



Insight

Network Neutrality Decision a Mixed Bag for Consumers

WILL RINEHART | JANUARY 14, 2014

A four year struggle over network neutrality came to a head today as the DC District Court of Appeals struck down two of the three major provisions of the Open Internet Order, making it the [15th major regulation](#) struck down by courts during the Obama Administration. The ruling is a temporary win for consumers, but could easily be undone by the FCC's reaffirmed power over the Internet. The agency should accept the decision and table network neutrality to work on much more pressing issues like spectrum auctions, smoothing the transition to all IP networks, and cleaning up its own house.

Verizon brought a suit against the Federal Communications Commission (FCC) [in 2010](#), challenging its reading of the Open Internet Order and its legality. In the [decision](#) of *Verizon v FCC*, the court disagreed: The Commission interpreted the 1996 Telecommunications Act correctly, and it does empower it to govern Internet traffic. However, the Commission failed to convince the courts that the effect of the law wouldn't have been common carrier style regulation, a burden from which broadband providers are exempt. For this oddity of law, portions of the Open Internet Order were struck down.

This ruling is a partial win for consumers. The FCC originally adopted the Open Internet Order to "preserve the Internet as an open platform for innovation, investment, job creation, economic growth, competition, and free expression," even though the agency was hard pressed to find truly anti-competitive behavior in the billions of daily Internet transactions. Had the two rules stood, innovative business models that fully utilized next generation networks would have been clearly outlawed. The effect would have been unseen, but disastrous. All of the social benefits touted in the order, such as "investment, job creation, economic growth, competition, and free expression," would have suffered.

This ruling is a big win for the agency's power over the Internet, and could open it to a bevy of new regulations. Contradicting Verizon, the courts do believe Section 706 of the 1996

Telecommunications Act grants the FCC the general authority to regulate Internet traffic to “preserve and facilitate the ‘virtuous circle’ of innovation that has driven the explosive growth of the Internet.” However, the two most controversial sections of the order, the so-called no blocking rule and the no unreasonable discrimination rule have been vacated. The first would have limited fixed broadband providers from “block[ing] lawful content, applications, services, or non-harmful devices, subject to reasonable network management.” The second would have limited ISP’s from “unreasonably discriminat[ing] in transmitting lawful network traffic” over their own networks.

The Telecommunications Act of 1996 divides communication services into two distinct categories, Title I and Title II. Verizon rightly worried that the Order would impose the onerous common carrier style regulation of Title II on Internet providers, even though they are currently governed under Title I as information services. The court agreed with the company, stating that “the Commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers,” and so, “the Communications Act expressly prohibits the Commission from nonetheless regulating them as such.” The court did allow the third section of the order to stand. Companies will now be required to disclose network management practices, performance characteristics, and terms and conditions of their broadband services.

This decision is by far the most muddled outcome possible. FCC Chairman Tom Wheeler recently gave strong indications that he’d fight for net neutrality in the courtroom, saying “This is why it’s essential that the FCC continue to maintain an Open Internet and maintain the legal ability to intervene promptly and effectively in the event of aggravated circumstances.” In today’s ruling, the D.C. Court of Appeals affirmed the FCC’s power to govern Internet traffic, but stripped them of the no blocking and no discrimination rules.

What’s next for this stalemate? If the public took up the mantle and made it an important topic, Congress could pass new legislation giving the FCC express authority to regulate in the name of network neutrality, but at least ten previous attempts at a legislative fix have failed. The Commission could try again with a different set of rules, emboldened with this ruling, but that would result in another protracted series of court cases. Another path to codifying network neutrality is reclassification. Yet, this move too would face intense political scrutiny and court challenges.

The best outcome for consumers and for the public is if the FCC lets this one go. Far too much political capital has been expended already on the issue. Instead of pursuing this issue, the FCC needs to push spectrum auctions, ensure a smooth transition to all IP networks, and clean up its own house. Besides, as the Energy and Commerce Committee considers an update to the Telecommunications Act, this issue will surely rear its ugly head

again. The D.C. Circuit Court of Appeals just handed the FCC broad power over the Internet and an exit to this morass. The Commission should realize this and move on.