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## NET NEUTRALITY: LOOKING AHEAD

In June, the United States Court of Appeals for the District of Columbia affirmed the FCC's *Open Internet Order*, popularly known as the "Net Neutrality Order." Fundamental to the FCC's Order was the reclassification of broadband services as "telecommunications services" which are regulated as common carrier services under federal law. Prior to the *Open Internet Order*, broadband had been classified as "information services" which are not subject to common carrier style regulation. The D.C. Circuit's decision affirming the *Open Internet Order* was a 2-1 decision of a panel of that Court. The National Cable and Telecommunications Association (NCTA), Verizon, AT&T, and Tech Freedom have requested the D.C. Circuit Court rehear the case *en banc*. If an *en banc* D.C. Court of Appeals upholds the panel's decision, the case could be appealed to the United States Supreme Court.

Ironically, the most notable regulatory consequence of the *Open Internet Order* has not (yet at least) been the enforcement of the actual "net neutrality" rules (i.e. no blocking, no throttling, and no paid prioritization). Rather, the FCC has leveraged the regulatory reclassification decision to transform a legacy telephone regulatory subsidy program into broadband regulatory program. *See*, A. Mendoza, "FCC Extends Broadband 'Lifeline' to Low-Income Customers," (September 7, 2016). Moreover, the FCC's has also just issued new privacy regulations applicable to broadband providers. *See*, A. Mendoza, "FCC Releases New Broadband Privacy Rules" (October 27, 2016).

In fact, the FCC has only taken one enforcement action under the *Open Internet Order* to date. In March 2016, the FCC entered into a consent decree in which Verizon agreed to a fine of \$1.35 million for inserting Unique Identifier Header ("UIDH") codes into Verizon Wireless customers' HTTP requests made over Verizon's network. These codes, undeletable by the customer, were dubbed in the press as "supercookies." In January 2015, news reports revealed that one Verizon ad partner, Turn, used supercookies for customer unauthorized purposes by restoring (non-super) cookie identifiers that customers had cleared from their mobile internet browsers by associating the supercookies with the deleted (non-super) cookie, which while deleted from the customer's phone, was not deleted from Verizon's network. The FCC charged Verizon with violating Section 8.3 of the FCC's Net Neutrality rules (47 C.F.R. §8.3), the so-called Transparency Rule, as well as violation of 47 U.S.C. section 222(b), which prohibits carriers from using customer proprietary information for its own marketing purposes.

Unless the *Open Internet Order* is overturned on appeal, or unless Congress takes some action to reform federal telecommunications law, it is expected the FCC will continue to reform and transform common carrier telephone programs and regulations into programs applicable to broadband service providers. Critics of the FCC's *Open Internet Order* argue was that it solved a problem that did not exist. It remains to be seen whether the kind of market conduct prohibited by the net neutrality rules – blocking, throttling, and paid prioritization – is prevalent, or whether the real legacy of the *Open Internet Order* is how a federal agency, with no involvement of Congress,

transformed federal communications law from a law regulating only telephone service into a law that now regulates broadband and telephone service.

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