

## 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](mailto:fclj@law.gwu.edu), and any submissions for publication consideration may be directed to [fcljarticles@law.gwu.edu](mailto:fcljarticles@law.gwu.edu). This Issue and our archive are available at <http://www.fclj.org>.

Anthony Glosson  
*Editor-in-Chief*

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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.

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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.

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# FEDERAL COMMUNICATIONS LAW JOURNAL



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## ARTICLES

### **Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service**

By George S. Ford, PhD and Lawrence J. Spiwak, Esq. .... 1

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.

### **The Scope of the FCC’s Ancillary Jurisdiction After the D.C. Circuit’s Net Neutrality Decisions**

By Christopher J. Wright..... 19

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

ancillary authority after Verizon, rather than on how the FCC should respond to the opinion with respect to net neutrality.

This Article first reviews the statutory framework and the Supreme Court decisions governing the scope of the FCC’s ancillary authority. The Article then analyzes how Judge Tatel’s decisions in *Comcast v. FCC* and *Verizon v. FCC*, have reshaped the scope of the FCC’s ancillary jurisdiction. Although Judge Tatel’s synthesis of the relevant cases has produced a test that is largely true to D.C. Circuit precedent, this test is unlikely to shift judicial results away from complex issues having little to do with real-world matters and toward the merits of the FCC’s actions as a matter of economic policy and engineering realities.

## COMMENT

### *American Broadcasting Cos. v. Aereo, Inc.*

By Steven Tepp .....41

Few things are as central to Americans’ lives as their television. But the medium that has for decades been defined by the device on which it has traditionally been viewed is now undergoing a transformation to computers, tablets, and smartphones. In *American Broadcasting Cos. v. Aereo, Inc.*, the U.S. Supreme Court addressed a service that sought to deliver television programming over the Internet to these devices without obtaining permission from either the broadcaster or the copyright owner.

This comment briefly summarizes the legal background against which the Aereo service was engineered. It then describes the pertinent design and functions of the Aereo service. Next, it reviews and analyzes the Supreme Court’s majority opinion in *American Broadcasting Cos. v. Aereo, Inc.*, as well as the dissent.

The issues presented in this litigation have implications beyond the specific facts of the case, and those issues remain controversial. This comment is intended to provide an even-handed account of the Court’s opinions and, while it will note unanswered questions, it does not seek to offer answers to them.

## NOTES

### **Private Performances for the Public Good: Aereo and the Battle for Broadcast’s Soul**

By Max Hsu.....57

Every so often, a new technology comes along with the potential to revolutionize an entire industry. These “disruptive innovations” are what continue to move society forward—upending antiquated regimes and providing a prototype for future innovation. Enter Aereo: a New York-based



startup that enables users to receive over-the-air broadcast television on their Internet-connected devices. Because of its creative design, it has the potential to generate significant change in the current retransmission consent model that has been the bedrock of the broadcast television industry for the past two decades.

In June 2014, the Supreme Court held that Aereo infringed broadcasters’ public performance rights under the U.S. Copyright Act. This Note argues that the Court’s results-oriented decision ignores the statutory plain language and legislative history, which makes clear that Aereo engages in private performances. Although such decision making may seem attractive and sufficient for the short term, inevitably new technologies will arise that will once again challenge the all-too-delicate, judicially-created framework. Instead, as technology advances and causes industry-wide changes, it should fall on Congress, administrative agencies, and industry participants to adapt and respond accordingly.

## **A Tale of Two Agencies: Exploring Oversight of the National Security Administration by the Federal Communications Commission**

By Audra Healey .....91

The National Security Administration intercepts and collects tens of thousands of emails and electronic communications of United States citizens in an unconstitutional manner. There is no effective oversight over this unconstitutional monitoring of citizens, and current oversight mechanisms are sorely inadequate. This note argues that the Federal Communications Commission is in a unique position to facilitate effective oversight of the National Security Administration without compromising national security. This note first explores the inadequacy of the current oversight scheme, both preventive and reactive, before turning to the suitability of the Federal Communications Commission to facilitate more effective oversight. This note concludes by proposing legislation that would codify the Federal Communications Commission’s ability to review the volume of data the National Security Administration collects, as well as to participate in Foreign Intelligence Surveillance Act Court proceedings. A novel solution, this inter-agency monitoring could increase accountability and public confidence in a way that traditional oversight mechanisms cannot.

## **Hello, Congress? The Phone’s For You: Facilitating the IP Transition While Moving Toward a Layers-Based Regulatory Model**

By John Gasparini .....117

Our nation’s communication infrastructure stands at a crossroads, caught between nearly a century of regulation defined by a unique dual-jurisdiction model, and immense pressure from industries and consumers clamoring to deploy and adopt next-generation technology. While regulators struggle to

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.