



Written by [Raven Clabough](#) on September 10, 2013

D.C. Circuit Court Appears Skeptical of FCC's Net Neutrality Rules, Again

The United States Court of Appeals for the District of Columbia Circuit [heard](#) arguments Monday on the Federal Communications Commission's Internet access rules that prohibit cable and telecom carriers from blocking websites, even those that compete with their own Internet businesses. The judges on the Court of Appeals appeared [skeptical](#) of the increased regulations on broadband providers.



In addition to barring companies from blocking websites, the *Washington Post* reports that the rules "also strongly discourage the creation of 'fast lanes' for Web sites willing to pay more for VIP delivery of their content into homes. Such deals would have allowed Verizon Communications, for example, to charge Netflix extra for faster delivery of its streaming videos."

The FCC is being sued for its rules by Verizon, which argued in court on Monday that the regulator is overstepping its authority by imposing phone-era rules on the broadband Internet industry.

Verizon contends that the [Open Internet Order](#) violates the company's rights under the First and Fifth Amendments. Verizon argues that its role as an Internet provider allows it to select the services it wants to provide, and are editorial decisions of a sort that should be protected as free speech.

The court's decision is a significant one as it could affect the future of the FCC as a regulator of the Internet.

The judges appear to be skeptical of the FCC's arguments. Three judges on the U.S. Court of Appeals questioned an FCC lawyer on Monday on the FCC's legal basis for creating its "net neutrality" rules in 2010. According to the *Washington Post*, two of the three judges at times appeared to agree with Verizon's criticism of the net-neutrality rules that prevent broadband providers from making fast lane deals.

Verizon's attorney Helgi Walker argued that the rules hamper new investments in networks by not allowing telecom and cable companies to explore partnerships with websites that could bring in new sources of revenue. "But for these rules, we could be pursuing those types of commercial arrangements," Walker said. "My client wants freedom to explore that."

Verizon has challenged the rules as being "arbitrary and capricious" intrusions into the company's right to control what its networks transmit. "It is just not credible that Congress would have authorized these kinds of rules. We think that they (FCC) lack statutory authority," said Walker.

The FCC asserts that it has the authority to create and enforce the net-neutrality rules, even as analysts claim that the law codifying the FCC mandate does not explicitly define its powers over broadband services.

The *Wall Street Journal* wrote in 2010 when the net neutrality rules were introduced, "The FCC has wanted to step in and act as an Internet cop, but Congress has never given it clear authority to do so."



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Rather than allowing Congress make the final determination, however, the FCC has elected to usurp the power.

“We must take action to protect consumers against price hikes and closed access to the Internet-and our proposed framework is designed to do just that to guard against these risks while recognizing the legitimate needs and interests of broadband providers,” said former FCC Chairman Genachowski who wrote the rules.

This is not the first time that net neutrality is having some difficulty holding up in court. In fact, the U.S. Court of Appeals for the District of Columbia — the same court hearing this case — ruled three years ago that the FCC had not proved it had the legal power to regulate the Internet in a case brought by Comcast. That ruling is what led to the Open Internet Order, which set out the rules in question. Monday’s case presents the judges with the question of whether or not this particular case brought by Verizon is any different.

There are some indications that the court believes its not. “The way it played out today underlines the fact that the court very much wants to be deferential to the FCC but is limited because of the way the FCC classifies broadband,” said Jennifer Yeh, a policy counsel at consumer advocacy group Free Press. “The court can only defer so much.”

As [observed](#) by *Business Week*, there is much more at stake in this case than simply net neutrality:

The commission is taking on all kinds of Internet-related issues — like privacy, fraudulent billing, and universal broadband access. Stripped of its authority to pursue any of this, the government would be losing a fair chunk of its overall power.

Gigi Sohn, head of the advocacy group Public Knowledge, seems to agree with this assessment. “This is not a narrow question about net neutrality, it’s a much broader question about the FCC’s relevance,” Sohn said.

And the D.C. Circuit Court is notorious for its stern stances against the FCC. According to *Business Week*, the court ruled several times to restrict the power of the commission. The perceived “swing vote” on the panel is Judge David Tatel, the judge who wrote the Comcast decision that struck down the FCC’s last attempt to impose net neutrality laws.

Tatel threw a barrage of skeptical questions at the FCC lawyer on Monday. He compared the FCC’s current net neutrality rules to rules proposed 30 years ago that would have required cable television operators to provide public access channels to third parties for public purposes, rules that were struck down by the Supreme Court in 1979. “Isn’t that exactly this case?” Judge Tatel asked.

Despite Tatel’s questions, however, he did seem to consider the possibility of upholding some of the FCC regulations.

But Judge Laurence Silberman, who also asked a number of skeptical questions, suggested the possibility of invalidating all of the net neutrality rules.

Still, the FCC issued a statement that indicated confidence. “We are confident that the FCC’s order will withstand judicial scrutiny.”

And the FCC’s position could be upheld, as the Supreme Court ruled in May that regulatory agencies may have deference in interpreting the extent of their own regulatory authority.

Some analysts believe that the D.C. Circuit will ultimately weaken the rules but not eliminate them. “We



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left tending to suspect the D.C. Circuit could be headed toward a divided ruling that dilutes but not necessarily eviscerates open Internet rules,” said Jeffrey Silva, an analyst at Medley Global Advisors.



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