U.S. Court Curbs F.C.C. Authority on Web Traffic

By EDWARD WYATT

WASHINGTON — A federal appeals court ruled on Tuesday that regulators had limited power over Web traffic under current law. The decision will allow Internet service companies to block or slow specific sites and charge video sites like YouTube to deliver their content faster to users.

The court decision was a setback to efforts by the Federal Communications Commission to require companies to give Web users equal access to all content, even if some of that content is clogging the network.

The court ruling, which came after Comcast asserted that it had the right to slow its cable customers' access to a file-sharing service called BitTorrent, could prompt efforts in Congress to change the law in order to give the F.C.C. explicit authority to regulate Internet service.

That could prove difficult politically, however, since some conservative Republicans philosophically oppose giving the agency more power, on the grounds that Internet providers should be able to decide what services they offer and at what price.

More broadly, the ruling by the United States Court of Appeals for the District of Columbia Circuit could raise obstacles to the Obama administration's effort to increase Americans' access to high-speed Internet networks.

For example, the national broadband plan released by the administration last month proposed to shift billions of dollars in money from a fund to provide phone service in rural areas to one that helps pay for Internet access in those areas. Legal observers said the court decision suggested that the F.C.C. did not have the authority to make that switch.

The F.C.C. will now have to reconsider its strategy for mandating “net neutrality,” the principle that all Internet content should be treated equally by network providers. One option would be to reclassify broadband service as a sort of basic utility subject to strict regulation, like...
telephone service. Telephone companies and broadband providers have already indicated that they would vigorously oppose such a move.

The appeals court’s 3-0 decision, which was written by one of the court’s more liberal members, Judge David S. Tatel, focused on the narrow issue of whether the F.C.C. had authority to regulate Comcast’s network management practices.

But it was a clear victory for those who favor limiting the F.C.C.’s regulation of the Internet, said Phil Kerpen, a vice president at Americans for Prosperity, a group that advocates limited government. “The F.C.C. has no legal basis for imposing its dystopian regulatory vision under the net neutrality banner,” he said.

As a practical matter, the court ruling will not have any immediate impact on Internet users, since Comcast and other large Internet providers are not currently restricting specific types of Web content and have no plans to do so.

Comcast, the nation’s largest cable provider, had a muted reaction to its victory. The company said it was gratified by the court’s decision but added that it had changed the management policies that led it to restrict access to BitTorrent, a service used to exchange a range of large data files, from pirated movies to complex software programs.

“Comcast remains committed to the F.C.C.’s existing open Internet principles, and we will continue to work constructively with this F.C.C. as it determines how best to increase broadband adoption and preserve an open and vibrant Internet,” Comcast said in a statement.

The company is currently seeking federal approval for its proposed acquisition of a majority stake in NBC Universal, the parent of the NBC broadcast network and a cadre of popular cable channels. Some members of Congress and consumer groups have opposed the merger, saying that it would enable Comcast to favor its own cable channels and discriminate against those owned by competitors — something the company has said it does not intend to do.

After the ruling on Tuesday, consumer advocates voiced similar concerns about Comcast’s potential power over the Internet, saying that the company could, for example, give priority to transmission of video services of NBC channels and restrict those owned by a competitor like CBS.

“Internet users now have no cop on the beat,” said Ben Scott, policy director for Free Press, a nonprofit organization that supported the F.C.C. in the case.

Julius Genachowski, the chairman of the F.C.C., had said previously that if the agency lost the Comcast case, he would seek to find other legal authority to implement consumer protections
over Internet service. In a statement, the F.C.C. said it remained “firmly committed to promoting an open Internet.”

While the court decision invalidated its current approach to that goal, the agency said, “the court in no way disagreed with the importance of providing a free and open Internet, nor did it close the door to other methods for achieving this important end.”

The concept of equal access for all Internet content is one that people who favor some degree of F.C.C. regulation say is necessary not only to protect consumers but also to foster innovation and investment in technology.

“You can’t have innovation if all the big companies get the fast lane,” said Gigi B. Sohn, president of Public Knowledge, which advocates for consumer rights on digital issues. “Look at Google, eBay, Yahoo — none of those companies would have survived if 15 years ago we had a fast lane and a slow lane on the Internet.”

The court’s ruling could potentially affect content providers like Google, which owns YouTube, a popular video-sharing service. Content providers fear that Internet service companies will ask them to pay a fee to ensure delivery of material like high-definition video that takes up a lot of network capacity.

Google declined to comment directly on the ruling but pointed to the Open Internet Coalition, of which it is a member. The coalition’s executive director, Markham Erickson, said the decision “creates a dangerous situation, one where the health and openness of the Internet is being held hostage by the behavior of the major telco and cable providers.”

Sam Feder, a lawyer who formerly served as general counsel for the F.C.C., said that the court’s decision “is the worst of all worlds for the F.C.C.” He said the opinion was written narrowly enough that it was unlikely to be successfully appealed, while also raising enough possibilities of other ways that the F.C.C. could accomplish the same goals that it was unlikely to inspire Congressional action to give the agency specific regulatory authority over the Internet.

Under the Bush administration, the F.C.C. largely deregulated Internet service. But in 2008, the final year of the administration, the agency decided to impose the net neutrality order on Comcast. Under President Obama, the F.C.C. has broadened that initiative, seeking to craft rules governing the entire industry.

Tuesday’s ruling was the latest in a string of court decisions that rebuffed efforts by the F.C.C. to expand its regulatory authority, noted Eli M. Noam, a professor of finance and economics at the Columbia University graduate business school and the director of the Columbia Institute for
Tele-Information.

“The F.C.C. is going to have to be more careful in how it proceeds,” he said, suggesting that the agency would have to structure policy decisions that were more broadly acceptable to the major telecommunications industry players in order to give them some legitimacy.

Andrew M. Odlyzko, a professor at the University of Minnesota who has served as director of the university’s Digital Technology Center, said that while some service providers might jump at the opportunity to establish toll roads for broadband, the biggest companies, including Comcast and Verizon, have said they do not intend to do so.