

Third Time's the Charm: Court Upholds FCC Net Neutrality Regulations

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Introduction

Earlier today, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in a lengthy 2-1 decision denied various challenges to the Federal Communications Commission's (FCC or Commission) 2015 Open Internet Order (the Order), which adopted broad net neutrality regulations. The decision represents the first time an appellate court has affirmed net neutrality regulations, entrenching the regulations more solidly than either of the Commission's two prior aborted attempts to address open internet concerns. As such, the court's ruling will have far-reaching implications for entities in the telecommunications, media, content, internet and technology sectors by subjecting a number of entities and services to regulation under the Communications Act of 1934, as amended (Communications Act).

Summary of Decision

In a sweeping victory for the FCC, the majority upheld every aspect of the Order and the FCC's net neutrality regulations. The court specifically:

- rejected procedural and substantive challenges to the Order by ruling that (a) the FCC's classification of broadband internet access as a telecommunications service, (b) the Commission's regulation of interconnection arrangements between broadband providers and other service providers, and (c) the Commission's classification of mobile broadband service as a commercial mobile service were each properly noticed in the Commission's 2014 Notice of Proposed Rulemaking (the 2014 Notice) and within the FCC's statutory authority;
- found that the commission's forbearance from certain Title II provisions and the proposed net neutrality regulations themselves were both procedurally and substantively sound; and
- determined that the FCC's regulations did not violate the First Amendment.

Judge Stephen F. Williams agreed with many of the majority's conclusions but dissented in part. In his opinion, the FCC acted arbitrarily and capriciously because it failed to account for broadband providers' reliance on their exclusion from common carrier status; failed to point to any relevant change in factual circumstances that would support the agency's changed position; and did not undertake the economic analysis that he believed necessary to justify the changes in policy. He also argued that the Communications Act does not provide the FCC with the authority to promulgate a ban on paid prioritization. Lastly, he contended that the FCC's decision to forbear from applying a number of statutory provisions undermined its conclusion that it was reasonable to regulate broadband providers under Title II in the first place.

While the decision likely will be subject to further appeal, and the highly charged political and regulatory debate surrounding network neutrality likely will continue, the court's action is a landmark decision in communications law.

Background

The FCC's struggle to develop open internet rules started in 2005, when it issued the 2005 Wireline Broadband Order, which classified broadband services provided by digital subscriber line service as an integrated "information service" under the Communications Act. Simultaneously, the FCC issued a policy statement signaling its intention to preserve and promote the open and interconnected nature of the internet. The 2005 order was ultimately vacated in the April 2010 *Comcast v. FCC* decision by the D.C. Circuit, which found that the FCC failed to cite any statutory authority that would justify its

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decision to compel a broadband provider to adhere to certain open internet practices.

In response to the court's decision, the FCC adopted binding network neutrality regulations later in 2010 that imposed a series of obligations on broadband internet service providers (ISPs). These included an anti-discrimination rule applicable only to wireline broadband providers that prevented them from engaging in unreasonable discrimination in the transmission of lawful internet traffic and an anti-blocking rule that prohibited all broadband providers — wireless and wireline — from blocking or degrading lawful internet content and applications. A transparency rule also required all broadband providers to publicly disclose information regarding their network management terms and practices.

The FCC order implementing these rules was struck down by the D.C. Circuit in its January 2014 *Verizon v. FCC* decision. While the *Verizon* court found that the Commission had authority to impose the regulations under Section 706 of the Telecommunications Act of 1996, the court vacated the anti-blocking and anti-discrimination regulations, finding that the FCC had improperly attempted to impose these common carrier obligations without expressly reclassifying broadband services as common carrier services.

In response, the FCC issued the 2014 Notice to determine the best approach to protecting and promoting internet openness. The Commission subsequently promulgated the Order at issue, which consisted of three primary regulatory actions. First, the FCC reclassified both wired and wireless broadband internet access service as telecommunications services under the Communications Act, subjecting them to additional regulation and oversight. Second, the FCC forbore from applying certain Title II provisions to broadband service, asserting that these provisions were not necessary to protect consumers or ensure reasonable rates. Third, the FCC promulgated five specific open internet rules. The first three prohibit broadband providers from blocking or throttling lawful internet traffic on the basis of content, or favoring certain content or providers. The fourth rule prohibits broadband providers from unreasonably interfering with internet use by end users and edge providers. Finally, the FCC adopted an enhanced transparency rule.

The Order was immediately challenged by various petitioners, who argued that the Commission: (a) lacked statutory authority to reclassify broadband services as telecommunications services under the Communications Act, (b) violated the Administrative Procedures Act (APA) in adopting the regulations, (c) improperly classified mobile broadband as a commercial mobile service, (d) impermissibly forbore from certain provisions of Title II in the Order, and (e) violated the First Amendment in adopting the regulations.

