

# DC Circuit Court Vacates Significant Portions of the FCC's Net Neutrality Obligations

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On January 14, 2014, the DC Circuit Court of Appeals partially vacated the FCC's net neutrality rules applicable to Internet access providers, while affirming the conclusion by the FCC that it has jurisdiction to regulate the Internet to promote broadband infrastructure investment and to promote competition. [Verizon v. Federal Communications Commission](#) \_\_\_ F.3d \_\_\_ (D.C. Cir. 2014) ("*Verizon Net Neutrality Order*."). The Court determined, however, that the FCC's own prior regulatory classification decisions limited its substantive authority to impose net neutrality obligations on broadband Internet access services, unless (the Court implied) the FCC were to reclassify Internet broadband as a telecommunications service.

The Court's opinion appears to conflict with its 2010 ruling in its *Comcast* decision, striking down previous FCC net neutrality orders on the ground that the FCC had insufficient regulatory authority to adopt such provisions. See *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010). In the *Verizon Net Neutrality Order*, the Court deferred to the FCC's changed understanding of the source of its authority and affirms the agency's more recent finding that Section 706 of the 1996 Telecommunications Act does indeed vest the FCC with certain authority to regulate how broadband providers treat edge providers of content and applications. However, despite the finding of adequate jurisdiction, the Court found that the FCC had, in effect, tripped on itself. The Court concluded that two of the Commission's net neutrality rules – specifically, the anti-blocking and the anti-discrimination provisions – were common carrier-type regulations that under the Commission's own regulations and the Communications Act of 1934, as amended, itself, the FCC could not impose on information service providers. Because the FCC has previously held broadband Internet access services are information services, the Court rules that the Commission may not impose common carrier obligations on broadband Internet access service providers. The Court, however, let stand the rules requiring Internet broadband providers disclose information about their network management practices, performance and commercial terms of their services.

Because the Court relies significantly on the FCC's own prior decisions construing provisions of the Communications Act, the *Verizon Net Neutrality Order* is a compelling decision that demonstrates the discretion and latitude that the FCC has in construing its own enabling statutes, including the scope of its own jurisdiction. The Court specifically relied on the Supreme Court's 2013 finding that the courts must apply a deference analysis to the FCC's interpretation of the scope of its statutory authority. See [City of Arlington v. FCC](#), 133 S. Ct. 1863 (2013). This decision also recognizes that the FCC, with adequate explanation, can change its mind about the construction of its statutory authority. However, because the FCC had classified broadband Internet access service as an

information service, the Court limited the Commission's ability to impose common carrier-type regulations on Internet service providers. Consequently, the outcome of this appeal raises the questions of whether the FCC will consider changing the regulatory classification of broadband Internet access services and whether Congress will rewrite the Communications Act to circumscribe the scope of the discretion the Court found the FCC has out of the hands of the Commission. In short, this decision may well be an early chapter in the evolution of the regulatory framework that applies to Internet access rather than any sort of denouement.

To read the full Kelley Drye Client Advisory on the court's decision, please click [here](#).