EDITOR'S NOTE

Welcome to the first Issue of Volume 67 of the *Federal Communications Law Journal*, the nation's premier communications law journal and the official journal of the Federal Communications Bar Association.

In our first article, George S. Ford and Lawrence J. Spiwak take a detailed look at the implications of classifying broadband as a Title II service. Ford and Spiwak conclude that reclassification creates a new termination market in which edge providers are the customers of Broadband Service Providers ("BSPs"). Under Section 203 of the Communications Act, BSPs would be required to tariff their termination service at a nonzero rate. Because the Commission has determined that BSPs are "terminating monopolists," it would be unable to forebear from enforcing the tariffing requirement.

In our second article, Christopher J. Wright discusses the FCC's ancillary jurisdiction after the D.C. Circuit's decision in *Verizon v. FCC*. Wright reviews the evolution of the ancillary jurisdiction doctrine over the years, culminating in D.C. Circuit Judge David Tatel's test in *Comcast v. FCC*, which stipulated that the FCC must both identify an express delegation of ancillary authority" beyond a mere "policy statement," and show that its regulation is not inconsistent with the principles embodied in the Communications Act. Wright argues that, as applied in *Verizon*, the *Comcast* test may require the FCC to specify a provision reflecting a congressional anticipation of new technology, which could prove to be a substantial limitation on ancillary jurisdiction.

In our third article, Steven Tepp reviews the Supreme Court's decision in *American Broadcasting Companies v. Aereo*. In his piece, Tepp analyzes the legal background leading up to the *Aereo* decision, and explains Aereo's technology and business model. Tepp walks the reader through the Court's reasoning, and explains the long term implications of the Court's holding.

Next, Max Hsu provides a critique of the Supreme Court's reasoning in Aereo. He suggests that the Court may have boxed itself in for future decisions on the copyright implications of modern cloud computing services.

Audra Healey identifies an innovative role for the FCC to play in reviewing the NSA's surveillance activities as they relate to the viability of U.S. network infrastructure and its resilience against malicious attackers. She proposes a regime under which the FCC could bring its institutional expertise to bear in seeking to ensure that NSA operations do not undermine our long-term network security.

Finally, John Gasparini closes out the issue with a detailed analysis of the Communications Act in light of the IP transition. Concluding that only a Communications Act rewrite can realistically facilitate a twenty-first century FCC, Gasparini proposes some guiding principles on which a prudent and durable Communications Act rewrite might be based.

The *Journal* remains committed to providing its readership with substantive coverage of relevant topics in communications law, and we appreciate the continued support of contributors and readers alike. We welcome your feedback and submissions—any questions or comments about this Issue or future issues may be directed to fclj@law.gwu.edu, and any submissions for publication consideration may be directed to fcljarticles@law.gwu.edu. This Issue and our archive are available at http://www.fclj.org.

Anthony Glosson
Editor-in-Chief

FEDERAL COMMUNICATIONS LAW JOURNAL

VOLUME 67 ISSUE 1

DECEMBER 2014

Published by the GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
and the FEDERAL COMMUNICATIONS BAR ASSOCIATION

Federal Communications Law Journal

The *Federal Communications Law Journal* is published jointly by the Federal Communications Bar Association and the George Washington University Law School. The *Journal* publishes three issues per year and features articles, student notes, essays, and book reviews on issues in telecommunications, the First Amendment, broadcasting, telephony, computers, Internet, intellectual property, mass media, privacy, communications and information policymaking, and other related fields.

As the official journal of the Federal Communications Bar Association, the *Journal* is distributed to over 2,500 subscribers, including Association members as well as legal practitioners, industry experts, government officials and academics. The *Journal* is also distributed by Westlaw, Lexis, William S. Hein, and Bloomberg Law and is available on the Internet at http://www.fclj.org.

The *Journal* is managed by a student Editorial Board, in cooperation with the Editorial Advisory Board of the FCBA and two Faculty Advisors.

Federal Communications Bar Association

The Federal Communications Bar Association (FCBA) is a volunteer organization of attorneys, engineers, consultants, economists, government officials and law students involved in the study, development, interpretation and practice of communications and information technology law and policy. From broadband deployment to broadcast content, from emerging wireless technologies to emergency communications, from spectrum allocations to satellite broadcasting, the FCBA has something to offer nearly everyone involved in the communications industry. That is why the FCBA, more than two thousand members strong, has been the leading organization for communications lawyers and other professionals since 1936.

Through its many professional, social, and educational activities, the FCBA offers its members unique opportunities to interact with their peers and decision-makers in the communications and information technology field, and to keep abreast of significant developments relating to legal, engineering, and policy issues. Through its work with other specialized associations, the FCBA also affords its members opportunities to associate with a broad and diverse cross-section of other professionals in related fields. Although the majority of FCBA members practice in the metropolitan Washington, D.C., area, the FCBA has ten active regional chapters: Atlanta, Carolina, Florida, Midwest, New England, New York, Northern California, Pacific Northwest, Rocky Mountain, and Texas. The FCBA has members from across the U.S., its territories, and several other countries.