Broadband as a Telecommunications Service

The D.C. Circuit first addressed whether broadband services meet the statutory definition of a “telecommunications service” under the Communications Act — that is, whether broadband constitutes “the offering of telecommunications for a fee directly to the public.” The court largely deferred to the FCC’s judgment in holding that broadband can be considered a telecommunications service and hence could be reclassified as such.

- In reaching its conclusion, the court heavily relied on the U.S. Supreme Court’s reasoning in its 2005 *Brand X* decision, in which the Court determined that the term “offering” in the definition of a “telecommunications service” is ambiguous. The Supreme Court determined that broadband service contains components of both an “information service” and a “telecommunications service” under the Act. The Court further concluded that the FCC, as an expert agency, had the authority to decide whether to view the relevant broadband services “offering” as a single integrated service or as the service’s component parts. In its Order, the FCC concluded that consumers generally viewed broadband as a stand-alone service meant to transmit user messages without alteration, even if some broadband companies also offered information services like email. The D.C. Circuit refused to challenge the FCC’s conclusion on this point, especially given the ample factual support on the record. All three judges on the panel agreed with this holding.
- The court also rejected several procedural objections by those opposed to reclassification of broadband as a telecommunications service. These challengers argued that the FCC did not provide sufficient notice under the APA that it might reclassify broadband as a telecommunications service. The court ruled, however, that the possibility of reclassification was sufficiently raised in the 2014 Notice. Other challengers accused the FCC of failing to adequately explain why it previously considered broadband to be an information service and now opted to regulate broadband as a telecommunications service. Consistent with Supreme Court precedent, the D.C. Circuit concluded that the FCC needed only to acknowledge and adequately explain its decision to change the classification. Because the FCC reasonably determined that reclassification was necessary to impose net neutrality regulations and reasonably explained that decision, the court upheld the agency’s determination. The court also deferred to the FCC’s prediction that the reclassification would not undermine investment in broadband.

Interconnection Between ISPs and Other Service Providers

The court upheld another key provision of the Order, which extended the FCC’s jurisdiction to cover interconnection between ISPs and online service providers or backbone service provid-

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ers. The Order had defined broadband service to include the provision of access to edge providers (e.g., Google, Netflix and *The New York Times*), to the extent such access has an impact on end-user consumers' access to the services they sought. Challengers contended that this change, which could potentially subject nearly any internet-based service to certain FCC regulations, was inadequately introduced in the 2014 Notice. In addition, opponents argued that the FCC would have needed to separately classify such service as a telecommunications service rather than merely declare it an adjunct service to consumer broadband. The court swept aside both arguments in short order, determining that the FCC had provided sufficient notice and the revised definition fell within the FCC's discretion to define broadband services.

Mobile Broadband Services as a Common Carrier Service

The court next addressed the FCC's decision to classify mobile broadband services as common carrier services under the Communications Act, which would subject such services to increased oversight and regulation. Opponents had challenged the Commission's attempts to reclassify mobile broadband services on procedural and substantive grounds, arguing that the Commission had not provided proper notice of its decision and that such reclassification violated the express terms of the Communications Act. In the opponents' view, the Commission especially erred by departing from its prior classification of mobile broadband as "private mobile services" without adequate justification or factual support.

- The court rejected each of these arguments and found that the Commission's decision to reclassify mobile broadband services was reasonable and supported by the record. In particular, the court found it compelling that mobile broadband services bear all of the hallmarks of a commercial — rather than a private — mobile services as provided in the marketplace. It also determined that nothing in the Communications Act prohibited the FCC from reassessing its 2007 decision to classify mobile broadband as a "private mobile service" subject to light regulation.
- According to the court, the FCC has ample authority under the Communications Act to reconsider the regulatory classification of a service based on evolution of the relevant marketplace or changed factual circumstances. The court determined that the evidence cited by the FCC regarding the extensive changes that have occurred in the mobile marketplace was more than adequate to support the reclassification. With this evidentiary support, the court determined that the Commission needed only to provide a "reasoned explanation" for departing from its prior finding.

Forbearance of Certain Title II Provisions

Having upheld the Commission's reclassification of broadband services — both fixed and mobile — the court next addressed various challenges to the Commission's decision to forbear from applying portions of the Communications Act to those services. These challenges raised a number of procedural and substantive arguments against the FCC's attempt to forbear from applying numerous provisions of Title II to broadband services while, at the same time, reclassifying fixed and mobile broadband services under Title II.

