

Verizon v. FCC: D.C. Circuit Overturns FCC Network Neutrality Regulations

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On Tuesday, the United States Court of Appeals for the District of Columbia Circuit vacated and remanded the operative portions of the Federal Communications Commission's (FCC or Commission) network neutrality regulations.¹ The court found that the prohibitions on unreasonable discrimination and Internet content blocking improperly imposed common carrier regulations on broadband access providers in violation of the Communications Act of 1934, as amended (the Communications Act). The court's decision puts the future of network neutrality policies up in the air and may lead to significant economic shifts in the manner in which broadband Internet access services are provided and content is distributed to consumers.

Adopted in 2010, the FCC's network neutrality regulations imposed a number of obligations on domestic broadband network operators, including wireline, cable, satellite and wireless carriers — though only some of the requirements applied to mobile network operators. The regulations prohibited all network operators from blocking or degrading lawful Internet content and applications and barred fixed network operators from engaging in unreasonable discrimination in the transmission of lawful Internet traffic. The regulations excepted reasonable network management practices from the prohibitions only if such practices were narrowly tailored to further a legitimate objective, such as fighting network congestion, spam or malicious network activity. The regulations also imposed general requirements on network operators to broaden disclosures regarding their network management practices. In adopting the regulations, which the FCC described as prophylactic in nature, the Commission stated its belief that broadband network operators had the incentives and abilities to limit the openness of the Internet.

In its decision, the court found adequate statutory authority under Section 706 of the Communications Act for the Commission to issue the regulations.² This section directs the FCC to encourage the deployment of advanced telecommunications capability to all Americans on a reasonable and timely basis. If the Commission finds that these capabilities are not being deployed, the statute authorizes the Commission to take immediate action to remove barriers to infrastructure investment and promote competition in the telecommunications market. In July 2010, the Commission determined that broadband deployment to all Americans was not reasonable and timely. According to the court, this triggered Section 706's mandate that the Commission take immediate action. The court also found that the Commission adequately supported its conclusion that absent the regulations, broadband providers could have the incentive and ability to threaten Internet openness and ultimately to inhibit the speed and extent of broadband deployment.

1 *Verizon v. Federal Communications Commission*, No. 11-1355 (D.C. Cir. January 14, 2014).

2 47 USC § 1302.

Notwithstanding the statutory authority and expressed necessity for the regulations, the court found that the Commission had run afoul of the Communications Act provisions that prohibit common carrier regulation of private (non-common-carrier) communications providers.³ The court noted that the Commission had consistently held that providers of broadband Internet access services were not common carriers, yet the unreasonable discrimination obligations imposed by the regulations relegated broadband providers to common carrier status. Additionally, the regulations prohibiting the blocking of lawful traffic required broadband providers to furnish communication service upon reasonable request — a hallmark of common carrier status.

In a statement released shortly after the D.C. Circuit opinion, FCC Chairman Tom Wheeler noted that the court had found affirmative authority for issuance of the regulations under Section 706 of the Communications Act, and said that he would consider all available options, including an appeal, to ensure that U.S. broadband networks remain free and open platforms for innovation and expression.

The court's decision, if allowed to stand, may open up new potential sources of revenue for broadband Internet access providers, who can now enter agreements with content providers to favor their data traffic over competitors' traffic. Content providers, in turn, may develop new offerings and services that take advantage of these new arrangements. There may also be a chilling effect on new entrants into the online service marketplace. These entrants may face an uphill battle in providing services on equal terms with established providers possessing the resources necessary to establish content and application distribution arrangements with nationwide broadband Internet access providers.

3 47 USC §§ 153(51) and 332.