



OLR BACKGROUNDER: APPELLATE COURT DECISION ON NET NEUTRALITY

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This report summarizes the recent U.S. Court of Appeals decision on “net neutrality.” OLR Report [2009-R-0392](#) discusses issues surrounding net neutrality.

SUMMARY

“Net neutrality” refers to requirements that broadband service providers (companies such as Verizon, AT&T, and Comcast) treat all Internet traffic the same regardless of the source of the traffic. In 2010, the Federal Communication Commission (FCC) issued an order (1) barring broadband providers serving homes and other fixed locations from blocking lawful content, applications, services, or non-harmful devices and from unreasonably discriminating in transmitting lawful network traffic over a consumer's broadband Internet access service and (2) barring mobile broadband providers from blocking lawful websites or applications that compete with their voice or video services. The order also required all broadband providers to disclose information on their network management practices and performance (e.g., download speeds), and the commercial terms of their broadband services.

On January 14, 2014, the DC Circuit Court determined, in [Verizon v. Federal Communications Commission](#), No. 11-1355 (D.C. Cir. Jan. 14, 2014), that the FCC lacked authority to enforce key parts of the order, since the FCC had determined that broadband providers are not subject to regulation as common carriers. The court vacated the order's blocking and discrimination provisions but upheld the disclosure provisions. The FCC is considering whether to appeal the decision.

FEDERAL LAW AND PRIOR FCC CLASSIFICATION ORDERS

The federal Telecommunications Act of 1996 distinguishes between (1) telecommunications carriers that provide basic services and (2) information-service providers that provide enhanced services. Under Title II of the act, telecommunications carriers are subject to regulation as common carriers. Among

other things, they must furnish communication service upon reasonable request (47 U.S.C. § 201(a)) and may not engage in unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services (47 U.S.C. § 202(a)). On the other hand, the FCC may not subject information service providers to these provisions (see 47 U.S.C. § 153(51)).

Pursuant to the act, and consistent with its prior practice, FCC initially classified digital subscriber line (DSL) services (broadband Internet service furnished over telephone lines) as telecommunications services subject to common carrier regulation. But, the FCC subsequently determined that cable broadband providers provide a single, integrated information service and thus were not telecommunications carriers subject to Title II regulation.

In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), the U.S. Supreme Court upheld the FCC's classification of cable broadband providers. The Court concluded that the FCC's ruling represented a reasonable interpretation of the 1996 Telecommunications Act's "ambiguous" provision defining telecommunications service and that its determination was entitled to deference notwithstanding its apparent inconsistency with the agency's prior interpretation of that statute. Following *Brand X*, the FCC classified other types of broadband providers, such as those that use DSL and wireless technologies, as information service providers exempt from Title II's common carrier requirements. (See *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 F.C.C.R. 14853, 14862 ¶ 12 (2005); *In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 F.C.C.R. 5901, 5901-02 ¶ 1 (2007); *In re United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, 21 F.C.C.R. 13281, 13281 ¶ 1 (2006).) The FCC has not overruled these classification orders.

NET NEUTRALITY ORDER

In 2008, several subscribers to Comcast's cable broadband service complained that it had interfered with their use of certain networking applications. In response, the FCC ordered the company to (1) adhere to open network management ("net neutrality") practices for managing demand for bandwidth and (2) disclose the details of this approach to its customers. The FCC based its order on its ancillary jurisdiction under 47 U.S.C. § 154(i), which allows it to make rules and regulations and issue orders, not inconsistent with the statutes, needed to execute its functions. But, in *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010), the

federal district court vacated this order, holding that the FCC had failed to cite any statutory authority that would justify its order compelling a broadband provider to adhere to open network management practices.

While the Comcast matter was pending, the FCC sought comment on a set of proposed rules that, with some modifications, eventually became the order addressed in this report. The FCC relied on the same ancillary jurisdiction it had asserted in its order to Comcast. But after the *Comcast* decision undermined that theory, the FCC sought comment on whether and to what extent it should reclassify broadband Internet services as telecommunications services.

