

## Net Neutrality Survives, But FCC's Fight Has Just Begun

By **Bill Donahue**

*Law360, New York (June 11, 2015, 10:23 PM ET)* -- The Federal Communications Commission won the first round in the fight over net neutrality Thursday by beating back an effort to delay the rollout of the new rules, but the agency still has a long, uncertain road ahead.

That's not to say that the FCC and net neutrality supporters shouldn't be happy with Thursday's order by the D.C. Circuit, which refused a request by U.S. Telecom Association and others that the court halt the implementation of the new rules until a final ruling is issued.

It means the new rules will go into effect as planned on Friday, immediately giving the FCC new authority to ban broadband providers from giving "fast lane" treatment to certain types of traffic — a decadelong regulatory effort that's twice been hamstrung by unfavorable court rulings.

Chairman Tom Wheeler called it "a huge victory for Internet consumers and innovators." Public Knowledge, an outspoken pro-neutrality group, called the ruling "cause to celebrate." Free Press, another staunch net neutrality advocate, praised the court for "thwarting this latest attempt to strip Internet users of the protections they deserve."

But as the FCC and other advocates themselves acknowledged on Thursday, the D.C. Circuit's decision is hardly tantamount to a final victory — or anything close to it.

That's mainly because a stay is a much tougher thing to win than a final victory. Like preliminary injunctions in regular civil litigation, getting a court to halt the rollout of federal regulations requires a finding not only that you are likely to win, but also that you'll be irreparably harmed in the meantime if the court doesn't freeze the status quo.

It's a high bar, and the fact that the net neutrality challengers didn't reach it doesn't mean they're destined to lose the case.

"I think it's a relief for the FCC that they made it past this stage, but I'm not sure anyone can draw too many conclusions from the denial of a stay," said Yaron Dori, the co-chair of the communications and media practice at Covington & Burling LLP. "I think even the parties that sought a stay had expectations that it might not be granted."

"It doesn't mean they won't prevail on the merits," Dori said. "That's going to be a different type of analysis, so I'm not sure anyone is jumping to conclusions just yet."

The stay effort defeated, the FCC still faces the same tough court fight in the months ahead over all the intricacies of the new rules.

Was the agency allowed to switch course and reclassify broadband providers as a “telecommunications services” that can be regulated under Title II of the Communications Act? Did it violate the Administrative Procedure Act by failing to sufficiently notify the public about the rules it was crafting?

One of the challenges filed even goes the other way, aiming to force the FCC to impose even more rules on broadband providers; the agency has to defeat that case, too.

Another complication for the FCC following Thursday's order: If complaints start rolling in while the court case is still pending, how does the agency react?

Sure, on Thursday, the D.C. Circuit gave the agency the green light to enforce the new rules. Come Friday, Tom Wheeler & Co. officially have a big new gun called Title II, which they can use to regulate broadband providers in a way the FCC never has. For instance, if petitioned, the agency says it can now punish ISPs if it believes they've acted unreasonably in how they demand payment at the point of so-called interconnection — the place where others gain access to their network of subscribers.

But can it, in a practical sense?

Remember, the FCC still needs to shoot down the argument, from U.S. Telecom and the other challengers, that the new rules are going to impose huge new burdens on broadband providers. If it starts receiving complaints under the new system and immediately begins enforcing the new rules while the case is pending, it's essentially handing evidentiary ammo to its courtroom opponents.

“Why would they give red meat to their opponents?” said John Beahn, an attorney with Skadden Arps Slate Meagher & Flom LLP. “They would be giving the petitioners headlines that they could point to in oral arguments and say, 'This is exactly what we were worried about.'”

“This is a very smart FCC, so my guess would be that they hang back while the case is pending,” Beahn said.

How long that will be is anybody's guess. Though the previous net neutrality court case took years to complete, many experts are predicting this one to wrap up by early next year — particularly because Thursday's ruling also included an order that the case will be handled in an expedited fashion.

It's tough to say how that ruling will look, even after Thursday's early victory for the FCC. But no matter who ends up coming out on top, an expedited case will have been a win for everyone.

“The one thing that everyone can agree on, no matter what side you're on, is the need for certainty,” Beahn said. “Once rules are in place, people can modify their approach. They just need to know what the rules are.”

The consolidated case is U.S. Telecom Association v. Federal Communications Commission et al., case number 15-1063, in the U.S. Court of Appeals for the District of Columbia Circuit.

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