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Net Neutrality Ruling Leaves FCC With Much Work To Do

By **Robert Gastner and William Simmerson** (October 21, 2019, 5:12 PM EDT)

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On Oct. 1, 2019, the United States Court of Appeals for the District of Columbia affirmed the majority of the Federal Communications Commission's 2018 decision repealing Obama-era net neutrality rules that prohibited internet service providers from blocking or slowing internet access (referred to by the commission as the Restoring Internet Freedom Order).

The D.C. Circuit, however, struck down a provision that preempted states from passing their own net neutrality rules. The court also remanded the Restoring Internet Freedom Order to the FCC and directed the commission to revise the order with respect to several issues.

By way of background, in 2015, the FCC adopted net neutrality regulations banning ISPs from blocking or slowing internet traffic and prohibiting them from offering fast lanes or paid prioritization to companies that paid a fee to reach consumers quicker than competitors. To ensure that it had the legal authority to enforce its own net neutrality rules, the FCC also reclassified broadband internet access service as a telecommunications service, similar to that provided by the traditional telephone network.

However, in 2017, after the change in administrations, the FCC, led by its new Chairman Ajit Pai, issued a notice of proposed rulemaking seeking to repeal the agency's net neutrality rules. Then, in January 2018, the commission released an order reversing its classification of broadband internet access service as a telecommunications service and eliminating most of its recently enacted requirements for broadband service providers.

Mozilla Corp. and other internet companies filed suit to oppose the FCC's regulatory rollback and argued that the FCC had not justified its decision for repealing the rules, calling the FCC's action arbitrary and capricious. The internet companies also argued that the FCC "fundamentally mischaracterize[d] how internet access works." Twenty-two state attorneys general joined the internet companies' suit against the FCC, arguing that the FCC overstepped its authority when it preempted states from passing their own net neutrality regulations.

In upholding the FCC's 2018 repeal of the net neutrality regulations, the D.C. Circuit characterized the majority of the objections to the FCC's order as unconvincing. As a result, Chairman Pai claimed that the D.C. Circuit's decision was "a victory for consumers, broadband deployment, and the free and open Internet."

FCC Commissioner Brendan Carr further stated that the "decision is a big win for a free and open Internet and for U.S. leadership in 5G." According to Commissioner Carr, "[t]he Internet has flourished under the light touch approach to regulation that the FCC restored."

Despite the FCC's claims of victory, however, the D.C. Circuit struck down several significant portions of the FCC's rollback decision. Most significantly, as noted above, the court rejected the FCC's preemption of states' legislative efforts regarding net neutrality and stated that the states were

correct that the move "exceed[ed] the Commission's statutory authority."

As explained by the court, one of the FCC's most important enabling statutes, the 1996 Telecommunications Act, creates "two potential classifications for broadband Internet: 'telecommunications services' under Title II of the act and 'information services' under Title I." Pursuant to the act, the FCC has expansive regulatory powers over telecommunications services and little to no authority to regulate information services.

In examining the FCC's actions, the D.C. Circuit found that, when the FCC reclassified broadband internet access service as an information service governed by Title I of the act, the commission effectively stripped itself of any claim to a statutory grant of authority sufficient to preempt states' efforts to impose net neutrality obligations on broadband service providers.

However, the court left open the possibility of the FCC raising future challenges to state net neutrality laws: "If the Commission can explain how a state practice actually undermines the 2018 [Restoring Internet Freedom] Order, then it can invoke conflict preemption. If it cannot make that showing, then presumably the two regulations can co-exist."

In response, FCC Commissioner Michael O'Rielly stated that the court's decision would inevitably "lead to Commission case-by-case preemption efforts and more litigation." Thus, it is likely that the court's remand will result in renewed efforts by the commission to challenge states' net neutrality laws and potentially create years of ongoing litigation.

In addition to the state legislation preemption issues, the D.C. Circuit also remanded the Restoring Internet Freedom Order to the FCC so as to: (1) bolster the record regarding the order's impact on public safety; (2) reconsider the order's effect on the utility pole attachment regulation; and (3) reconsider the order's effect on the FCC's Lifeline Program.

With respect to public safety, although the D.C. Circuit upheld the Restoring Internet Freedom Order's reclassification as permissible, the court determined that the FCC's "disregard of its duty to analyze the impact of the 2018 [Restoring Internet Freedom] Order on public safety" rendered its decision-making arbitrary and capricious. Thus, the court remanded this issue to the commission for further consideration.

Regarding regulation of utility pole attachments, the commission repeatedly has maintained that the rates, terms and conditions of both telecommunications carriers' and broadband service providers' attachments to utility poles is key to deploying 5G wireless facilities and broadband services. As such, in the Restoring Internet Freedom Order, the commission asserted that it retained jurisdiction over the pole attachments of standalone broadband service providers despite its reclassification of broadband internet access service as an unregulated information service.

Similar to its state preemption holding, however, the court found that the FCC's reclassification of broadband internet access service stripped the FCC of the authority to regulate the attachments of standalone broadband service providers. Thus, the court remanded this portion of the FCC's order to the commission to better articulate what, if any, statutory bases remain to support its claims.

The D.C. Circuit also held that the FCC's reclassification "facially disqualifies broadband from inclusion in the [FCC's] Lifeline Program." As explained by the court, the FCC's Lifeline Program "subsidizes low-income consumers' access to certain communications technologies, including broadband Internet access."

Thus, the court stated that because the FCC no longer classifies broadband Internet access service as a telecommunications service, standalone broadband service providers "cannot be designated as 'eligible telecommunications carriers'" for the purposes of administering subsidies under the FCC's Lifeline Program.

The court remanded this issue to the FCC to be further addressed. However, given the court's statement that "reclassification of broadband as an information service precludes the agency from solving this problem in future proceedings," the commission likely will be unable to rectify the situation short of again classifying broadband Internet access under Title II of the act.

Thus, despite the FCC's depiction of the D.C. Circuit's decision as a victory, the court's decision has significantly weakened the commission's efforts to roll back the previous administration's net neutrality rules. In the wake of the decision, states are now free to impose regulations that are identical, or even more stringent, than those the commission sought to overturn.

Moreover, although the D.C. Circuit remanded the pole attachment regulation and Lifeline Program portions of the FCC's order back to the commission, the court was clear that the commission will have little ability to effectively address those issues without reversing course and reclassifying broadband internet access as a telecommunications service — something the current commission is almost certainly loathe to do.

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