The George Washington University Law School

Established in 1865, the George Washington University Law School is the oldest law school in Washington, DC. The school is accredited by the American Bar Association and is a charter member of the Association of American Law Schools. The Law School is located on the GW campus in the downtown neighborhood familiarly known as Foggy Bottom.

GW Law has one of the largest curricula of any law school in the nation with more than 250 elective courses covering every aspect of legal study. GW Law's home institution, the George Washington University, is a private, nonsectarian institution founded in 1821 by charter of Congress.

The *Federal Communications Law Journal* is published by the George Washington University Law School and the Federal Communications Bar Association three times per year. Offices are located at 2028 G St. NW, Suite LL-020, Washington, D.C., 20052. The *Journal* can be reached at fclj@law.gwu.edu, and any submissions for publication consideration may be directed to fcljarticles@law.gwu.edu. Address all correspondence with the FCBA to the Federal Communications Bar Association, 1020 19th St. NW, Suite 325, Washington, D.C., 20036-6101.

Subscriptions: Subscriptions are $30 per year (domestic), $40 per year (Canada and Mexico), and $50 per year (international). Subscriptions are to be paid in US dollars, and are only accepted on a per-volume basis, starting with the first issue. All subscriptions will be automatically renewed unless the subscriber provides timely notice of cancellation. Address changes must be made at least one month before publication date, and please provide the old address or an old mailing label. Please send all requests for address changes or other subscription-related questions to fcljsubscribe@law.gwu.edu.

Single and Back Issues: Each issue of the current volume can be purchased for $15 (domestic, Canada and Mexico) or $20 (international), paid in U.S. dollars. Please send all requests for single or back issues to fcljsubscribe@law.gwu.edu.

Manuscripts: The *Journal* invites the submission of unsolicited articles, comments, essays, and book reviews mailed to the office or emailed to fcljarticles@law.gwu.edu. Manuscripts cannot be returned unless a self-addressed, postage-paid envelope is submitted with the manuscript.

Production: The citations in the *Journal* conform to the *Bluebook: A Uniform System of Citation* (19th ed., 2010), copyright by the *Columbia*, *Harvard*, and *University of Pennsylvania Law Reviews* and the *Yale Law Journal*. Variations exist for purposes of clarity and at the editors' discretion. The *Journal* is printed by Joe Christensen, Inc.

Citation: Please cite this issue as 67 FED. COMM. L.J. ___ (2014).

FEDERAL COMMUNICATIONS LAW JOURNAL

GW | LAW

FCBA
FEDERAL COMMUNICATIONS BAR ASSOCIATION

VOLUME 67 ISSUE 1

DECEMBER 2014

ARTICLES

The Federal Communications Commission is coming under intense political pressure to reclassify broadband Internet access as a common carrier telecommunications service under Title II of the Communications Act. Yet, almost no attention has been directed at the fine details of how reclassification will be implemented. Relying on the plain terms of the FCC's governing statute, current case law, and the Commission's own precedent, we examine such details in this Article and conclude the following: First, reclassification would turn edge providers into "customers" of Broadband Service Providers ("BSPs"), and this new "carrier-to-customer" relationship (as opposed to a "carrier-to-carrier" relationship) would require all BSPs to create, and then tariff, a termination service for Internet content under Section 203 of the Communications Act. Because a tariffed rate cannot be set arbitrarily, and since a service cannot be generally tariffed at a price of zero, reclassification would require all edge providers (not their carriers)—as customers of the BSP—to make direct payments to the BSPs for termination services. Second, as competition is the basis for Section 10 forbearance, the Commission is precluded from setting aside tariffing because it has labeled all Broadband Service Providers as "terminating monopolists." As such, the agency has boxed itself in for mandatory tariffing under Title II.

Whether the Federal Communications Commission can and should reenact net neutrality rules similar to those invalidated by the U.S. Court of Appeals for the D.C. Circuit in Verizon v. FCC has been the focus of most commentary on the case. But the decision in Verizon is also noteworthy for its effect on the scope of the FCC's "ancillary jurisdiction"—that is, the FCC's authority to adopt regulations based largely on the provisions in Title I of the Communications Act of 1934 that grant the agency general, rather than specific, authority. This Article thus focuses on the scope of the FCC's

reconcile decades-old law with cutting-edge technology, however, the IP Transition moves implacably forward. Legislative action is needed, to be sure, but that will take time; in the interim, the FCC should use the tools it already has to move toward a more horizontal regulatory model, eliminating regulatory absurdities while facilitating the IP transition and enabling effective regulation of modern services and connectivity. While other commenters recognize the need for reform, their proposals focus on the end result, resigning regulators and consumers to indefinite uncertainty until Congress acts.

The FCC need not wait, however. Its preemption and forbearance powers allow it to take the first steps toward a regulatory framework based on the layers which define modern networks, rather than the means by which any given service is provided. These actions would respect the interests of the states and the federalism analysis which produced the joint-jurisdiction model, while allowing the FCC to regulate competing services equally. Most importantly, however, would be the guidance that FCC action can provide to Congress, as legislators have a history of looking to the actions of their expert agencies for inspiration when rewriting the law.