

U.S Court Throws Out Net Neutrality Rules – Explained



*A US court ruled on a landmark net neutrality case against the communications regulator earlier this week. Rutgers University Law Professor and LSE Visiting Fellow **Ellen Goodman** explains the decision and its implications warning of risks to the public internet.*

We've waited a long time for a verdict on the FCC's net neutrality rules (**Open Internet Order**). On 14 January, the D.C. Circuit Court of Appeals, in a **63-page opinion**, handed a qualified victory to the challenger in *Verizon v. FCC*, by throwing out most of the rules. As a result, broadband access providers are now free to negotiate differentiated carriage packages with content and applications companies. The carriers can try to get edge providers to "sponsor" data – like **ATT's wireless plan** to deliver certain content free from data caps. Content and application providers may also find themselves paying to obtain faster broadband delivery speeds or secure other kinds of priority service. Comcast alone is bound until 2018 by net neutrality rules it agreed to as part of a 2011 merger deal.

But Court Recognizes FCC Authority to Regulate Broadband

Verizon's victory was only partial, and the **FCC too is hailing** parts of the decision. This is because the court upheld the FCC's authority, under Section 706 of the Communications Act, to promote broadband deployment and regulate Internet traffic. Importantly, the court accepted the argument that there is a "virtuous circle" by which open broadband access stimulates edge provider innovation, which in turn stimulates broadband infrastructure growth. Verizon derided this FCC justification for the rules as a "triple-cushion shot." To this, the court replied that in billiards too, "a triple-cushion shot, although perhaps more difficult to complete, counts the same as any other shot."

The dissenting judge (Senior Judge Silberman) objected to the majority's reading of Section 706 as overly generous to the agency. He wrote that, with this interpretation, "we have a new statute granting the FCC virtually unlimited power to regulate the Internet."

What Happened to Net Neutrality Rules

The Open Internet Order had three components, and it's important to see just what happened to each of them.

- 1) **Transparency rule:** fixed and mobile broadband providers must disclose network management practices, performance, and terms. **UPHELD**
- 2) **No-blocking rule:** subject to network management requirements, fixed broadband providers could not block lawful content, applications, services, and non-harmful devices, and mobile providers could not block lawful websites and rival telephony services. **GONE**
- 3) **Anti-discrimination rule:** fixed broadband providers could not engage in "unreasonable discrimination" in transmitting network traffic over a consumer's broadband Internet access service (subject to network management). Consumers could be charged based on usage, but edge providers probably could not be charged for priority service on the public Internet (managed services over private networks didn't count). **GONE**



The court held that the no-blocking and anti-discrimination rules treated broadband providers as common carriers, which is illegal given the FCC's prior classification of them as "information providers" not subject to common carriage rules. The court found that the anti-discrimination rule in particular "by its very term compels ... providers to hold themselves out to 'serve the public indiscriminately.'" The FCC had not differentiated between its blocking and discrimination rules, but the court did, and found the no-blocking rule less problematic. It is very likely that the FCC can revive this rule on remand.

Some other interesting findings

1. The court was sympathetic to the FCC's concerns that broadband providers could act in a way that threatened innovation in the Internet ecosystem even in the absence of market power. In reaching this conclusion, the court credited the arguments that, given the high costs of switching fixed broadband providers, consumers might put up with loss of value before punishing their provider.
2. No one has been clear on what "reasonable network management" entails and net neutrality advocates feared it was a huge loophole in the Open Internet Order. In the litigation, the FCC tried to convince the court that it was not treating broadband providers as common carriers because they were allowed to engage in network management. The court found this unconvincing. That's because "network management" is such a narrow category of activity, limited to preventing harm to the network. If the rules are revived, this parsimonious interpretation of "network management" could bolster the net neutrality position.

The practical upshot

Either Verizon or the FCC can appeal the decision for *en banc* review, but it's hard to see how either side will score a more complete victory with the full court. The two judges in the Verizon v. FCC majority (Judges Tatel and Rodgers) are Democratic appointees. A majority of the active judges on the court (7-4) are of the same party, although the three newly appointed judges may be more sympathetic to the FCC. An appeal to the Supreme Court would be risky for both sides. There is thus a good chance that this is the final word for now.

The FCC can work within its Section 706 authority to pass new net neutrality rules – especially including the anti-blocking component – that don't go as far as the Open Internet Order did. Or it can reclassify Internet access as a common carrier service – a heavy lift that would set off a political firestorm. It's what the FCC **should have done** originally. Will it have the temerity and stamina to do so now? It will be attractive to the agency to wait a while and see how things play out. However, waiting carries risks; business practices are more difficult to uproot than to prevent. With this overhang, the carriers are likely to be careful about how they experiment. To the extent that the FCC can maintain a credible threat of regulation, this might be a reasonably good outcome.

The end of media policy?

Net neutrality is often framed as a battle between edge providers like Netflix and Google, on the one side, and broadband carriers like Comcast and Verizon, on the other. In fact, edge providers are very differently situated. The most successful among them may be advantaged by paid prioritization in network carriage because they can afford to absorb or pass the costs along. Their upstart competitors are less likely to be in that position. This loss of competition, innovation, and service will be a "negative externality" of the kind that media policy has always been concerned about. If the FCC lacks meaningful capabilities to deal with lost communicative capacity, lost access to consumers, lost diversity and innovation in communications content and services, then media policy is over.

There is another lesson from media policy past that's applicable here. Paid prioritization, like many market arrangements, is a mixed bag for consumers. It delivers value if it gets them high-bandwidth content cheaper. But it deprives them of service if it reduces investment in the "public Internet." If the public internet becomes a broken-down neighbourhood where poor content

providers have to live, the public suffers. Access to communications capacity has always had to be regulated. Cable public access requirements and public broadcast channels were responses in the analogue world. Whatever the future of net neutrality, it's time to consider how to subsidize public access to the fast lanes of the Internet.

This blog post gives the views of the author, and does not represent the position of the LSE Media Policy Project blog, nor of the London School of Economics.

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