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Court of Appeals Reluctantly Affirms Most of FCC Restoring Internet Freedom Decision

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The US Court of Appeals for the District of Columbia Circuit has released an order on the FCC's 2018 Restoring Internet Freedom decision. The court affirmed most of the FCC decision but said the FCC could not prevent states from adopting their own network neutrality requirements unless the FCC specifically can show that those requirements conflict with FCC policies. The court also ordered the FCC to take a second look at three arguments made by parties that opposed the 2018 order.

In its 2018 Restoring Internet Freedom order, the FCC largely reversed its earlier 2015 decision that (1) classified broadband internet access as a common carrier service subject to the same general regulatory regimes as traditional telephone service; and (2) imposed robust rules that prohibited blocking, throttling and discrimination by broadband internet service providers. The Restoring Internet Freedom order also prohibited states from adopting their own internet access rules. In the appeal, parties that opposed the Restoring Internet Freedom decision argued that the FCC misinterpreted the service classification provisions of the Communications Act, did not properly consider certain arguments and did not have the authority to prevent states from adopting their own rules.

These are the key elements of the court's order:

- The court concluded that the FCC had the ability to change the classification of broadband internet access from a common carrier service to an information service, a category of service that generally is not subject to regulation by the FCC, based largely on *Brand X*, a 2005 US Supreme Court decision on broadband service regulation.
- The court rejected most claims that the FCC did not correctly decide factual and policy questions in the 2018 decision. However, it agreed that the FCC had not properly addressed three issues: (1) the impact of the decision on public safety; (2) how the decision would affect the rates paid by internet service providers to attach their transmission facilities to utility poles; and (3) the impact of the decision on the FCC's Lifeline program, which provides discounts for telecommunications services provided to low-income households and has been expanded to cover broadband service in recent years. The court told the FCC to review these issues in a subsequent proceeding, but left the Restoring Internet Freedom decision in place while the FCC reviews these questions.
- Most significantly, the court overturned the portion of the FCC decision that widely prohibited state and local regulation of broadband internet service, concluding that the prohibition was not supported by any legal authority. The court found that the FCC could address any potential conflicts with the Restoring Internet Freedom decision on a case-by-case basis.

One unusual element of this order is that two of the three judges on the panel wrote concurring opinions that implied that they would have overturned the FCC order if they had not been bound by the *Brand X* decision. The third judge would have upheld the FCC order in its entirety, including the preemptionre will be requests to review individual state laws, likely at the FCC, while the Democratic commissioners encouraged states to adopt their own rules. This confirms that significant disagreement remains within the FCC about what can and should be done to address state of state rules.

The combination of the court's approval of the FCC’s underlying decision to eliminate most regulation of broadband service and its disapproval of the FCC's effort to preempt state law may create significant uncertainty in the short run. Republican commissioners' offices have indicated that they expect that there will be requests to review individual state laws, likely at the FCC, while the Democratic commissioners encouraged states to adopt their own rules. This confirms that significant disagreement remains within the FCC about what can and should be done to address state laws. In addition, it is possible that one or more parties will ask for further review of this decision, either by the entire DC Circuit or by the Supreme Court.

This decision, and particularly the conclusion that the FCC cannot prohibit state regulation, also increases pressure on Congress to act to adopt national network neutrality legislation. While earlier negotiations on

potential legislation stalled, it is possible that this decision will result in additional activity, particularly because broadband and edge providers both would like to have certainty about what the rules will be going forward.

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Key Contacts

J.G. Harrington Washington, DC	jgharrington@cooley.com +1 202 776 2818
Robert M. McDowell Washington, DC	rmcdowell@cooley.com +1 202 842 7862

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