



D.C. CIRCUIT VACATES ANTI-BLOCKING AND ANTI-DISCRIMINATION RULES OF THE FCC'S *OPEN INTERNET ORDER*

On January 14, 2014, the D.C. Circuit issued its long-awaited decision in Verizon's challenge to the FCC's *Open Internet Order*. The three-judge panel vacated the anti-blocking and anti-discrimination provisions of the *Order*, holding that the Commission failed to demonstrate that the rules "do not impose *per se* common carrier obligations" on broadband providers. In contrast, the Court upheld the disclosure provision that requires broadband providers to "publicly disclose accurate information regarding the network management practices, performance, and commercial terms" of their service. Perhaps of equal importance, however, the court generally upheld the theory under which the FCC issued its *Order*—making future regulation at least possible.

Much has been written about this decision already but three items are of particular interest.

- The immediate result of the decision is to eliminate the anti-discrimination and anti-blocking rules. The Court determined that these rules represented common-carrier obligations that the FCC was not authorized to impose on broadband providers. This is so because the FCC previously classified broadband providers as "information service providers," making them exempt from regulation as common carriers. Despite this classification, the Court held that the FCC's anti-discrimination and anti-blocking rules impermissibly functioned to treat broadband providers as common carriers with respect to edge providers by requiring ISPs to "serve all edge providers without 'unreasonable discrimination.'"
- The Court nonetheless agreed for the first time with the FCC that Section 706 of the Telecommunications Act of 1996 gives the agency affirmative rulemaking authority to encourage broadband deployment. This provides a sharp contrast to the D.C. Circuit's decision in *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010). In that case, the Court had rejected as lacking statutory authority an FCC order regarding Comcast's alleged traffic throttling, network management, and disclosure practices. Here, however, the Court determined that the FCC had demonstrated that its justification for the *Open Internet Order*—that allowing broadband providers to block or otherwise discriminate among edge providers would stifle innovation and hamper broadband expansion—was reasonable and supported by the record. Indeed, the Court noted that broadband providers "have powerful incentives to accept fees from edge providers, either in return for excluding their competitors or for granting them prioritized access to end users." As a result, the Court's decision leaves open the possibility for the FCC to issue new rules that regulate broadband providers without imposing common-carrier obligations on them. In particular, the Court suggested that there may be arguments that the anti-blocking rules do not rise to the level of common carriage, but that the Court could not uphold the rules on grounds that the Commission had not advanced.

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- The Court did not strike down the entire *Open Internet Order*. It upheld the Commission's disclosure rule, requiring broadband ISPs to publicly disclose accurate information regarding their network management practices and network performance. This transparency requirement will provide edge providers, end users, and other broadband providers with some insight into and information about the development of preferential or priority access arrangements.

The ultimate impact of the Court's decision has yet to be determined. The FCC may or may not seek *en banc* or Supreme Court review. In the meantime, broadband providers may begin seeking payments from edge and over-the-top providers for priority access to end users. In turn, end users may see increases in fees for broadband services or edge and over-the-top services as providers seek to recoup the costs of such arrangements.

FCC Chairman Tom Wheeler issued a statement shortly after the opinion was released, indicating he is "committed to maintaining our networks as engines for economic growth" and that the FCC "will consider all available options, including those for appeal, to ensure that these networks on which the Internet depends continue to provide a free and open platform for innovation and expression, and operate in the interest of all Americans."

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