

Breaking News: Court vacates FCC's Comcast Decision

April 6, 2010

The US Court of Appeals for the DC Circuit vacated the FCC's decision declaring illegal Comcast's 2007 blocking of P2P internet traffic. This decision is not surprising, given how poorly the oral argument went for the FCC. (see our post [here](#)).

Click [here](#) to download the Court's decision. ~~We will post a discussion of the jurisdictional issue later.~~

UPDATE 4/6/10: The Court of Appeals vacated the FCC Order because the Commission had not adequately justified its exercise of Title I "ancillary" authority over Comcast's network management practices. Discussing at length appellate Title I jurisdiction cases over the last 40 years, the Court in essence held that the FCC failed to relate Internet network management to common carrier telephone service (Title II), broadcast service (Title II) or cable TV service (Title VI). One quote from the decision sums up the conclusion: "On the record before us, we see 'no relationship whatever' between the Order and services subject to Commission regulation." In other words, the FCC must connect its assertion of authority to *something* that it indisputably can regulate.

Since the decision was released, there has been much discussion about whether the FCC will reclassify Internet access services as Title II common carrier services. While it is premature to predict these issues with any confidence, one alternative not being discussed is to accept the Court's invitation to connect regulation of Internet access service with regulation of pure transmission services. In the *Wireline Broadband Order*, the Commission concluded that Internet access did not have a separate transmission component. The decision today may lead the Commission to reverse that determination -- and find that a separate transmission component is inherent in the offering -- so that it may then regulate bundled Internet access due to its impact on stand alone transmission services.

Finally, I note that the Court did not address the enforceability of the Policy Statement itself. As a result, the potential impact on the Universal Service Fund's Form 499-A instructions did not come to pass. Maybe next time.