

CLIENT ALERT | NET NEUTRALITY

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Impact of the DC Circuit Decision: Paving the Path for State Net Neutrality Laws

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On Tuesday, the U.S. Court of Appeals for the DC Circuit issued its long-awaited decision in *Mozilla v. FCC*, largely upholding the Federal Communications Commission's (FCC) repeal of the 2015 net neutrality rules but striking down the agency's attempt to preempt state and local neutrality laws. Additionally, the DC Circuit remanded questions back to the FCC to address the repeal's effects on public safety, pole attachments, and the FCC's Lifeline program. The decision leaves the Commission's rules in place while it reconsiders those issues.

Further appellate proceedings, including seeking Supreme Court review, are possible. If the decision holds, broadband would remain largely unregulated on the federal level, freeing internet service providers (ISPs) from previous restrictions on the blocking, throttling, or paid prioritization of online content. By striking down the FCC's attempt at wholesale preemption, however, the Court clears the way for states to pass and enforce more stringent net neutrality rules, which will likely face state-by-state legal challenges.

The Court Upholds Reclassification of Broadband as Title I Information Service.

The decision affirms the FCC's authority to classify broadband as either a Title I or a Title II service.¹ By way of background, in December 2017 the FCC passed the *Restoring Internet Freedom Order*, which took effect on June 11, 2018.² The Order reclassified broadband service as a Title I information service and repealed the 2015 rules against blocking, throttling, and paid prioritization. The Order also repealed the 2015 "general conduct rule" designed to prevent ISPs from otherwise behaving in a non-neutral manner.

Citing "binding precedent" from the Supreme Court's 2005 decision in *National Cable & Telecommunications v. Brand X Internet Services*, the DC Circuit held that the FCC

¹ See *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005); *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 689-97 (D.C. Cir. 2016).

² *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2018).

made “a reasonable policy choice” to reclassify broadband as a Title I information service. Similar to the reasoning endorsed in *Brand X*, the FCC classified broadband as an information service because its transmission element is “inextricably intertwined” with “information processing” functionalities such as DNS and caching. The Commission’s approach warranted *Chevron* deference, which compels courts to defer to reasonable agency interpretations of ambiguous statutes.³

Similarly, the Court upheld as reasonable the FCC’s classification of mobile broadband as a “private mobile service” exempt from Title II common-carriage treatment.⁴ The Court recognized the Commission’s “compelling policy grounds to ensure consistent treatment of” fixed and mobile broadband by avoiding contradictory interpretations of the Communications Act that would subject one, but not the other, to Title II obligations.

The FCC Reasonably Disclaimed Its Section 706 Authority. The DC Circuit also upheld the FCC’s conclusion that Section 706 of the Communications Act is not an independent grant of regulatory authority for issuing net neutrality rules. Section 706 directs the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . price cap regulation, regulatory forbearance, measures to promote competition, or other regulating methods that remove barriers to infrastructure investment.”⁵ Section 706 also directs the FCC to “take immediate action” if this deployment goal is not being met “in a timely fashion.”⁶ In a previous case, the Court had held that Section 706 was ambiguous and could be read as either vesting the FCC with actual authority or as simply a policy statement.⁷ Thus the FCC acted reasonably to reject Section 706 as an independent source of authority.

The FCC Properly Relied on Section 257 Authority to Issue the Transparency Rule. In its 2018 Order, the FCC adopted a modified transparency rule that requires ISPs to make certain disclosures about their network and content management practices. The DC Circuit upheld the FCC’s interpretation of Section 257 of the Communications Act (which directs the FCC to “identify[] . . . market entry barriers” for telecommunications services and information services) as an independent source of authority for the transparency requirements.⁸ Though Section 257 was not mentioned in the Commission’s notice of proposed rulemaking, the Court held that

³ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

⁴ See 47 U.S.C. § 332(c)(1)-(2).

⁵ 47 U.S.C. § 1302(a).

⁶ 47 U.S.C. § 1302(b).

⁷ *Verizon v. FCC*, 740 F.3d 623, 635-37, 641 (D.C. Cir. 2014).

⁸ See 47 U.S.C. § 257(a).

parties had adequate notice that the Commission might rely on Section 257 because it was mentioned in a previous D.C. Circuit decision discussing a related issue.

The FCC's Actions Were Not Arbitrary and Capricious, Except for Failures to Address the Order's Impact on Public Safety, Pole Attachments, and Lifeline.

