

FCC loses key ruling on Internet 'neutrality'

The logo for Associated Press, featuring the letters 'AP' in a bold, red, sans-serif font, followed by the words 'Associated Press' in a smaller, black, sans-serif font.

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WASHINGTON – A federal court threw the future of Internet regulations and U.S. broadband expansion plans into doubt Tuesday with a far-reaching decision that went against the Federal Communications Commission.

The U.S. Court of Appeals for the District of Columbia ruled that the FCC lacks authority to require broadband providers to give equal treatment to all Internet traffic flowing over their networks. That was a big victory for Comcast Corp., the nation's largest cable company, which had challenged the FCC's authority to impose such "network neutrality" obligations on broadband providers.

The unanimous ruling by the three-judge panel marks a serious setback for the FCC, which is trying to adopt official net neutrality regulations. FCC Chairman Julius Genachowski, a Democrat, argues such rules are needed to prevent phone and cable companies from using their control over Internet access to favor some kinds of online content and services over others.

The case centers on Comcast's actions in 2007 when it interfered with an online file-sharing service called BitTorrent, which allows users to swap big files such as movies over the Internet. But public interest groups stressed that the ramifications of Tuesday's ruling are much broader. That's because it undercuts the FCC's ability to prevent broadband providers from becoming gatekeepers for many kinds of online services, potentially including Internet phone programs and software that runs in a Web browser.

"Today's appeals court decision means there are no protections in the law for consumers' broadband services," Gigi Sohn, co-founder of Public Knowledge, said in a statement. "Companies selling Internet access are free to play favorites with content on their networks, to throttle certain applications or simply to block others."

The decision also has serious implications for the massive national broadband plan released by the FCC last month. The FCC needs clear authority to regulate broadband in order to push ahead with some its key recommendations, including a proposal to expand broadband by tapping the federal fund that subsidizes telephone service in poor and rural communities.

In a statement, the FCC said it remains "firmly committed to promoting an open Internet and to policies that will bring the enormous benefits of broadband to all Americans" and "will rest these policies ... on a solid legal foundation."

Comcast welcomed the decision, saying "our primary goal was always to clear our name and reputation."

At the heart of the court case is Comcast's challenge of a 2008 FCC order banning it from blocking subscribers from using BitTorrent. The commission, at the time headed by Republican Kevin Martin, based its order on a set of net neutrality principles adopted in 2005.

But Comcast argued that the FCC order was illegal because the agency was seeking to enforce mere policy principles, which don't have the force of regulations or law. That's one reason that Genachowski is now trying to formalize those rules.

The cable company had also argued the FCC lacks authority to mandate net neutrality because it had deregulated broadband under the Bush administration, a decision upheld by the Supreme Court in 2005.

The FCC now defines broadband as a lightly regulated information service. That means it is not subject to the obligations traditional telecommunications services have to share their networks with competitors and treat all traffic equally. But the FCC maintains that existing law gives it authority to set rules for information services, including net neutrality rules.

Tuesday's court decision rejected that reasoning, concluding that Congress has not given the FCC "untrammelled freedom" to regulate without explicit legal authority.

With so much at stake, the FCC now has several options. It could ask Congress to give it explicit authority to regulate broadband. Or it could appeal Tuesday's decision.

But both of those steps could take too long because the agency "has too many important things they have to do right away," said Ben Scott, policy director for the public interest group Free Press. Free Press was among the groups that alerted the FCC to Comcast's behavior after The Associated Press ran tests and reported that the cable company was interfering with attempts by some subscribers to share files online.

The more likely scenario, Scott believes, is that the agency will simply reclassify broadband as a more heavily regulated telecommunications service. That, ironically, could be the worst-case outcome from the perspective of the phone and cable companies.

"Comcast swung an ax at the FCC to protest the BitTorrent order," Scott said. "And they sliced right through the FCC's arm and plunged the ax into their own back."

The battle over the FCC's legal jurisdiction comes amid a larger policy dispute over the merits of net neutrality. Backed by Internet companies such as Google Inc. and the online calling service Skype, the FCC says rules are needed to prevent phone and cable companies from prioritizing some traffic or degrading or services that compete with their core businesses. Indeed, BitTorrent can be used to

transfer large files such as online video, which could threaten Comcast's cable TV business.

But broadband providers such as Comcast, AT&T Inc. and Verizon Communications Inc. argue that after spending billions of dollars on their networks, they should be able to manage their systems to offer premium services and prevent high-bandwidth applications such as BitTorrent from hogging capacity.

For its part, the FCC offered no details on its next step, but stressed that it remains committed to the principle of net neutrality.

"Today's court decision invalidated the prior commission's approach to preserving an open Internet," the agency's statement said. "But the court in no way disagreed with the importance of preserving a free and open Internet; nor did it close the door to other methods for achieving this important end."