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D.C. CIRCUIT COURT OF APPEALS VACATES PART OF FCC'S NET NEUTRALITY RULES

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The U.S. Court of Appeals for the D.C. Circuit in *Verizon v. Federal Communications Commission, et. al.*, No. 11-1355 (D.C. Cir. Jan. 14, 2014) vacated the FCC's anti-discrimination and the anti-blocking provisions of the FCC's net neutrality rules, finding that the FCC did not have authority to enact such regulations. The Court held that Section 706 of the Communications Act of 1996 vests the FCC with authority to "enact measures encouraging the deployment of broadband infrastructure" and that the FCC interpreted

this statute "to promulgate rules governing broadband providers' treatment of Internet traffic." But the Court found that the Communications Act prohibits the FCC from regulating broadband providers as common carriers having "classified them as in a manner that exempts them from treatment as common carriers." That is, having previously exempted certain broadband providers as information service providers that are exempt from Title II common carrier obligations, the FCC cannot now regulate them by imposing anti-discrimination and anti-blocking obligations on them. The FCC plans to appeal the decision.

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The FCC's net neutrality rules barred wired broadband providers from prioritizing some types of Internet traffic over others, and preserve an open Internet. So what does this mean for the FCC's efforts to treat all Internet traffic the same regardless of source, popularly known as net neutrality? What does this decision mean for broadband providers and consumers? Will it promote innovation and choices as some broadband providers claim, or will it result in a torrent of blocked Internet content and discriminatory practices? Is net neutrality is now effectively dead, is it just on hold for now pending appeal or the next round of FCC net neutrality rule revisions?

First, the FCC's rules could be reinstated if the Court's decision is reversed on appeal. If not, then the FCC could go back to the drawing board and attempt to cure the rules' defects.

Second, this decision points out the difficulty of crafting rules that are based on artificial distinctions between common carriers and information providers. The distinction between communications transmitting content regulated under Title II of the Communications Act of 1934 and computer processing applications which are not so regulated is tenuous at best. Although the likelihood of new legislation

clarifying these distinctions is low, the need for clearer distinctions and classifications is obvious given the litigation on this topic over many years.

Third, major broadband providers have pledged not to discriminate with respect to Internet traffic following previous file sharing disputes and public concerns that broadband providers were becoming gatekeepers of online content. Any attempts to block or discriminate with respect to Internet traffic, absent a good reason for doing so, would likely be highly publicized, criticized and subjected to further regulations.

Another consideration is broadband pricing. Will the Court's Order impact broadband pricing? If so, how, and by which broadband providers? Will broadband providers "shakedown" consumers with new fees, and deliver some content faster and more reliably than other content at will? By analogy, will we see new tolls to drive on the fast lane of the Internet super highway?

The *Verizon* decision is available at [Verizon v. FCC](#). We welcome your thoughts at our interactive blog: <http://blog.tlgdc.com/>

If you have questions about this issue, or if we may be of assistance to you, please feel free to contact us.

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