Addressing arguments that the FCC's Order was arbitrary and capricious, the DC Circuit first rejected the FCC's position that the reasonableness of its statutory interpretation under the *Chevron* test "insulates" the 2018 Order from challenges under the Administrative Procedure Act (APA) that the agency's actions were arbitrary and capricious. Although the two tests "ha[ve] some overlap," they "must be independently satisfied."

The Court then found the FCC's failure to address the 2018 Order's impact on public safety, pole attachment regulation, and the Lifeline program to be as arbitrary and capricious in violation of the APA. FCC decision-making "must take into account its duty to protect the public," given the agency's responsibility, as conferred by Congress, "to regulate a market . . . repeatedly deemed important to protecting public safety."⁹ As for pole attachments, the FCC failed to conduct "reasoned consideration" of the effects from its reclassification of broadband, given that the existing pole attachment regulatory regime applies to attachments for cable TV and telecommunications service, but not information service.¹⁰ Instead, the 2018 Order offered contradictory statements on whether the pole attachment regulations would continue to govern Title I broadband. Similarly, the 2018 Order "completely fails to explain" how reclassified broadband could qualify for inclusion in the Lifeline program when its "eligibility for Lifeline subsidies turns on its [Title II] common-carrier status."¹¹ Consequently, the Court remanded these issues to the FCC but declined to vacate, keeping the Order in effect during remand proceedings.

The Court otherwise upheld the FCC's reasoning and justifications for the 2018 Order. It emphasized judicial deference to agency expertise, especially when it comes to predicting the actions of regulated entities, such as ISPs, and evaluating complex market conditions. Given this deference, the Court found that the FCC sufficiently supported its conclusion that Title I reclassification would increase investment and innovation in broadband. Similarly, the Court held that the FCC reasonably concluded that harms to edge providers and consumers from the repeal "could instead be mitigated—at a lower cost [than the 2015 rules]—with transparency requirements, consumer protection, and antitrust enforcement measures." Although the Court

⁹ *Nuvio Corp. v. FCC*, 473 F.3d 302, 307 (D.C. Cir. 2006).

¹⁰ See 47 U.S.C. 224(a)(4), f(1).

¹¹ See 47 U.S.C. 254(e).

expressed some misgivings, particularly over the Commission's "anemic analysis" of whether antitrust and consumer protection laws would protect against non-neutral, anticompetitive ISP conduct, it nevertheless concluded that the FCC has done enough to survive arbitrary and capricious review.

The Court Overturns FCC's Preemption of State Net Neutrality Laws. In a 2-1 decision, the DC Circuit vacated the 2018 Order's preemption of "any state or local requirements that are inconsistent with [its] deregulatory approach." The majority found that the FCC failed to establish legal authority for its sweeping preemption. "[I]n any area where the Commission lacks the authority to regulate, it equally lacks the power to preempt state law." By reclassifying broadband as a Title I service, the FCC relinquished express preemption authority. Nor could the agency claim ancillary authority because Title I is not an independent source of regulatory authority.

As a practical matter, this decision clears the way for states to enact broader net neutrality protections than those contained in the 2018 Order. The Court does not, however, foreclose the FCC from challenging and preempting state or local net neutrality rules on a case-by-case basis. According to the decision, "[i]f the Commission can explain how a state practice actually undermines the 2018 Order, then it can invoke conflict preemption."

Industry Considerations. The fight over net neutrality is far from over. Companies should continue to monitor developments in the present case, as parties may seek *en banc* review of the *Mozilla* decision from the full DC Circuit or appeal to the Supreme Court. If the decision stands, the FCC will conduct further proceedings to address the public safety-related communications, pole attachment, and Lifeline issues identified in the Court's decision. Companies with a stake in the outcomes of these proceedings should monitor their progress and consider participating.

Additionally, companies should monitor state net neutrality developments. The DC Circuit's decision paves the way for state net neutrality laws but also leaves those laws open to legal challenge on a state-by-state basis. Already, California and Vermont's net neutrality laws face court challenge in cases that were stayed pending the outcome of *Mozilla*. Of note, California's law is set to go into effect once the appeals of the 2018 Order are exhausted, and it would provide even stricter net neutrality protections than the FCC's 2015 rules. Due to the difficulty of applying a patchwork of state laws, ISPs may ultimately decide to comply with the highest common denominator (i.e., California's law at present, should it go in effect) on a nationwide basis.

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For more information on net neutrality or the legal and practical implications of this ruling, please contact any of the authors or the HWG lawyer with whom you regularly work at 202-730-1300.

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