- In rejecting these challenges, the court first ruled that the Commission had adequate authority to forbear on its own motion. Contrary to other situations in which third parties requested that the Commission forbear from application of a rule, the Commission in this case decided *sua sponte* to forbear from applying the Title II provisions. Given that the Commission's rules do not address such a situation, the court determined that the Commission had wide latitude to implement forbearance.
- The court further decided that the FCC had provided proper notice of its intent to forbear from application of the Title II provisions. With respect to the substantive challenges, the court determined that the Commission's judgments about the marketplace effects of its forbearance actions were reasonable and supported by record evidence. Interestingly, the court also appeared sympathetic to select points raised by the dissent against forbearance but noted that since none of the challengers raised these issues in their briefs, the court could not address them.

The Open Internet Rules

With the questions regarding the FCC's authority to reclassify the underlying services and define the set of applicable statutory provisions resolved, the court then turned to the challenges that addressed the regulations themselves. Of the five base rules established by the Commission in the Order — prohibitions on blocking, throttling and paid prioritization of traffic; a general conduct rule; and an enhanced transparency rule — the appellants challenged the anti-paid-prioritization and general conduct rules.

- First, challengers argued that neither Title II or Title III of the Communications Act nor Section 706 of the Telecommunications Act of 1996 granted the Commission sufficient authority to promulgate paid prioritization regulations. In response, the court noted that the *Verizon* opinion had already addressed rulemaking under Section 706, which requires the Commission to promote the deployment of advanced telecommunications services on a reasonable and timely basis. The court accordingly reiterated the *Verizon* court's finding that Section 706 constitutes a separate grant of rulemaking authority that could

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reasonably be interpreted to include authority to issue rules governing the treatment of internet traffic, including paid prioritization.

- Second, opponents argued both that the general conduct rule was insufficiently previewed in the 2014 Notice and that the rule's unreasonable-interference-or-disadvantage standard for future FCC review of ISP conduct established under the rule was impermissibly vague. On the initial point, the court found that the description in the 2014 Notice of the factors that would be included in the new rule was sufficient to introduce the rule. On the latter point, the court found that the rule was specific enough to be understood by a reasonably prudent person familiar with the regulations' purpose. The court distinguished the general conduct rule from other rules previously stricken down, noting that the FCC's purpose had been spelled out in the Order through factors delineated by the Commission and that the Order had discussed each factor and its application in sufficient depth. In addition, the court stated that the process introduced in the Order by which the FCC will offer advisory opinions on potential violations of the general conduct rule cured the rule of any potential remaining constitutional deficiency.

First Amendment

Lastly, several challengers argued that the Order violated the First Amendment because it forced broadband providers to transmit speech with which they might disagree. The court held, however, that common carriers merely facilitate the transmission of speech rather than engage in speech in their own right. Unlike editors of newspapers or cable networks, broadband providers exercise little control over the content that users access on their platform. Those that do, offer only a limited subset of webpages or programming, exempting them from the regulations. As a result, the court concluded, the First Amendment is not implicated by the net neutrality order because broadband providers are not engaging in speech.

Possible Litigation Scenarios

Net neutrality opponents now face a critical decision whether to continue contesting the regulations and, if so, where to take the fight next. They could attempt to obtain a more favorable decision from the D.C. Circuit by requesting rehearing from the panel or *en banc* review of the decision before the full D.C.

Circuit. Opponents may also attempt to appeal the ruling directly to the Supreme Court by filing a petition for a writ of *certiorari*. An attempt to appeal the ruling is likely, given the more than 10-year fight over net neutrality regulations and opponents' concerns with the potential impact of the regulations. Further review by either the D.C. Circuit or Supreme Court, however, would be discretionary. If both courts deny review, the panel's decision will become final.

Marketplace Impacts

With the ruling in place, focus will now turn to how the FCC will enforce the net neutrality regulations. While it remains unlikely that the FCC will address each of the tens of thousands of complaints it has received since the rules were first proposed, the Commission may decide to pursue a select few to establish the parameters of acceptable behavior under the rules. In addition, the FCC has recently begun proceedings or informal discussions regarding industry practices more generally. These proceedings include developing standards for protecting consumer network information held by broadband providers and examining the use of 'zero-rating' to reduce wireless customer billing for certain services. These proceedings can be expected to accelerate.

- Given that the court's decision comes fairly late in the Obama administration, another issue to note is how the next administration will implement the regulations. The next administration's FCC will have significant say over how the new regulations are applied and may determine that more draconian enforcement of the regulations is not necessary to ensure a competitive marketplace for broadband service.

Industry actors, meanwhile, may change their capital investment strategies in the absence of a permissible paid prioritization business model that can be used to differentiate their services.

- Wireless providers may recommit to improvements in service quality, which in turn may drive investments in new network technology and new spectrum.
- Cable operators may be forced to locate new ways to monetize their existing infrastructure in the online video environment.
- Edge providers, meanwhile, may further invest in technologies such as content delivery networks that allow content owners and providers to better manage the delivery of content to end users without directly prioritizing traffic.