Six Key Consequences of the D.C. Circuit Upholding Net Neutrality

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On its third try, the Federal Communications Commission finally got the sweeping net neutrality court victory it had been seeking for years. In *US Telecom v. FCC*, the U.S. Court of Appeals for the District of Columbia Circuit held that the FCC acted within its statutory authority when it issued its 2015 Open Internet Order.[1] That Order reclassified mobile and fixed broadband internet access services as "telecommunications services" under Title II of the Communications Act, and it imposed on such broadband providers a modified form of common-carrier regulation that has long applied to mobile wireless telecom carriers.[2] This Title II outcome was the result most feared and opposed by many cable and wireless broadband providers and related trade associations and, on more ideological grounds, the Republican majorities in the House and Senate.

In previous attempts at net neutrality, the D.C. Circuit had first overturned the FCC's efforts (in *Comcast v. FCC in 2010*) and then sharply limited the FCC's later efforts (in *Verizon v. FCC in 2014*). The FCC's 2015 Open Internet Order was consequently quite vocal about how the commission was carefully following the legal roadmap set forth in the court's opinion in *Verizon*. In particular, the *Verizon* court had found that the FCC had essentially lacked the courage of its convictions when it effectively regulated broadband providers as common carriers without first reclassifying them as common carriers under the Title II of the Communications Act. As a result, in its 2015 Order the FCC expressly reclassified broadband providers as Title II common carriers, while at the same time relieved them of many of Title II's more onerous and outdated regulatory obligations, such as rate regulation and tariffing requirements, under a statutory doctrine known as forbearance.

This update distills the key consequences of the D.C. Circuit's decision for broadband providers, consumers, edge providers and other stakeholders, including the likely next steps for net neutrality's proponents and opponents.

1. **FCC's Ban on Broadband Providers' Blocking, Throttling and Other Discriminatory Conduct is Here to Stay.** While opponents of net neutrality were likely encouraged to hear Republican FCC Commissioner Ajit Pai's battle cry to "continue the legal fight," the reality is the battle is probably over. Although AT&T has announced it will pursue an appeal before the U.S. Supreme Court, there is no split among the federal circuit courts to resolve. Moreover, the issue of net neutrality is a fairly narrow and technical one for which an increasingly selective Supreme Court is unlikely to grant review. Because an evenly split Supreme Court would leave the D.C. Circuit decision in place, the prospect of a 4-4 decision would also work against the chances of the Supreme Court granting certiorari. In addition, while some opponents have expressed hope that Congress could intervene, the House and Senate Republicans' repeated efforts since 2010 to legislate alternatives to net neutrality have failed under the threat of a White House veto. If the Democrats retain the White House, or retake the Senate majority in 2016, there is little likelihood the political fortunes of net neutrality opponents will improve on Capitol Hill. Now, with the cloud of uncertainty largely lifted, we can expect renewed interest from consumer advocacy organizations and the FCC's Enforcement Bureau to enforce the net neutrality rules.
2. **Giving a Green Light for the FCC's Broadband Privacy Rulemaking.** Another significant but less-publicized implication of this victory is its effect on the FCC's pending rulemaking to adopt broadband privacy rules. Because the 2015 Order reclassified broadband providers under Title II as providers of telecommunications service, the existing privacy-related rules in Section 222 of the Communications Act now apply to broadband providers. Recognizing the FCC's existing rules implementing Section 222 were intended for voice telephony services, the FCC recently launched a rulemaking to adopt new rules better tailored for the online context of broadband services. Had the *US Telecom* court overturned the FCC's reclassification of broadband service, the legal foundation for the broadband privacy rulemaking would have been eliminated. But now that the D.C. Circuit has upheld the Commission's reclassification, the broadband privacy rulemaking can and will proceed with a solid jurisdictional foundation.
3. **FTC's Lack of Jurisdiction Over Broadband Providers Resolved.** While the validity of the FCC's net neutrality efforts remained unsettled, the Federal Trade Commission had flexed its enforcement muscle towards mobile wireless carriers in their role as wireless broadband providers. But because FCC-regulated common carriers have long been exempt from FTC jurisdiction, the 2015 Open Internet Order's reclassification of broadband service as common carriage stripped the FTC of jurisdiction over the provision of broadband service, going forward. The

decision in *US Telecom* has affirmed that as a general matter only the FCC, not the FTC, can bring enforcement actions concerning the provision of broadband service.[3]

4. **Interconnection Arrangements Are Fair Game.** The *US Telecom* court rejected the petitioners' challenge to the FCC's prospective regulation of interconnection arrangements—i.e., non-consumer-facing arrangements between broadband providers and "backbone" providers (e.g., Level 3) or "edge" providers (e.g., ESPN.com). The court made clear that the FCC has sufficient authority to make interconnection arrangements subject to Title II once it "reclassif[ied] broadband service—and the interconnection arrangements necessary to provide it—as a telecommunications service."[4]
5. **Mobile Service Is Also Covered.** The *US Telecom* court also found that the FCC's Open Internet authority extends to mobile services provided by wireless carriers. That holding is important because otherwise the FCC's net neutrality rules would apply to internet usage on fixed broadband connections but not to mobile connections on smartphones and tablets. With consumers increasingly using mobile networks to access the internet, reversal by the D.C. Circuit on this issue would have created a major discontinuity in the FCC's net neutrality regulations.
6. **Deference to Agency Expertise.** The *US Telecom* court went to great lengths to emphasize that it is not for the court to second-guess rational agency decisions, even those that they view as unwise. The panel, for example, largely brushed aside the opposing economic studies and economic declarations emphasized in Judge Stephen Williams' partial dissent by noting "we [do not] inquire whether some or many economists would disapprove of the agency's approach because we do not sit as a panel of referees on a professional economics journal, but as a panel of generalist judges obliged to defer to a reasonable judgment by an agency acting pursuant to congressionally delegated authority."[5] The court instead observed that whether broadband service qualifies as a telecommunications or information service depends on "factual particulars of how Internet technology works and how it is provided," and the FCC has the expertise and resources to make decisions based upon those particulars.[6] Further, the court denied petitioners' argument that the FCC's decision should be vacated because it could have accomplished its Open Internet goals *without* the reclassification.[7] In so doing, the court rebuffed the petitioners' efforts to transform the well-known "arbitrary and capricious" standard into one requiring the agency to show there were no less-restrictive alternatives. *US Telecom* thus reaffirms that, at least with respect to arbitrary and capricious review, courts do not ask what agencies *could have done* but whether what the agency in fact did was the result of reasoned decision-making.[8]

ENDNOTES

[1] *U.S. Telecom Assoc. v. FCC*, No. 15-1063, slip op. 1619173 (D.C. Cir. June 14, 2016) (hereinafter, *US Telecom*).

[2] *In re Protecting and Promoting the Open Internet* , Report & Order on Remand, Declaratory Ruling & Order, 30 FCC Rcd 5601 (2015) (Open Internet Order).

[3] Whether the FTC now lacks jurisdiction over broadband providers without regard to whether their conduct concerns a common carrier activity remains a subject of dispute before the Ninth Circuit. *See Fed. Trade Comm'n v. AT&T Mobility LLC*, No. 14-CV-04785 (N.D. Cal. Oct. 28, 2014).

[4] *US Telecom*, at 54-55.

[5] *US Telecom*, at 23 (quoting *City of Los Angeles v. U.S. Department of Transportation* , 165 F.3d 972, 978 (D.C. Cir. 1999)).

[6] *US Telecom*, at 14.

[7] *US Telecom*, at 43.

[8] *Id*. at 42.

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