [Act]” in sections 153(51) and 322(c)(2) as permitting common law common-carrier treatment for broadband providers is consistent with the Supreme Court’s precedent in *Midwest Video II*, which the D.C. Circuit held to be determinative in *Verizon*.<sup>70</sup> In *Midwest Video II*, the Court was asked to determine whether section 153(11) precluded FCC authority to pass rules requiring cable television providers to make available a minimum of twenty channels for public use and to provide free or low-cost equipment and facilities to cable programmers for public-use broadcasting.<sup>71</sup> The Court struck down the FCC rules and held that the regulations unlawfully imposed common-carrier obligations on cable-television providers because section 153(11)’s broad language prohibited not only subjecting such providers to common-carrier regulation under Title II of the Act, but also subjecting them to any rules that qualified as imposing “common-carrier obligations.”<sup>72</sup>

Although the D.C. Circuit held that *Midwest Video II* was controlling and “indistinguishable” from *Verizon*,<sup>73</sup> the court was not adequately presented with a distinguishing element — the narrower “under this [Act]” language present in sections 153(51) and 322(c)(2) but

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<sup>67</sup> *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)) (internal quotation mark omitted).

<sup>68</sup> 47 U.S.C. § 153(11) (2006 & Supp. V 2011).

<sup>69</sup> *Id.* § 541(c).

<sup>70</sup> See *Verizon*, 740 F.3d at 651–56.

<sup>71</sup> See *Midwest Video II*, 440 U.S. 689, 695 (1979). The Court also held that section 153(11) applied to cable operators, although the provision only discussed radio broadcasting. See *id.* at 706–07.

<sup>72</sup> *Id.* at 701.

<sup>73</sup> *Verizon*, 740 F.3d at 654.

missing from section 153(11). Because the *Midwest Video II* Court focused on section 153(11)'s broad and unlimited language, it held that "the language of [section 153(11)] is unequivocal"<sup>74</sup> and prohibited any and all common-carrier treatment of cable television providers, rather than distinguishing between the Title II common-carrier regulatory scheme and rules that more closely approximated the nondiscrimination requirements of common law common-carrier regulation.<sup>75</sup> Because the "under this [Act]" language can be read to proscribe only the heightened Title II regulation within the Communications Act, an interpretation of sections 153(51) and 332(c)(2) as permitting imposition of traditional common-carrier obligations, such as nondiscrimination, is therefore fully consistent with *Midwest Video II*.<sup>76</sup> In addition, because sections 153(51) and 332(c)(2) were amended into the Act following *Midwest Video II*, the agency may reasonably infer congressional intent to permit imposing common law common-carrier regulations, but to bar the type of common-carrier treatment imposed by Title II.<sup>77</sup>

Although the D.C. Circuit rejected the FCC's initial interpretation of sections 153(51) and 332(c)(2) of the Communications Act, in upholding the agency's jurisdiction to regulate broadband providers under section 1302, it opened the door for the FCC to refine its interpretation and adopt new Open Internet rules. The historical distinction between statutory common-carrier regulatory schemes and common law common-carrier obligations, the deference owed to agency interpretations of ambiguous statutes under *Chevron*, and Supreme Court precedent all support an interpretation of sections 153(51) and 332(c)(2)'s common carrier "under this [Act]" language as barring the FCC only from subjecting broadband providers to Title II's explicit common-carrier regulatory scheme — without barring the FCC from adopting Open Internet rules under section 1302 that subject broadband providers to the lesser nondiscrimination requirements traditionally imposed on common carriers by state common law. If the FCC desires to preserve its Open Internet policies, it should act swiftly to clarify its interpretation of these provisions and adopt new Open Internet rules.

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<sup>74</sup> *Midwest Video II*, 440 U.S. at 705.

<sup>75</sup> *Id.*

<sup>76</sup> In fact, three Justices dissented in *Midwest Video II* and argued that section 153(11) was intended to prohibit *only* Title II common-carrier regulations, not rules applying traditional common law common-carriage obligations, reading into it an implied "under this [Act]" limitation. *See id.* at 710–11 (Stevens, J., dissenting).

<sup>77</sup> *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 3, 110 Stat. 56, 60 (adding 47 U.S.C. § 153(51)); Communications Amendments Act of 1982, Pub. L. No. 97-259, § 120, 96 Stat. 1087, 1097 (adding 47 U.S.C. § 332(c)(2)).