



D.C. Circuit Upholds “Light Touch” Federal Regulation of Broadband ISPs, but Opens the Door to Differing State-Level Laws

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As a result of the D.C. Circuit’s decision, broadband Internet access service providers will be free from legacy utility-style regulation by the Commission but, absent a valid case for federal preemption, may be faced with a patchwork of state laws.

Background

The D.C. Circuit’s decision is the latest page in a long history of net neutrality regulation at the FCC. Almost ten years ago, the FCC adopted its first *Open Internet Order*, in which it promulgated three basic rules designed to promote transparency and prevent blocking as well as other discriminatory traffic management practices used by Internet service providers. The D.C. Circuit subsequently vacated the no-blocking and antidiscrimination rules on the grounds that the FCC had impermissibly regulated broadband Internet access providers as common carriers.

In 2015, in response to the D.C. Circuit’s decision, the Obama-era FCC adopted a second *Open Internet Order*, which reclassified broadband Internet access service as a “telecommunications service” subject to utility-style common carrier regulation by the FCC. The 2015 *Open Internet Order* also adopted a bright-line prohibition against blocking, throttling and paid prioritization. Once again, the matter was appealed to the D.C. Circuit, which upheld the rules in a decision issued in June 2016.

Shortly after taking office under President Trump’s administration, FCC Chairman Ajit Pai initiated a rulemaking to roll-back the Obama-era net neutrality regulations. The result of this

rulemaking was the 2018 *Restoring Internet Freedom Order*, which reclassified broadband Internet access services as “information services” subject to limited regulation by the FCC. The *Restoring Internet Freedom Order* also repealed the Obama-era prohibitions on blocking, throttling and paid prioritization, and adopted a provision prospectively preempting state and local governments from enacting laws that conflict with the new federal framework.

The D.C. Circuit’s October 1 decision was in response to a lawsuit brought by a number of parties challenging the FCC’s authority to adopt the rules established in the *Restoring Internet Freedom Order*.

Decision

The D.C. Circuit affirmed the Commission’s decision to reclassify broadband Internet access services as “information services,” thereby exempting broadband Internet access from utility-style regulation by the FCC.

However, the D.C. Circuit did not uphold the entire *Restoring Internet Freedom Order*. It vacated the FCC’s decision to bar states from imposing their own additional restrictions or regulations on Internet service providers. The D.C. Circuit concluded that the FCC lacked authority to adopt such a “sweeping preemption directive” that went “far beyond conflict preemption.” The court left open the possibility that the FCC could, on a case-by-case basis, preempt specific state net neutrality laws.

The D.C. Circuit also remanded the *Restoring Internet Freedom Order* to the FCC for reconsideration, with regard to three discrete issues that, according to the court, the FCC had failed to consider adequately in assessing the impact of the rule changes adopted in 2018. Specifically, the D.C. Circuit directed the FCC to consider (1) how the lack of rules prohibiting throttling and blocking might affect public safety; (2) how reclassification of broadband Internet access service as an “information service” might affect the regulation of pole attachments, which are statutorily defined by reference to “telecommunications services”; and (3) the potential elimination of the statutory basis to include broadband Internet access service among the services eligible for low-income subsidization under the FCC’s Lifeline Program.

Conclusion

The D.C. Circuit’s decision makes clear that, at least for the moment, the FCC has authority to change its mind and exempt broadband Internet access services from utility-style common

carrier regulation. For this reason, the decision has received praise from FCC Chairman Pai, who called the ruling a “victory for consumers, broadband deployment, and the free and open Internet.” However, the Court’s ruling that the FCC lacks authority prospectively to preempt state net neutrality regulations, could be viewed as having the potential to lead to a patchwork regulatory scheme, as certain states like California, seek to enforce state-level net neutrality laws. Regardless, the D.C. Circuit’s ruling on state preemption is likely to lead to more legal battles in the future, particularly if the FCC seeks to preempt state regulations on a case-by-case basis. Given the long history of net neutrality at the FCC and the fact that these three issues have been remanded to the FCC for further consideration, the D.C. Circuit’s latest ruling is unlikely to be the final decision on this issue.

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