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FCC's Net Neutrality Initiative Suffers Body Blow, But is Still Standing

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Earlier this month, the [DC Court of Appeals dealt a blow to the FCC's "net neutrality" initiatives](#) when it held that the Commission did not have the authority to sanction Comcast for employing network management practices that targeted users of P2P applications. However, by basing its reasoning on a straightforward (and not surprising) interpretation of the Communications Act of 1934, the Court's decision cannot be called a knock-out and it is likely that we will see a [tactical shift in the FCC's efforts to implement netneutrality regulations](#). We had previously written about the original sanction order, in which the [FCC found that Comcast had violated the non-binding netneutrality principles](#) by examining users' connections and routing them (in actuality, slowing them down) based on whether the connection was being used for P2P uploads. In effect, Comcast was managing traffic connections not based on destination but on application. Comcast appealed the ruling, asserting that the FCC did not have the appropriate authority to issue the sanction. The Circuit Court's decision rested, in large part, on where the regulations governing ISPs fall within the provisions of the Communications Act. In 2002, the FCC defined ISP services as "information" carriers, subject to Title I of the Communications Act, rather than as "telecommunications" services governed by Title II. That distinction proved fatal to its attempt to sanction Comcast. FCC itself conceded that it did not have the express authority under Title I to regulate an ISP's network management practices. The FCC was therefore compelled to rely on the broad provisions of Section 4(i) of the Act, which authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." Under prior DC Circuit precedent, this "ancillary" authority may only be used if the FCC can demonstrate that its action, is "reasonably ancillary to the effective performance of its statutorily mandated responsibilities." The FCC relied on several Congressional statements of policy to show that regulating Comcast and other ISPs was within its "statutorily mandated responsibilities." But as the appeals court decision pointed out, Supreme Court and DC Circuit case law has held on numerous occasions that such statements of policy cannot create "statutorily mandated responsibilities." The Court went on to reject the FCC's claim of "ancillary authority" and vacated the sanction order against Comcast. So where does this leave the FCC's net neutrality initiatives? Several proponents of expanded FCC authority have suggested that the FCC reclassify ISPs as "telecommunications" services under

Title II of the Communications Act. Title II expressly makes it unlawful for common carriers “to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service”. Such language would appear to provide solid footing for implementing and enforcing the net neutrality principles. Indeed, immediately after the DC Circuit’s decision was handed down, [FCC Commissioner Michael Copps released a statement](#) urging the FCC to reverse its earlier 2002 determination and treat ISPs as telecommunications services saying “It is time that we stop doing the ‘ancillary authority’ dance and instead rely on the statute Congress gave us to stand on solid legal ground in safeguarding the benefits of the Internet for American consumers.” Congress may yet get into the action as well. Last August, the [Internet Freedom and Preservation Act of 2009](#) was introduced. The Act expressly makes it unlawful to block, interfere with, discriminate against, impair, or degrade” access to any lawful content from any lawful application or device.” However, no action has been taken on the bill since its introduction. Stay tuned.

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