



D.C. Circuit Rules that FCC Lacks Authority to Enforce Net Neutrality

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Today, the U.S. Court of Appeals for the D.C. Circuit held that the FCC lacks the statutory authority "to regulate an Internet service provider's network management practices." *Comcast Corp. v. FCC*, No. 08-1291, slip op. at 2 (D.C. Cir. Apr. 6, 2010). At issue was Comcast's practice of slowing down its subscribers' access to peer-to-peer ("P2P") applications, such as BitTorrent, because they "consume significant amounts of bandwidth." *Id.* at 3. This interference with Internet traffic violates the principle of net neutrality, which the FCC adopted in 2005.¹ *Id.* at 4. Net neutrality contemplates Internet service providers ("ISPs") managing network traffic without discriminating against content providers, including BitTorrent and other P2P communications, in terms of the speed with which the ISPs send information through the network. *Id.* In 2008, the FCC issued an Order against Comcast, asserting jurisdiction over Comcast's practice, holding that Comcast had "significantly impeded consumers' ability to access the content and use the applications of their choice," and ordering Comcast to disclose its implementation of a net-neutral bandwidth management system. *Id.* at 4-5.

Comcast complied with the Order but sought judicial review, challenging the Order on a number of grounds. The D.C. Circuit analyzed only the first of these grounds—Comcast's jurisdictional challenge. The court found that the FCC does not have the statutory authority to issue the Order. Congress did not give the FCC express authority to regulate Internet services; in contrast, the FCC does have express statutory authority to regulate common carrier services, radio and broadcast TV, cell phones, and cable TV. Thus, the FCC claimed "ancillary" authority under Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), which allows it, among other things, to issue such

¹ The FCC issued its Internet Policy Statement in September 2005, which set out broad principles to promote the general idea of net neutrality. The statement set out four key principles, explaining that, "to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to": (1) access the lawful Internet content of their choice; (2) run applications and use services of their choice, subject to the needs of law enforcement; (3) connect their choice of legal devices that do not harm the network; and (4) competition among network providers, application and service providers, and content providers.



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orders "as may be necessary in the execution of its functions." *Id.* at 6. The legal question before the court was whether the Order was "reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities." *Id.* at 7.

Based on its review of the statutory language as well as on relevant Supreme Court and D.C. Circuit precedent, the court found that the Order did not meet this test. The specific statutory sections on which the FCC relied as granting it ancillary authority to issues the Order—Sections 1 and 230(b) of the 1934 Act—were mere policy statements "that themselves delegate no regulatory authority." *Id.* at 18. The Order, the court held, was not ancillary to regulating any "activities over which [the FCC] does have express statutory authority." *Id.* at 23 (citation omitted). The court saw "no relationship whatever between the Order and services subject to Commission regulation." *Id.* at 23 (citation and quotation marks omitted). Thus, the court vacated the Order.

Stepping back from the technicalities of the court's analysis, it appears the FCC lost because it could not articulate a limiting principle to its theory of statutory authority. The court saw this problem clearly. "[Under the Commission's] theory of ancillary authority, we . . . can think of few examples of regulations that apply to Title II common carrier services, Title III broadcast services, or Title IV cable services that the Commission . . . would be unable to impose upon Internet service providers." *Id.* at 23-4. In short, the court found, the FCC "seeks to shatter . . . entirely" the limits of its already broad jurisdiction. *Id.* at 24.

The blogosphere is already resonating with cries that the D.C. Circuit has dealt a fatal blow to the principle of net neutrality, which many voices in that space cherish (including such key Internet players as Google, eBay, and Amazon). Yet these worries are overblown. The D.C. Circuit merely held that the FCC did not have the statutory authority to compel an ISP to comply with net neutrality. The court did not address, let alone resolve, the substantive merits of net neutrality. The court's decision was diligent, technical, and concerned with statutory interpretation and administrative law. It does not seem to be ideologically driven. Moreover, the court's concern with the FCC's inability to articulate a limiting principle to its view of its own statutory authority is reasonable. Federal agencies are not permitted to have unlimited mandates.

In the end, the FCC's claimed ancillary jurisdiction has always been a slender reed on which to rest the principle of net neutrality. Now we know the reed was too slender. Congress will have to lay a foundation of statutory authority if it wants the FCC to be in the business of implementing net neutrality.

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