

## FCC Law Blog

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### FCC Loses Net Neutrality Suit

On Tuesday, the U.S. Court of Appeals for the D.C. Circuit ruled that the FCC lacks the authority to regulate Internet service providers' network management practices. The unanimous decision by a three-judge panel immediately throws into question the FCC's ability to require Internet providers to treat all network traffic equally (a concept known as "net neutrality"). The ruling may also hinder the FCC's efforts to move forward with key aspects of its National Broadband Plan for expanding high-speed Internet service nationwide.

At issue in the case was the FCC's decision in 2008 that Comcast had improperly interfered with its customers' use of peer-to-peer programs, which allow users to share large files directly with one another and hence consume substantial amounts of bandwidth. While conceding that it lacked the express authority to prevent Internet service providers from blocking or slowing Internet traffic, the FCC argued that it possessed "ancillary" authority under Title I of the Communications Act to regulate network management practices as "reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities." The D.C. Circuit disagreed, concluding that the FCC had "failed to make that showing."

In responding to the decision, FCC spokesperson Jen Howard emphasized that the court had not "closed the door to other methods" for implementing its open Internet regulations and that the FCC was committed to finding a "solid legal foundation" for its policies. While the FCC did not specify whether it plans to appeal the court's decision or what "other methods" it may employ to achieve its objectives, the FCC may attempt to reclassify broadband Internet access as a traditional telecommunications service, which would provide the FCC with regulatory authority under Title II of the Communications Act. The easiest solution, of course, would be for Congress to clarify the FCC's authority in this area, though it is likely to be difficult to find time this year to enact any such legislation.

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