

Net neutrality just went to court. Here's how it did.

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Net neutrality, explained

A federal appeals court on Friday challenged regulators to defend a series of strict new rules for Internet providers, asking them why it should allow the controversial regulations to stand in spite of an industry lawsuit that's become the centerpiece of a highly-charged battle over the future of the Internet.

Dozens of court-watchers began lining up before dawn to hear the case, with some having spent the night in frigid temperatures outside the U.S. Court of Appeals for the D.C. Circuit. Heavy turnout led the court to open up an overflow room for other spectators. Inside the courtroom itself, a three-judge panel peppered agency and industry lawyers with probing questions in a roughly three-hour debate.

The stakes for the Federal Communications Commission are high. Friday marked the third time the agency has appeared before the court in recent years to justify regulating Internet providers more heavily. At issue is the FCC's net neutrality rules — which prevented Internet providers from slowing down or blocking Web content that they do not like, or even charging Web sites a fee for reaching Internet users faster.

Led by several industry associations, broadband providers argued the FCC had abused its authority when it approved those rules in February. In response, the FCC — backed by a number of tech companies and advocacy groups — said Congress had given it sufficient powers to implement the regulations it had written.

How the court ultimately rules could have far-reaching consequences for the way Americans experience the Web. If the FCC's policy is struck down, it could give Internet providers more freedom to determine what consumers can see online, and at what cost. The agency itself would be faced with a choice: Appeal to the Supreme Court, or attempt to rewrite the rules a fourth time — a process that analysts say will likely be interrupted by the 2016 election.

Alternatively, the court could uphold some parts of the FCC's rules while invalidating others. Depending on which portions survive, the judges could effectively affirm the agency's power to implement net neutrality but order the FCC to clarify problematic sections of the rules.

Friday's debate began by revisiting a controversial FCC decision: To subject broadband companies to the same legal obligations as legacy telephone companies.

Because consumers only purchase access to the system of wires and servers run by a broadband company as opposed to directly connecting to the Internet itself, Internet service is not like telephone service, argued Peter Keisler, the industry attorney arguing before the court. Instead, what consumers subscribe to simply "supports the ability for consumers to retrieve information" from the Internet and is not a telecommunications service, he said.

Judge David Tatel appeared unpersuaded, musing that when consumers sign up for broadband, they likely believe they are "just buying Internet" rather than access to something else. But Tatel — said to be a key vote in the case because of his role in writing the D.C. Circuit's last opinion on net neutrality — also seemed dissatisfied by the FCC's defense on some topics.

Tatel invited the FCC's top lawyer, Jonathan Sallet, to explain why the agency abruptly "abandoned" a plan to regulate Internet providers lightly, without imposing telephone-style obligations on them. Sallet said that the FCC's ultimate policy, which was much stricter, was simply the result of public feedback. But Tatel continued to press for specifics, demanding the "crispest answer" to the question as he sat impassively with one hand on his chin.

Sallet seemed more comfortable discussing the basis for the FCC's rules. Drawing a comparison to furniture and automobiles, Sallet said that a screw that might appear in either product should be regulated the same way by the government, even if the furniture and automobile industries are subject to different laws. Similarly, he said, technology that provides a telecommunications capability should operate under a single set of rules.

Another flashpoint in the debate occurred when Senior Judge Stephen Williams questioned the FCC's view of a tactic known as "paid prioritization," where an Internet provider attempts to charge a Web site for faster service. Williams, who is considered a skeptic of preemptive regulation, warned that the FCC's ban on the practice risked wiping out "a lot of perfectly innocent" deals between Internet providers and Web site operators.

Neither Tatel nor the panel's third judge, Sri Srinivasan, appeared to share Williams' skepticism of the FCC's paid prioritization ban. But all three closely examined the FCC's application of net neutrality to mobile Internet providers.

The FCC violated the law when it extended its policy to cover firms such as Sprint and T-

Mobile, industry lawyers argued, because mobile Internet is not part of the "public switched network" that Congress originally instructed the FCC to regulate.

But if the mobile Internet is not subject to net neutrality, that could limit protections for consumers, Srinivasan pointed out. In that scenario, a tablet user who is surfing on WiFi would benefit from net neutrality, but the same tablet connected to a 4G LTE signal would not.

"You're saying where I am in my house determines whether I'm subject to blocking?" Srinivasan asked Keisler, to laughter in the courtroom.

Consumer advocates say the debate over mobile broadband led to "mixed results," but predicted a win overall in the end.

"I think you might get a 2-1 decision with Williams in dissent on the paid prioritization rule," said Harold Feld, senior vice president of the advocacy group Public Knowledge.

CTIA, the wireless industry's top trade association, said that although it supported an open Internet, the FCC's rules moved the country in the wrong direction.

"Today, we made our case to the court that imposing monopoly-era rules on the wireless industry is unlawful," the group said in a statement. The FCC declined to comment.

But some analysts said the outcome is still a toss-up.

"Sometimes you walk out of an oral argument with a pretty good sense of which way the decision is going to go," said Randolph May, president of the Free State Foundation. "After witnessing the entire 3 hour argument, to my mind this was not one of those cases."