

Today, the D.C. Circuit Court of Appeals [upheld](#) the Federal Communications Commission's 2015 Net Neutrality rules in their entirety, marking a significant victory for the FCC. In a 2-1 decision, the court ruled that the FCC had the authority to regulate broadband Internet access service as a "common carrier" service and to issue rules that police the relationship between customers, broadband Internet service providers, and Internet content and application companies.

In particular, FCC rules that prohibit unreasonable discrimination, including bans on "paid prioritization" relationships between broadband Internet service providers (ISPs) and content companies, and rules that require providers to disclose their terms of service for data caps and broadband speeds will remain on the books, after years of legal uncertainty.

The decision today will likely be appealed by broadband providers to the U.S. Supreme Court and will result in intensified calls by members of Congress to pass legislation that would restrict the FCC's ability to enforce or expand these rules.

The FCC Open Internet Order

The FCC [adopted](#) these current Net Neutrality (or "Open Internet") rules in February 2015, after the D.C. Circuit overturned two previous attempts to implement similar rules. The purpose of these rules is to ensure that broadband Internet Service Providers (ISPs) do not unduly favor certain types of Internet content and applications over other Internet services. In general, the FCC's rules prohibit broadband ISPs from:

- **Blocking** access to legal content, applications, services, or non-harmful devices,
- **Throttling**, impairing, or degrading lawful Internet traffic, and
- **Favoring** some affiliated Internet content or applications, such as providing **paid prioritization** to Internet content or applications companies (no "fast lanes" for particular Internet content).

The FCC also implemented a "general conduct rule" that allows it to ensure and enforce, on a case-by-case basis, that broadband ISPs would not "unreasonably interfere with or unreasonably disadvantage" its customers and Internet content providers. The FCC also imposed disclosure and transparency rules that require broadband ISPs to disclose their policies and quality of service.

The FCC tried to implement similar rules twice before, but both efforts were reversed by the D.C. Circuit Court, on the basis that the FCC had not provided an adequate legal basis for those rules under Title I of the Communications Act of 1934. After the court's 2014 [reversal](#), the FCC's 2015 Open Internet Order provided a different legal authority for these actions, by declaring that "broadband Internet access service" was a "common carrier" service, regulated by Title II of the Act.

This common carrier classification will have a wide-ranging impact on the relationship between broadband ISPs and their customers, as it applies a myriad of other regulations to Internet service that previously had only applied to telephone service. (For example, customer privacy laws relating to telephone records now apply to Internet service.) The classification of broadband Internet access as a

Title II service, called for by the [Obama Administration](#) and [other public figures](#), is highly controversial and has resulted in calls for Congress to rein in the FCC's authority.

The Appeals and D.C. Circuit Decision

After the FCC released its rules in 2015, broadband providers filed lawsuits, contesting both the FCC's authority to reclassify broadband Internet access as a common carrier service as well as the rationality and logic of the specific rules adopted by the FCC. These appeals were consolidated before the D.C. Circuit Court of Appeals, the same court that [reversed](#) the FCC's prior attempts to implement Net Neutrality rules.

In 2014, the court had ruled that while the FCC had "convincingly detailed how broadband providers' [gatekeeper] position in the market gives them economic power" over Internet traffic, and that the FCC had "adequately supported and explained" its conclusion that Net Neutrality rules were necessary, the court ultimately ruled that the FCC's legal basis for those rules was improper. The court ruled that the FCC had "unlawfully subjected broadband providers to per se common carrier treatment" without actually defining the broadband Internet service as a "common carrier" service.

The FCC's 2015 response was to classify broadband Internet access service as a Title II common carrier service. While conceptually simple, that FCC 2015 decision overturned nearly twenty years of FCC interpretations of its statutory authority that had refused to extend Title II to broadband, and the FCC's change in course was hotly debated and contested, both legally and politically.

