

Court Defers to FCC on Dismantling Net Neutrality for Now but Opens Door for States, Higher Courts and Congress to Act

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On Tuesday, the U.S. Court of Appeals for the D.C. Circuit deferred to the Federal Communications Commission in upholding its 2017 repeal of Net Neutrality, but overturned key parts of the agency's so-called Restoring Internet Freedom Order, which was adopted on partisan lines in December 2017. That order repealed the landmark Open Internet Order the Obama-era FCC put in place in 2015.

In a lengthy and unusual opinion, the court upheld the FCC's misguided legal analysis repealing the federal rules for Net Neutrality, even though the judges who joined the opinion wrote that they are "deeply concerned that the result is unhinged from the realities of modern broadband service."

The opinion also threw out the agency's attempt to prevent states from filling the void the FCC created with their own laws and orders. It also sent the 2017 repeal back to the agency to assess the impact of that agency order on public safety, ISPs' use of public rights of way, and the federal Lifeline broadband-discount program. Those questions signal to the FCC yet again that it got this decision wrong, and that it cannot continue its unjustified ideological crusade against all of these important safeguards.

FCC **Chairman Ajit Pai** engineered the repeal of Net Neutrality despite the complete lack of evidence that the 2015 rules were harming ISPs, and despite the overwhelming public opposition to the move. A wave of fraudulent comments tainted the FCC's record in the 2017 proceeding, and Pai did nothing in response. Instead, he and his GOP colleagues uprooted all Net Neutrality rules. They also abandoned a wide range of other duties the agency has under the law to promote broadband affordability, competition and privacy by rejecting the successful legal framework for these protections in Title II of the Communications Act.

Free Press sued the FCC in early 2018, joined by dozens of other public-interest groups, companies, industry associations and state attorneys general who pinpointed the inaccuracies and failings in the repeal. The case was briefed last summer, with oral arguments before the three-judge panel of the D.C. Circuit held on Feb. 1, 2019.

Free Press Vice President of Policy and General Counsel **Matt Wood** made the following statement:

“Unfortunately, the judges gave a pass to the flimsy legal arguments and phony claims used to tear down these important rules in late 2017 — not because Ajit Pai and the agency processes he abused led to the right decision, but because courts give agencies a lot of deference when interpreting the law. The court’s unusual opinion gave credence to the bad technical arguments and economic lies Pai used to force his order through, even though the judges concurring in that close legal reading said loud and clear that the 15-year-old Supreme Court case dictating this result no longer reflects the realities of modern broadband service.

“Yet the court’s decision underscores the pressing need for the Senate to pass the Save the Internet Act that the House adopted in April. It opens the door for a future FCC to go back to the right rules, and for states to fill the vacuum with state-based Net Neutrality laws. And the court rejected the FCC’s arguments on several key broadband policies, sending them back to the agency.

“The FCC has a congressional mandate under Title II to protect people’s rights to communicate on the internet, free from ISPs’ interference and schemes. Open and clear communications networks are crucial in the fight for racial justice, immigrant rights, reproductive freedom and a host of other issues. People simply can’t afford to see their speech cut off by the companies that own the wires and channels connecting us all.

“The Trump FCC’s decision conflated broadband networks with the information those networks carry, and looked the other way on the thoroughly debunked claims Pai put forward about broadband investment under the Obama-era Net Neutrality rules. Although the judges ignored those mistakes, they did zero in on some key errors in Pai’s order. Chiefly, they refused to let Pai get away with his failure to explain why the FCC’s abdication of its authority over broadband could preempt state attempts to fill that void, and questioned the agency’s threadbare claims that broadband is somehow outside the FCC’s jurisdiction.

“Federal agencies get deference from courts when interpreting the law, but as today’s decision shows, that deference isn’t limitless when it comes to running a clean process and paying attention to reality. The Trump FCC’s attempt to reject the law and prevent any state from adopting crucial open-internet rules has failed.

“Already, nine states have put in place decisive rules to protect Net Neutrality. Of those, six have signed executive orders: Hawaii, Montana, New Jersey, New York, Rhode Island and Vermont. And four have passed laws: California, Oregon, Vermont and Washington. Another 27 states have considered legislation. In 2018, more than 125 city mayors signed a Net Neutrality pledge promising not to do business with any ISP that violates the open-internet standard. ISPs will now need to navigate this groundswell of local political support for Net Neutrality.

“The only place in the country where we don’t see overwhelming bipartisan support for real Net Neutrality rules is in a small and shrinking bubble inside the Beltway that’s populated chiefly by Republican congressional leadership and the failed FCC chairman they’ve wrongly backed. People in the rest of the United States get it: More than 85 percent of voters — including 82 percent of Republicans and 90 percent of Democrats — support the rules that Pai struck down.

“Pai may try a victory lap for today’s decision, but no one will be cheering besides his small circle of advisers and the lobbyists that give him his marching orders. The Senate must pass the Save the Internet Act that sailed through the House in April to put the 2015 open-internet rules and the wildly successful legal framework for them even more firmly back in place.”

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