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DC Circuit Upholds FCC's Network Neutrality Rules

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This morning, a 2-1 majority of the United States Court of Appeals for the District of Columbia Circuit issued a decision upholding the 2015 Open Internet Order, which re-adopted the FCC's network neutrality rules and classified retail broadband internet access as a common carrier service. The court's decision is sweeping and definitive: it affirms the FCC's authority to reclassify fixed and mobile broadband as a common carrier service subject to regulation under Title II of the Communications Act; to adopt the rules; and to forbear from applying all common carrier obligations to broadband providers. The decision also defers to all of the FCC's policy and factual findings for both fixed and mobile broadband providers.

Here are the key elements of the decision:

- **Reclassification of broadband:**
  - The court concluded that the FCC has the authority to reclassify broadband as a common carrier service because the classification is a factual matter left for the FCC to resolve in the context of the definition of "telecommunications carrier" in the Communications Act.
  - The court determined that it was reasonable to treat broadband as a common carrier service, particularly in light of the FCC's finding that consumers see broadband as just providing internet access, and that features like email and cloud storage are seen as optional "add-on" services.
- **Regulation of mobile broadband:** The court determined that the FCC's determination that mobile broadband qualifies as a "service that is interconnected with the public switched network" was reasonable because the FCC was allowed to adopt a broad definition of "public switched network" and because current mobile broadband permits interconnection with standard dialed telephone numbers via applications like Skype and Google Voice.
- **Regulation of interconnection:** The court affirmed the FCC's decision to oversee interconnection between broadband providers and third parties, finding that the FCC provided sufficient notice of its plans and that the FCC did not need to make a separate finding that interconnection was a common carrier service.
- **Other issues:**
  - The court affirmed the FCC's decision to grant forbearance and exempt broadband providers from many of the requirements that normally apply to common carriers.
  - The court concluded that the FCC had authority to adopt the rule prohibiting paid prioritization for broadband traffic.
  - The court denied a claim that the "General Conduct Rule," which prohibits providers from unreasonably interfering with or unreasonably disadvantaging end users or edge providers, is unconstitutionally vague.
  - The court determined that the rules did not violate the First Amendment rights of broadband providers.

One or more parties likely will ask the full Court of Appeals for the District of Columbia Circuit or the Supreme Court to review this decision. If either court takes the case, a final decision is not likely until 2017. Congress also could adopt legislation addressing network neutrality, but does not appear likely to do so before the end of the year.

In the wake of this decision, the FCC will take further steps to implement and enforce the Open Internet Order. The most likely areas for FCC action are privacy (which is the subject of an open rulemaking); obtaining final approval of the enhanced disclosure requirements from the Office of Management and Budget; completing the pending investigation into zero rating services like T-Mobile's "Binge On"; and addressing potential interconnection issues. In the future, the FCC may use its authority over broadband to address issues such as reliability and resiliency, access to emergency services, consumer protection, and universal service.

If you have questions about how this decision could affect your business, please contact your Cooley relationship attorney or one of the attorneys listed here.

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