Today's court decision largely considers whether the FCC could simply change its mind in this manner—and the court stated emphatically that the agency could. In 1998, when the FCC first declined to classify broadband as a common carrier service, dial-up was the dominant means of accessing the Internet. The court today implied that the growth and nature of the broadband Internet justified a change in the FCC's direction:

Indeed, given the tremendous impact third-party internet content has had on our society, it would be hard to deny its dominance in the broadband experience. Over the past two decades, this content has transformed nearly every aspect of our lives, from profound actions like choosing a leader, building a career, and falling in love to more quotidian ones like hailing a cab and watching a movie.

The court found that the growth in the broadband Internet was the result of choice among third-party applications and services offered by companies not affiliated with broadband providers, and that consumers overwhelmingly prefer to use Internet applications and services that are not bundled with the Internet service offered by their ISP. As a result, the court ruled that the FCC could properly determine that consumers now principally "view broadband service as a mechanism to transmit data of their own choosing to their desired destination," which meets the statutory definition of a common carrier service. The court rejected the argument made by broadband ISPs that "common carrier" regulation would be a barrier to network investment, ruling that that claim by providers was "mentioned in the most skeletal way," without enough proof to overturn the FCC's judgment.

With regard to the particular rules challenged, the court found that the FCC had adequate evidence to support its prohibitions on blocking, throttling, and paid prioritization. The court also upheld FCC rules that regulated the interconnection of broadband ISPs to Internet content companies like Netflix, as

those relationships affect the nature and terms of broadband Internet access service offered to consumers. In addition, the court upheld the FCC's extension of these rules in their entirety to mobile broadband service, upon which a growing number of consumers rely as their Internet access platform of choice. Prior FCC Net Neutrality rules had applied only to fixed broadband services.

Reaction to the Decision

Reaction to the court's decision today has been swift and demonstrates that the political battle over the FCC's rules will continue, especially in an election year.

[FCC Chairman Tom Wheeler](#) called the ruling "a victory for consumers and innovators who deserve unfettered access to the entire web." Ranking Democrat on the Senate Commerce Committee, Sen. Bill Nelson (D-Fla.) called the ruling "a significant milestone for consumer protections on the Internet," and other Democratic members of the House and Senate have issued [similar statements](#). Presumptive Democratic presidential nominee Hillary Clinton [tweeted](#) that the decision "is a big win for consumers, innovation, and freedom of expression on the Internet."

[FCC Commissioner Ajit Pai](#), who dissented from the 2015 Open Internet Order, said he is "deeply disappointed," quoting a dissent by D.C. Circuit Judge Stephen F. Williams which called the order an "unreasoned patchwork" that "shunts broadband service onto the legal track suited to natural monopolies." A statement from [AT&T](#) indicates that parties will appeal the decision to the U.S. Supreme Court. The [National Cable and Telecommunications Association](#) said that it will "carefully review" the decision before deciding on an appeal, but noted that it urges Congress "to renew their efforts to craft meaningful legislation that can end ongoing uncertainty." [US Telecom](#) said that it "will be evaluating all of our legal options."

Since the 2015 Open Internet Order, members of Congress have introduced bills designed to overturn or modify the FCC's net neutrality rules or to limit the agency's ability to enforce those rules. The court decision today will lead to increased attention to those bills, including hearings and likely votes. [Commerce Committee Chairman Sen. John Thune \(R-S.D.\)](#) said that the decision "is a clear signal that my colleagues and I need to reestablish Congress' appropriate role in setting communications policy on a bipartisan basis." [Rep. Greg Walden \(R-Ore.\)](#), Chairman of the Subcommittee of Communications and Technology of the House Energy and Commerce Committee, said that the "door remains open to look at this legislatively," but that "between now and any legislation moving forward you'll see an appeal by those who disagree with the court's decision."

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For more information about the FCC's Open Internet rules and other broadband policy topics, please contact Connected Nation at policy@connectednation.org.