

Verizon-F.C.C. Court Fight Takes On Regulating Net

WASHINGTON — Few people would dispute that one of the biggest contributors to the extraordinary success of the Internet has been the ability of just about anyone to use it to offer any product, service or type of information they want.

How to maintain that success, however, is the subject of a momentous fight that resumes this week in the United States Court of Appeals for the District of Columbia Circuit. The battle pits one of the largest providers of Internet access — Verizon — against the [Federal Communications Commission](#), which for nearly 80 years has been riding herd on the companies that provide Americans with telecommunications services.

[Verizon](#) and a host of other companies that spent billions of dollars to build their Internet pipelines believe they should be able to manage them as they wish. They should be able, for example, to charge fees to content providers who are willing to pay to have their data transported to customers through an express lane. That, the companies say, would allow the pipeline owner to reap the benefits of its investment.

The F.C.C., however, believes that Internet service providers must keep their pipelines free and open, giving the creators of any type of legal content — movies, shopping sites, medical services, or even pornography — an equal ability to reach consumers. If certain players are able to buy greater access to Internet users, regulators believe, the playing field will tilt in the direction of the richest companies, possibly preventing the next Google or Facebook from getting off the ground.

The court is set to hear oral arguments starting Monday morning in *Verizon v. F.C.C.*, which is billed as a heavyweight championship of the technology world, setting the old era against the new.

“This will determine whether the laws and regulations of the past — the pre-

Internet age — will apply to the Internet's future," said Scott Cleland, the chairman of NetCompetition, a group sponsored by broadband companies, including Verizon. "It will determine the regulatory power and authority of the F.C.C. in the 21st century."

Susan Crawford, a supporter of the F.C.C.'s position who is co-director of the Berkman Center for Internet & Society at Harvard and a professor at Yeshiva University's Cardozo School of Law, called the showdown "a moment of grandeur."

"The question presented by the case is, does the U.S. government have any role to play when it comes to ensuring ubiquitous, open, world-class, interconnected, reasonably priced Internet access?" Ms. Crawford said. "Does the government have good reason to ensure that facility in America?"

European countries are similarly struggling with whether and how to regulate Internet service. The Netherlands has some wireless regulations in place, and France this year introduced strict anti-discrimination measures. But while European Union officials have voiced support for what is known as [net neutrality](#), a recent proposal gives Internet providers great leeway. In December 2010 the F.C.C. issued its "[Open Internet Order](#)," an 87-page set of instructions directing Internet service providers not to block or to unreasonably discriminate against any type of Internet traffic deemed not harmful to the system. The only exception to the open access principle is for "reasonable network management," a loosely defined term that allows a company to do what it takes to keep its network up and running.

Internet service providers also were ordered to disclose how they manage their networks and how their systems perform — like how they handle congestion when a large portion of users are, for example, downloading high-definition video.

The order was necessary, the F.C.C. said in court papers, because "there were significant threats to openness, and thus to the engine that has driven invest-

ment in broadband facilities.” In the past, the F.C.C. said, “several broadband access providers had blocked or degraded service.” One was Comcast, which in 2008 was punished by the F.C.C. for blocking access by some of its users to the file-sharing service BitTorrent, which was often used for the unauthorized exchange of movies or music.

“Other providers have the technological capability and the economic incentive to engage in similar acts,” the commission said. “And with the majority of Americans having only two wireline broadband choices (many have only one), market discipline alone could not guarantee continued openness.” The F.C.C.’s rules generally are more strict for wireless carriers, because those networks are more susceptible to congestion.

In the Comcast case, the cable company appealed the F.C.C. ruling, and the D.C. federal appeals court — the same court hearing the Verizon case — said in 2010 that the agency had overstepped its bounds, failing to show that it had the authority to regulate an Internet service provider.

It is in fact far from easy for the F.C.C. to demonstrate that it has such authority. That is because in 2002 the commission, then led by Michael K. Powell, a Republican, voted to classify Internet service as an information service rather than a telecommunications service.

The difference meant that Internet providers were not subject to regulation like a telephone company. Instead, they were free of restrictions on rates and exempt from regulations that would require them to open their networks to allow competitors to offer lower-cost service over the same pipes.

The judge who wrote the Comcast decision, David S. Tatel, is one member of the three-judge panel that will hear Verizon’s appeal. Many industry experts view the two other judges as highly likely to take opposing sides, leaving Judge Tatel as the swing vote.

Verizon argues that the F.C.C.’s Open Internet Order should be struck down

because it is arbitrary and capricious, and aims to prevent activity that is not taking place. It argues in its court filings that the F.C.C. has documented only four examples, over six years, of purported blocking of Internet content by service providers.

During those six years, the company said, “end users successfully accessed the Internet content, applications and services of their choice literally billions of times.”

More broadly, Verizon argues that the F.C.C., as in the Comcast case, “fails to identify any statutory authority for the rules.” And in fact, Verizon said, the F.C.C. order is so broad that it would give the commission the power “to regulate all sectors of the Internet economy without limit.”

The court is likely to take several months to issue its decision, lawyers involved in the case say — perhaps before the end of the year, but more likely in 2014. When the ruling comes, many people will be waiting. More than 400 organizations or individuals weighed in at the F.C.C. when the rules were being considered. More than 60 signed legal briefs supporting the F.C.C., while at least a dozen did so backing Verizon.