

Net Neutrality Win Is Vindication For Wheeler's FCC

By Jenna Ebersole

Law360, Washington (June 14, 2016, 11:38 PM ET) -- The Federal Communications Commission's comprehensive win at the D.C. Circuit on its open internet rules took many in the telecom world by surprise Tuesday in its blanket endorsement of the agency, and experts say the ruling may embolden the FCC to press ahead with other controversial plans.

The D.C. Circuit upheld the FCC's reclassification of broadband internet as a telecommunications service in a split decision by a three-judge panel after a challenge to the Open Internet Order last year. The court also let stand the agency's bright-line rules targeting throttling, blocking and paid prioritization.

On key issues that some telecom attorneys thought may have met resistance, such as whether the agency correctly applied the rules to both fixed and mobile services, the court aligned broadly with the FCC. Experts said that level of deference to the agency is unexpected.

There were likely high-fives and celebrations on the FCC's eighth floor Tuesday, and Chairman Tom Wheeler may now feel he has a firmer basis for other actions, such as the commission's pending rule-making on broadband provider privacy regulations, Laura Phillips of Drinker Biddle & Reath LLP said.

"To me, the FCC is going to be emboldened in the rest of the Wheeler term to get the other things done that he wanted to get done," she said.

The privacy plans in particular could move forward given that they arose from the Open Internet Order's reclassifying of broadband providers as common carriers, which are largely exempt from Federal Trade Commission authority.

While the FCC refused to extend existing privacy rules under Section 222 of the Communications Act to broadband providers, calling those rules too "telephone-centric," the regulator did vow to craft specific rules for the industry. A hotly debated proposal is under review.

Now that the court has upheld the underlying Open Internet Order, Wheeler may feel he has more



The D.C. Circuit upheld the Federal Communications Commission's reclassification of broadband internet as a telecommunications service in a split decision by a three-judge panel after a challenge to the Open Internet Order last year. (Credit: AP)

authority to set the rules, Phillips said.

Georgina L.O. Feigen of Shulman Rogers Gandal Pordy Ecker PA said that after the court has apparently given the FCC the role it was seeking in internet regulation, Wheeler is "having a good day."

"Does this bolster the FCC argument, in the privacy context, that this should be ours as well?" she asked.

A different decision by the court could have given the FCC a "big black eye," Phillips said. Instead, the FCC may make moves even during attempts for rehearing en banc or for Supreme Court review.

The ruling could also be a catalyst for legislation, Phillips said, though a larger telecom bill is unlikely to move this year.

Before the court's ruling, Wheeler had also signaled that the FCC's inquiry into so-called zero-rating plans was waiting on the D.C. Circuit challenge. He said in May that the opinion could impact FCC scrutiny of the wireless plans, which exempt certain content from counting against customer data allotments.

Phillips said the court devoted a significant amount of time to its finding that the FCC's general conduct standard — which says a service provider cannot unreasonably interfere with a user trying to gain access to a content or app provider, or vice versa — is not too vague. The FCC is evaluating zero-rating under the standard.

Other experts were uncertain about an immediate impact on the FCC's agenda, given the time it will take for likely challenges to the court's decision, even if they end up unsuccessful. The real question might instead be who is in charge at the FCC next year, said Paul A. Werner of Sheppard Mullin Richter & Hampton LLP.

"How the next chairman sets the agenda, where this fits in it, whether there's another rule-making to pare it back or push it forward" will be determined by the election, Werner said.

John Beahn, counsel with Skadden Arps Slate Meagher & Flom LLP, said the next president will make a significant impact.

"Let's assume these rules are in place," he said. "How does the next administration handle them? It's clear what a Wheeler FCC would do ... the question is what a Trump or a Clinton FCC would do."

But experts agreed that the degree of the D.C. Circuit's deference to the agency across all issues, even with a lengthy dissent by Judge Stephen F. Williams, is surprising. The third time was the charm, Beahn said, after the FCC lost two previous cases at the court.

"It's a sweeping victory for the FCC. There's no other way to put it," Beahn said. "If you think about it, it's the first time an appellate court has upheld the commission's attempt to adopt net neutrality regulations."

Republican Commissioners Ajit Pai and Michael O'Rielly criticized the ruling in statements Tuesday. O'Rielly said he expects an appeal to the Supreme Court but said it's "troubling" that the majority of the panel didn't hold the FCC accountable for violating statute and precedent and ignoring comments and analyses that didn't support its policy goal.

Pai cited Judge Williams' dissent, saying he hoped the challengers would continue fighting.

AT&T said in a statement Tuesday that it would be participating in a Supreme Court appeal, and the National Cable & Telecommunications Commission said it was reviewing the decision and weighing next steps.

"While this is unlikely the last step in this decadelong debate over internet regulation, we urge bipartisan leaders in Congress to renew their efforts to craft meaningful legislation that can end ongoing uncertainty, promote network investment and protect consumers," the NCTA statement said.

Pantelis Michalopoulos of Steptoe & Johnson LLP, who represented the intervenors including Netflix Inc., said the "totality of the FCC's victory" is striking, and he believes en banc rehearing or a cert grant is unlikely.

But Phillips said the question of how to regulate the internet may be a big enough one to attract the Supreme Court's attention.

"How the internet works and what people's expectations are for it is a fairly significant matter for the entire U.S. economy," she said. "It's actually significant globally."

--Editing by Kat Laskowski and Philip Shea.

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