Ultimately, however, rather than reclassifying broadband services, the FCC approved "net neutrality" rules in its "Open Internet Order" (In re Preserving the Open Internet, 25 F.C.C.R. 17905 (2010)). The order imposed disclosure, anti-blocking, and anti-discrimination requirements on broadband providers. Under these rules, broadband service providers were required to disclose information on their network management practices and performance (e.g., download speeds), and the commercial terms of their broadband services.

The order established separate anti-blocking and anti-discrimination rules for (1) fixed broadband providers, such as telephone and cable companies, furnishing Internet access to end users primarily at fixed end points using stationary equipment and (2) mobile broadband providers serving end users primarily using mobile stations, such as smart phones. The order barred fixed broadband providers from blocking lawful content, applications, services, or non-harmful devices. The order also barred these providers from unreasonably discriminating in transmitting lawful network traffic over a consumer's broadband Internet access service. While the FCC did not expressly say that the rule would forbid broadband providers from granting preferred status or services to providers who pay for such benefits, it warned that, as a general matter, it is unlikely that pay for priority would satisfy the anti-discrimination provision. The order also barred mobile broadband providers from blocking lawful websites or applications that compete with their voice or video services.

The blocking and discrimination rules were subject to exceptions for "reasonable network management." This provision would allow broadband providers to address traffic that is unwanted by end users, for example by providing services or capabilities consistent with an end user's choices regarding parental controls or security capabilities.

The primary statutory authority the FCC cited in issuing the order was section 706 of the 1996 Telecommunications Act (47 U.S.C. § 1302(a), (b)), which directs it to encourage the deployment of broadband telecommunications capability. According to the FCC, the rules furthered this statutory mandate by preserving unhindered the “virtuous circle of innovation” that has driven the growth of the Internet. It argued that net neutrality would spur investment and development by providers, leading to increased end-user demand for broadband access, increased investment in broadband network infrastructure and technologies, and further innovation and development by edge providers. (The FCC uses the term “edge providers” to refer to companies such as Amazon or Google that provide content, services, and applications over the Internet.)

APPELLATE COURT DECISION

Verizon challenged the Open Internet Order on several grounds, including that (1) the FCC lacked statutory authority to promulgate the rules, (2) its decision to impose the rules was arbitrary and capricious, and (3) the rules contravene statutory provisions prohibiting the FCC from treating broadband providers as common carriers.

The federal appellate court held that the FCC’s understanding of section 706 of the act as a grant of regulatory authority represented a reasonable interpretation of an ambiguous statute. It also ruled the FCC’s finding that net neutrality fosters the edge-provider innovation that drives this “virtuous cycle” was likewise reasonable and grounded in substantial evidence. It found that Verizon did not offer any basis for questioning the FCC’s determination that preserving net neutrality is integral to achieving the statutory objectives set forth in Section 706 of the act. The court found that the FCC had adequately supported and explained its conclusion that, absent rules such as those set forth in the Open Internet Order, broadband providers represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment.

The court next reviewed whether the requirements imposed by the Open Internet Order subjected broadband providers to common carrier treatment and found that it did not. Given that the FCC has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers, the law expressly prohibits it from regulating them as such. Because the FCC failed to establish that the anti-discrimination and anti-blocking rules do not impose common carrier obligations, the court vacated those portions of the Open Internet Order.

Verizon did not argue that the disclosure provisions in the order constituted common carrier obligations, but instead that they were not severable from the rest of the order and should also be vacated. The court disagreed and found that the disclosure requirements operate independently from the rest of the order.

The court thus rejected Verizon's challenge to the Open Internet Order's disclosure rules, but vacated the anti-discrimination and the anti-blocking rules and remanded the case to the FCC for further proceedings consistent with the opinion.

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