

Oral arguments heard in the FCC's 'open internet' dispute

A three-judge panel of the federal appeals court for the District of Columbia Circuit ('DC Circuit') heard oral arguments on the Federal Communications Commission's ('FCC') 'Open Internet' rules in September. The court is expected to issue a ruling by the end of the year or in early 2014. Michelle W. Cohen of Ifrah Law PLLC, examines the background to the case and the arguments put forward.

The stakes are high - the appeals court is considering whether FCC authority under the Communications Act of 1934, as amended, permits the agency to require broadband networks to adhere to anti-blocking and anti-discrimination rules adopted in 2010 relating to internet content. If the court invalidates the FCC's rules, Verizon and other internet providers could strike special deals with certain websites and services to deliver their content with preferential treatment on speed and other features. Such an invalidation could also result in an appeal by the FCC to the US Supreme Court.

Background

Back in 2005, the FCC re-classified digital subscriber line ('DSL') services as 'information services,' rather than telecommunications services. This was significant because under the Communications Act, telecommunications services are subject to stringent 'common carrier' regulations mandating, among other things, that such carriers provide service on a non-discriminatory basis, on just and reasonable conditions, treating similarly-situated customers the same. Common carriers are subject

to many reporting requirements. Information services, on the other hand, are subject to a much 'lighter' regulatory scheme. The FCC had previously categorised cable modem services as an 'information service.'

However, the 2005 ruling did not mean that broadband providers were 'off the hook' and could prevent or impede access to their networks by websites and content providers. The FCC stated that consumers were entitled to certain rights regarding broadband services, including the right to:

- access the lawful internet content of their choice;
- run applications and use services of their choice, subject to the needs of law enforcement;
- connect their choice of legal devices that do not harm the network; and
- competition among network providers, application and service providers, and content providers.

The 2010 Open Internet rules

The FCC subsequently launched a proceeding in 2009 seeking comment from stakeholders concerning rules to solidify the internet's openness. The FCC issued its 'Open Internet' rules in December 2010, encompassing three main principles:

- Broadband providers must disclose information regarding their network management practices, performance, and the commercial terms of their broadband services.
- Fixed broadband providers (such as DSL, cable modem, or fixed wireless providers) may not block lawful content, applications, services, or non-harmful devices. Mobile broadband providers may not block lawful websites, or applications that compete with their voice or video telephony services.
- Fixed broadband providers

may not unreasonably discriminate in transmitting lawful network traffic over a consumer's broadband internet access service. Unreasonable discrimination of network traffic could take the form of particular services or websites appearing slower or degraded in quality.

However, the Open Internet rules attempt to balance providers' needs to manage their networks, such as blocking spam. Thus, the no blocking and no discrimination rules are subject to 'reasonable network management.' A network management practice is 'reasonable' if 'it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.'

The FCC likely expected a quick appeal of its new rules. An appeal would not be surprising, especially since broadband provider Comcast was successful in its appeal to the DC Circuit earlier in 2010. The DC Circuit in that decision struck the FCC's attempt to regulate Comcast's network management of peer-to-peer programs on its network. However, the FCC based its jurisdictional authority in that case on its 'ancillary' authority under the Communications Act, rather than a specific grant of authority.

To support its new rules, the FCC in the Open Internet order described in detail the specific problems its net neutrality rules addressed, and how the FCC had jurisdiction over the internet. Specifically, the FCC stated in the Open Internet order that regulation of broadband providers was necessary to preserve the freedom of the internet: 'The record and our economic analysis demonstrate, however, that the openness of the Internet cannot be

taken for granted, and that it faces real threats. Indeed, we have seen broadband providers endanger the Internet's openness by blocking or degrading content and applications without disclosing their practices to end users and edge providers, notwithstanding the Commission's adoption of open Internet principles in 2005.⁷ Edge providers include providers of content, applications, services, and devices.

The FCC concluded that it had authority to institute the Open Internet rules pursuant to various grants of authority in the Communications Act, including as amended in Section 706 of the Telecommunications Act of 1996. Section 706 directs the FCC (along with state commissions) to take actions that encourage the deployment of 'advanced telecommunications capability.' 'Advanced telecommunications capability,' as defined in the law, includes broadband internet access. Under Section 706(a), the FCC must encourage the deployment of advanced telecommunications capability by 'utilizing, in a manner consistent with the public interest, convenience, and necessity,' various tools including 'measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.'

Verizon's appeal

Verizon appealed to the DC Circuit, arguing that the FCC lacked authority under the Communications Act to apply common carrier regulation to broadband providers. According to Verizon's brief, 'the Act expressly forbids the FCC from applying common-carrier regulation to broadband Internet access....but the rules do just that. They subject broadband providers to quintessential common-carrier

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duties by compelling them to carry the Internet traffic of all comers, and to do so at a uniform, nondiscriminatory price of zero.' Verizon also claimed that the FCC lacked statutory authority for the rules, and that the rules are unconstitutional.

Verizon contended that 'Broadband networks are the modern day microphone by which their owners engage in First Amendment speech. The FCC thus must identify an actual problem, and narrowly tailor its solution to solve that problem.' Verizon argued that the FCC's new rules were not narrowly tailored. Verizon also argued that the rules were invalid because they were arbitrary and capricious; specifically, it claimed that economists and others concluded that the new rules would deter broadband providers' network investments and that the FCC had not put forth any evidence of a specific problem justifying the sweeping regulations.

The DC Circuit's skepticism

During oral arguments in September, at least two members of the three-judge panel reportedly stated that they were unconvinced that the FCC could prohibit internet service providers from discriminating against sites whose content is transmitted on their networks. The preliminary take from the oral arguments was that the court appears likely to strike the anti-discrimination provisions.

What's next for net neutrality?

Most federal agency decisions are appealed to the DC Circuit, which often has the final say because US Supreme Court review is discretionary and rare. While the DC Circuit has recognised the FCC's authority over many broad areas (including, in 2012, the FCC's data roaming rules for e.g.), it has shown a willingness (e.g. in the

Comcast case) to push the FCC back when its authority is not established, or when its rules do not take into account other relevant factors and are deemed 'arbitrary and capricious.'

Importantly, Verizon argues that this case has broad implications from a 'free market versus stifling regulation' front. If the DC Circuit strikes the net neutrality anti-discrimination rules, Verizon and other internet providers could negotiate with providers like Google and Amazon for preferential treatment in the internet providers' delivery of those services.

Even if some of the FCC's net neutrality rules fail, the FCC may have other ways to enforce similar requirements. The largest cable provider, Comcast, is reportedly eyeing the acquisition of number two provider, Time Warner. As Time Warner holds various licences and authorisations granted by - yes - the FCC - any such transaction would be subject to prior FCC approval. The FCC would likely allow an acquisition, with stringent requirements to protect programmers and websites that use significant bandwidth. If the cable giants want the FCC's essential approval, they may well agree to net neutrality rules similar to those they are fighting today.

Finally, in a recent interview, new FCC Chairman Tom Wheeler stated that he is "pro the ability of individuals to access an open network." Wheeler's comments appear to support net neutrality. Should a large cable acquisition come before the FCC, Wheeler and the other Commissioners may have yet another opportunity to shape open internet rules.

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