

## ISP Friends Weigh In on Open Internet Issue

Officials tell court where they can put the FCC's new network neutrality order 8/17/2015  
08:00:00 AM Eastern



By: [John Eggerton](#)

### WHY THIS MATTERS

Internet service providers will have a wealth of material to help them prepare for their oral arguments Dec. 4.

After the smoke had cleared from all the rhetorical shots fired at the FCC's new Title II-based Open Internet rules, it became clear that more than a dozen friends of Internet Service Providers were challenging the FCC's Open Internet order, which took effect June 12.

At stake in the fight is the FCC's plan to regulate broadband networks, including wireless, as the technology moves into every nook and cranny of the country's economic and social life. The decision will affect the future of the Internet.

Here is a court-watcher's guide to the players in supporting arguments against the commission's move to classify Internet access as a common carrier service, subject to increased FCC oversight. The court is the U.S. Court of Appeals for the District of Columbia. The FCC says the reclassification is needed to backstop new rules against such a court challenge, which undid its previous (2010) attempt to prevent online blocking and degrading. The FCC gets to make its case in person Dec. 4, the scheduled date for oral argument.

**Harold Furchtgott-Roth**, a big free-market fan, served on the FCC from 1997-2001. Like current commissioner Michael O'Rielly, who voted against the new rules, Furchtgott-Roth was also a Republican staffer who worked on the 1996 Telecommunications Act.

Writing for the **Washington Legal Foundation**, Furchtgott-Roth warned the court against allowing the FCC to exert too much power in the name of protecting the Internet. "The FCC's proper role is not to promote what it considers to be good policy, but to write, enforce and adjudicate rules that faithfully implement laws entrusted to the agency. A contrary view would not only permit regulatory agencies to essentially rewrite federal law, but it would leave their administrative powers unchecked."

**Christopher Yoo** has been a go-to academic for net neutrality opponents, including debating Tim Wu (who coined the term "network neutrality"), writing papers and appearing on numerous panels.

Yoo, a University of Pennsylvania law professor (who also teaches computer science and communications), said the FCC's definition of Internet Access as a telecommunications service rather than an information service does not square with how the Internet actually works on an engineering level. "An examination of the underlying technology and the reasoning of the Supreme Court's decision in *Brand X* [upholding the FCC's classification of ISPs as an information service not subject to mandatory access requirements] both underscore that for Internet transmissions that use the Domain Name System (DNS) or caching, end-users do not specify the endpoints of the communication. As such, Internet access services that rely on DNS and caching are not properly classified as telecommunications services," Yoo argued.

The FCC for the first time is applying its rules to mobile broadband. Big mistake, said **Mobile Future**. The technology and communications coalition said the record showed that mobile networks "are fundamentally different from fixed networks in critical ways that demand far more flexible, complex and aggressive network management." They further argue that the FCC's reasonable network management exemption does not provide enough flexibility and, besides, the mobile industry spent billions based on the FCC's recognition of that difference, and to do an about-face now is unwarranted and indefensible.

**The National Association of Manufacturers** teamed with the **U.S. Chamber of Commerce** to tell the FCC that its move would indeed hurt businesses and investment, an ISP argument that did not wash with FCC chairman Tom Wheeler, and was unnecessary because ISPs were already battling to deliver higher speeds.

"When Google announced plans to bring gigabit speeds to consumers, AT&T matched it for the same price. Comcast responded by offering two-gigabit speeds," the National Association of Manufacturers and the Chamber of Commerce told the court. "Time Warner countered by tripling its speeds without raising prices. The gigabit Internet thus is poised to enjoy the robust competition that consumers have come to expect in broadband."

**Richard Bennett**, founder and publisher of the High Tech Forum and visiting fellow at the American Enterprise Institute, pulled no punches. "The FCC's order is an example of a bungling regulator achieving exactly the opposite effect from the one it set out to cause by failing to understand the subject matter. The Internet is capable of being much, much more than it has ever been, but the FCC's ham-fisted regulatory model will actually cause it to be much less than it is today." The FCC gets to file its opening brief in defense of the order Sept. 14. Its amici (friends) get to weigh in Sept. 21. And advocates on both sides will be making their cases to the court in person in December.