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## Federal Court: FCC Can't Enforce Net Neutrality Rules

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A federal appeals court struck a blow against the desire of the Federal Communications Commission to enforce net neutrality rules on the Internet, ruling the FCC must first get Congress to approve such a sweeping expansion of its regulatory power.

The decision made it clear that the FCC has no authority to force Comcast to stop managing its broadband network as it sees fit—in this case by throttling back the speed of a relative handful of “bandwidth hogs” who use bitTorrent programs to share enormous files. Comcast said it throttled the “hogs” to ensure speedy service for the majority of its customers in 2007, but no longer does so.

The United States Circuit Court for the District of Columbia handed down the 36-page decision on April 6. Commonly referred to as Comcast v. FCC, the ruling stated that the FCC’s “ancillary authority” over the broadcast and cable industries “is not the equivalent of untrammelled freedom to regulate activities” on the Internet, too.

Comcast said in a statement after the ruling was issued that “our primary goal was always to clear our name and reputation.”

“We have always been focused on serving our customers and delivering the quality open-Internet experience consumers want,” the company said.

### A Test Case

The case was largely seen as a test of the FCC’s authority to, in the words of Chairman Julius Genachowski, act as a “cop on the beat” on the Internet. A majority of commissioners on the FCC have stated they want to impose net neutrality rules, rather than let the concept of a “free” and “open” Internet be something industry players embrace voluntarily with market forces guiding the policy.

The FCC has been collecting comments on its net neutrality proposal for months, with the deadline for submissions coming just days after the decision by the DC Circuit Court.

The ruling might make the FCC’s whole net neutrality project moot, and could affect the regulatory goals the commission laid out in the National Broadband Plan it released in March.

Larry Downes, a fellow with the Stanford Law School Center for Internet & Society, notes that the decision can only be seen as a thorough knock-down of the FCC’s position, because “there is not a single reference to any arguments made by Comcast.”

“Instead, the court begins and ends by dismantling the brief of the FCC, rejecting every effort to tie the Commission’s ‘ancillary jurisdiction’ to something—anything!—in the Communications Act that could justify the sanctions.”

### Congress Trumps the FCC

Judge David Tatel made clear when writing the unanimous 3-0 decision that only Congress can award such power to the commission, and has failed to do so.

“Because the [FCC] has failed to tie its assertion of ancillary authority over Comcast’s Internet service to any statutorily mandated responsibility,” the commission does not have the power to regulate the management practices of an Internet

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### FEATURED VIDEO

Adam Thierer, president of the Progress & Freedom Foundation, answers five questions on technology policy at FiveQsOnTech.com. Thierer was asked his thoughts on the upcoming National Broadband Plan, to be released by the Federal Communications Commission March 17.

### THIS MONTH'S POLL

#### Infotech & Telecom Poll

What do you think of the FCC's National Broadband Plan?

- I love it! This is just what America needs.
- It's OK. But it left out some important features.
- I'm relieved because it's not as bad as I expected.
- We don't need a 'National Broadband Plan' directed by government.

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Bartlett Cleland is the Director of the IPI Center for Technology Freedom at the Institute for Policy Innovation in Lewisville, Texas. The Institute for Policy Innovation (IPI) is a free-market “think tank” dedicated to promoting lower taxes, fewer

service provider (ISP), wrote Tatel, an appointee of President Clinton who took his seat on the bench in 1994.

"Notwithstanding the difficult regulatory problem of rapid technological change posed by the communications industry, the allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammelled freedom to regulate activities over which the statute fails to confer [to the FCC]," the ruling said.

The FCC, however, remains defiant about attempting to regulate net neutrality rules, saying in a statement the court did not "close the door to other methods for achieving this important end."

#### Praise for the Ruling

Jim Harper, director of Information Policy Studies at the Washington, DC-based Cato Institute, praised the decision, saying it "marks another turning point in the debate over whether the federal government should regulate Internet access services."

"What's entertaining about it is that the problem was solved two years ago by market processes—sophisticated Internet users, a watchdog press, advocacy groups, and interested consumers communicating with one another over the Internet," Harper said.

Carl Gipson, director of small business, technology, and telecommunications research at the Seattle-based Washington Policy Center, said this ruling "should put a huge dent in the plans of FCC Chairman Julius Genachowski to issue Net Neutrality rules—which is good seeing as how Congress has yet to actually order him to do so."

"The ruling hammers again and again on the difference between congressional policy and regulatory authority," Gipson added. "Perhaps this is an inane difference to most people, but the FCC's attempt to regulate network management by ISPs shows how important it is for regulating agencies to stick to the intent of their legislative mandate."

#### Disappointment Elsewhere

Advocates of allowing the FCC to regulate net neutrality rules expressed disappointment with the ruling.

"[This] decision means there are no protections in the law for consumers' broadband services," said Gigi B. Sohn, president and co-founder of Washington, DC-based Public Knowledge. "Companies selling Internet access are free to play favorites with content on their networks, to throttle certain applications or simply to block others."

"In addition, as of now, the Federal Communications Commission's (FCC) ambitious National Broadband Plan to help boost the economy is in legal limbo," she added. "In our view, the FCC needs to move quickly and decisively to make sure that consumers are not left at the mercy of telephone and cable companies."

S. Derek Turner, research director for the Washington, DC-based advocacy group Free Press, said the ruling "has forced the FCC into an existential crisis."

"As a result of this decision, the FCC has virtually no power to stop Comcast from blocking Web sites," he said. "This cannot be an acceptable outcome for the American public and requires immediate FCC action to re-establish legal authority."

#### Next Step? Ask Congress

Adam Thierer, president of the Washington, DC-based Progress & Freedom Foundation, said "the question now is whether the FCC learns its lesson—that it should seek the proper authority from Congress to impose new regulations like Net neutrality rules—or if the agency instead engages in another effort to concoct regulatory authority via regulatory classification."

Thierer is referring to the possibility that the FCC would attempt to reclassify broadband as a service under "Title II" authority. Such a move would arguably grant the FCC the authority the court just struck down.

"The next step will be for advocates to run to Congress, asking it to give the FCC authority to fix the problems of two years ago," Harper said. "But slow-moving, technologically unsophisticated bureaucrats do not know better than consumers and technologists how to run the Internet."

"If they get that authority, your online experience will be a little more like dealing with the water company or the electric company and a little less like using the Internet," he added.

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regulations, and a smaller, less-intrusive federal government.

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