

D.C. CIRCUIT UPHOLDS FCC OPEN INTERNET RULES

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On June 14, 2016, the United States Court of Appeals for the District of Columbia Circuit upheld the Federal Communications Commission's 2015 Open Internet Order (the "2015 Order") in *U.S. Telecom Ass'n v. FCC*, No. 15-1063. The majority opinion, written by Judge Tatel and joined by Judge Srinivasan, rejected various statutory interpretation and Administrative Procedure Act challenges brought by cable, telecommunications, and broadband industry associations and providers. This advisory summarizes the court's decision, which is effective immediately and remains operative even as the unsuccessful Petitioners prepare to seek review by the Supreme Court, and briefly highlights potential consequences of the decision.

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After the D.C. Circuit vacated most of the rules adopted in the FCC's 2010 Open Internet Order in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), the Commission began work on replacement rules. The earlier order had relied on ancillary statutory authority to enable the Commission to impose obligations on broadband providers. The 2015 Order, in order to address the jurisdictional concerns of the *Verizon* court, reclassified fixed and mobile broadband services as "Title II" telecommunications services in order to treat broadband providers as common carriers. Exercising that broader statutory authority, the Commission adopted rules that banned blocking, throttling, and paid prioritization; a general conduct standard that prohibits unreasonable interference with or disadvantage to consumers' ability to access and use (and edge providers' ability to offer) lawful Internet content, services, or devices; and transparency rules amending and expanding the disclosure requirements that had survived earlier judicial review.

The United States Telecom Association ("U.S. Telecom"), a trade association for large carriers, and other industry groups petitioned for review of the Order, challenging the rules themselves and the Commission's authority to adopt them. The D.C. Circuit denied the petitions for review, leaving the new Open Internet rules in place.

Broadband reclassification. The D.C. Circuit rejected arguments that the FCC lacked the statutory authority to reclassify fixed broadband as a Title II service. Applying the *Chevron* framework, the court concluded that Congress did not unambiguously answer the question of whether broadband is a "telecommunications service" under Title II or an "information service," which is subject to lighter regulation. The court found that the FCC's interpretation of these statutory terms was reasonable and, therefore, entitled to deference. The court concluded that the Commission need not apply the judicially created *NARUC* test, which requires a carrier to be regulated as a common carrier "if it will make capacity available to the public indifferently or if the public interest requires common carrier operation," when it invokes the statutory common carriage test.

The court also rejected various procedural challenges to reclassification, finding the notice and comment procedures employed and the FCC's explanation for its decision to be sufficient under the Administrative Procedure Act (APA). In his partial dissent, Judge Williams wrote that

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the reclassification decision should have failed for lack of the reasoned decision making required by the APA.

Interconnection. In the 2015 Order, the Commission decided that it needed to regulate interconnection agreements in order to protect consumer access to online services and applications. Applying the same Title II analysis applicable to reclassification, the D.C. Circuit found that the Commission had adequate authority to adopt the interconnection rules. The court rejected U.S. Telecom’s argument that the Commission’s proposal provided inadequate notice that the Commission was considering regulating interconnection, finding that commenters clearly understood the notice of proposed rulemaking as presenting that possibility. The court also held that the Commission need not reclassify interconnection services offered to edge providers as Title II services, concluding that the Commission has authority to regulate interconnection arrangements instead as part of the services provided to end users.

Mobile broadband services. Under Title III of the Communications Act, mobile services are either “private mobile services” subject to fewer regulatory requirements or “commercial mobile services” that may be treated as common carriers. The Order reclassified mobile broadband as a commercial mobile service, finding that the market had expanded to provide “universal access” to hundreds of millions of customers. As the court explained, there is no dispute that mobile broadband meets three of the four statutory requirements for commercial mobile services; it is a “mobile service” that is “provided for a profit” and available “to the public.”

