

Comcast, FCC take net neutrality dispute to court

January 8 2010, By JOELLE TESSLER , AP Technology Writer



In this July 30, 2008 file photo illustration, a silhouetted coaxial cable with the Comcast Corp. logo in the background is seen in Philadelphia. The FCC hopes to establish the legal underpinning for its push to write so-called "network neutrality" regulations _ which are intended to prevent phone and cable companies from abusing their control over the market for high-speed Internet access _ in a closely watched court battle between the agency and the nation's biggest cable operator. (AP Photo/Matt Rourke, File)

(AP) -- The Federal Communications Commission staked out new ground nearly three months ago when it began drafting rules that would require Internet providers to give equal treatment to all data flowing over their networks.

Now the FCC hopes to use a dispute with the nation's largest cable TV and Internet provider to establish its legal authority to adopt such

"[network neutrality](#)" regulations. The rules would aim to prevent phone and cable companies from abusing their control over the market for [high-speed Internet](#) access.

A [federal appeals court](#) was holding oral arguments Friday in Comcast Corp.'s challenge of the FCC's 2008 order banning the company from blocking its broadband subscribers from using an online file-sharing technology known as BitTorrent.

The commission, at the time headed by Republican Kevin Martin, based its order against Comcast on a set of [net-neutrality](#) principles it adopted in 2005 to prevent broadband providers from favoring or discriminating against certain types of [Internet traffic](#). Those principles have guided the FCC's enforcement of communications laws on a case-by-case basis.

Formally adopting those guidelines as binding regulations is a top priority for the FCC's new Democratic chairman, Julius Genachowski. The agency voted in October to start writing those rules.

And now, with Comcast appealing the FCC order against it, one key question that could come up in the courtroom is whether the commission has legal authority to mandate network neutrality. A ruling by the U.S. Court of Appeals for the District of Columbia Circuit, expected this spring, could bolster the FCC proceeding if the agency prevails.

"Comcast and others have challenged the FCC's authority to take action to protect consumers and ensure their access to a free and [open Internet](#)," FCC General Counsel Austin Schlick said. "This case provides the court of appeals an opportunity to reject those arguments and confirm that the commission has the power it needs to accomplish those goals."

The policy dispute over network neutrality has pitted some of the country's leading Internet companies, including Internet search provider

Google Inc. and the Internet calling service Skype, against the big phone and cable operators.

The Internet companies say that without such rules, broadband providers could become online gatekeepers and prioritize traffic for those who can pay extra, while degrading or blocking cheaper Internet calling services or online video sites that compete with their core businesses.

Indeed, BitTorrent, the online file-sharing technology blocked by Comcast, can be used to transfer large files such as online video, something that threatens Comcast's core cable TV business.

But broadband providers such as Comcast, AT&T Inc. and Verizon Communications Inc. argue that after pouring billions of dollars into their networks, they should be able to offer premium services to differentiate themselves from competitors and earn a healthy return on their investments.

They also insist they need flexibility to manage their systems so high-bandwidth applications such as BitTorrent don't hog too much capacity and slow down the network for everyone else.

For its part, Comcast wants to keep its challenge to the FCC order narrow. It argues that the order is illegal because the agency was seeking to enforce mere policy principles, which don't have the force of regulations or law.

As a result, the Philadelphia-based cable company says, it never had clear rules to follow and was never given fair notice of what conduct was prohibited. In fact, Comcast insists, the FCC proceeding to adopt the 2005 principles as formal regulations underscores its point.

Comcast also maintains that because that proceeding is still in the early

stages, it remains unclear whether the agency even has legal authority to mandate net neutrality obligations. This larger question, however, should be left for another day, [Comcast](#) says.

Yet that is exactly the question that the FCC hopes the court will address. The commission argues that a 2005 Supreme Court ruling upholding its move to deregulate Internet service gives it the jurisdiction it needs.

The high court upheld the FCC's decision to define broadband as a lightly regulated information service, which is not subject to the obligations traditional telecommunications services have to share their networks with competitors. But a 1996 federal telecommunications law still gives the agency authority to set rules for information services - including, the FCC now argues, net neutrality rules.

An appeals court ruling that accepts this argument would "strengthen the agency's hand ... and provide validation" in its broader net neutrality proceeding, said Ben Scott, policy director for Free Press, a leading advocate for net neutrality rules. Free Press brought Comcast's actions to the FCC's attention after The Associated Press ran tests and reported that the cable company was interfering with attempts by some subscribers to share files online.

But even if the court concludes that the FCC lacks authority to adopt such regulations, it would not necessarily be a devastating setback - just a delay - for the commission.

That's because Congress, with a number of key Democrats in support of net neutrality, would likely step in to give the FCC the necessary powers.

Either way, Friday's oral arguments could provide a road map. After all, even if the court issues a very narrow ruling, the FCC's upcoming net

neutrality regulations are likely to face a court challenge, too.

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