U.S. Telecom asserted that the FCC exceeded its statutory authority because mobile broadband does not meet the fourth requirement: that it “make[] interconnected service available.” That is so, U.S. Telecom argued, because “interconnected service” is a “service that is interconnected with the public switched network.” According to U.S. Telecom, “public switched network” is a term of art confined to the public switched *telephone* network. But the majority concluded that nothing in the statutory text contradicts the Commission’s reasonable interpretation of those defined terms. The court held that Congress could have adopted the more limited term, “public switched telephone network,” but instead chose the broader phrase and charged the Commission with defining it. And because Voice over Internet Protocol, messaging, and other applications allow mobile broadband subscribers to communicate with telephone-numbered endpoints as well as internet users, the FCC reasonably concluded that mobile broadband “makes interconnected service available.”

Forbearance. Petitioner Full Service Network challenged the Commission’s decision to forbear from applying certain common carrier regulations to fixed and mobile broadband. Full Service Network argued that the FCC failed to follow the procedural requirements for processing a petition for forbearance even though the Commission acted on its own accord. The court held that the Commission reasonably interpreted those regulations as inapplicable when the Commission acts *sua sponte*. The court also concluded that the FCC had provided adequate notice to commenters of the provisions from which it might forbear.

The court also rejected Full Service Network’s substantive arguments, including its assertion that the FCC should have made its forbearance determination on a market-by-market

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basis, rather than nationally. That argument, the court explained, had been foreclosed by earlier D.C. Circuit decisions. In his partial dissent, Judge Williams found fault with the FCC's decision to forbear from many of Title II's provisions because the Commission's decision was "based on premises inconsistent with its reclassification of broadband." The majority declined to consider that view because it was never advanced in Full Service Network's briefs.

Specific rules. Petitioners Alamo and Beringer challenged the FCC's ban on paid prioritization as beyond the Commission's authority, even after reclassification. The court explained that the argument misreads and gives insufficient weight to the *Verizon* decision, which concluded that the Commission's authority under Section 706 includes the power "to promulgate rules governing broadband providers' treatment of Internet traffic." Judge Williams disagreed, arguing that the court's previous pronouncements on the scope of Section 706 were merely dicta.

U.S. Telecom challenged the general conduct standard as "impermissibly vague" in violation of the due process clause. The standard prohibits actions by broadband providers that "unreasonably interfere with or unreasonably disadvantage" users' access to lawful content, applications, services, or devices or edge providers' ability to make those options available to consumers. The court found that the FCC's articulation of seven factors to apply in general conduct assessments and descriptions of how each factor would be applied laid out in the 2015 Order were sufficient. The case-by-case determination could be flexible, the court decided, while still providing the reasonable degree of certainty that due process requires.

First Amendment concerns. Alamo and Beringer argued that the 2015 Order violates the First Amendment by forcing providers to transmit speech with which they disagree. Because the court approved the Commission's decision to treat broadband providers as common carriers, the majority found no problem with subjecting providers to the kinds of nondiscrimination and equal access regulations long applied to other common carriers, including telephone companies.

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U.S. Telecom Ass'n will likely have a significant impact on broadband providers and other industry participants going forward. In addition to confirmation that the substantive requirements of the 2015 Order apply, the FCC may feel emboldened to take actions to enforce current regulations and further develop the parameters of the existing rules. In particular, broadband providers should expect the FCC to use enforcement proceedings to shape industry practice by evaluating potentially unreasonable interference under the general conduct standard. For example, the Commission can be expected to scrutinize business strategies that provide favorable treatment to ISP-affiliated or -selected content, services, or devices, such as zero-rating third party and vertically integrated content, and the bundling of broadband and non-broadband data services. The 2015 Order also allows broadband customers, edge providers, and others to file complaints with the Commission, alleging violation of the Open Internet rules. The industry should prepare to see complaints filed in growing numbers in the wake of the court's decision.

In addition, the FCC is conducting a rulemaking on the privacy practices of broadband providers, a proceeding that stems from the 2015 Order. The D.C. Circuit's decision substantially

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strengthens the Commission's tentative conclusion that it has authority to impose stringent privacy rules on broadband providers in that proceeding.

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For more information regarding Harris, Wiltshire & Grannis LLP's open internet compliance counseling or assistance in responding to FCC open internet complaints or enforcement proceedings, please contact **Jennifer Bagg** at +1 202 703 1332 or jbagg@hwglaw.com.

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