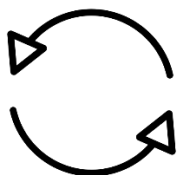


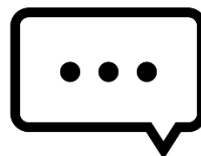
Broadband industry leaders challenge Open Internet rules in a petition for en banc review

Details on the petition and next steps



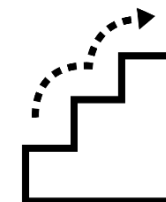
Petition information

- On the morning of July 29th, the deadline to request an **en banc review** of *US Telecom Association v. FCC*, multiple petitions were filed
- Submissions came from the National Cable and Telecommunications Association (NCTA), the American Cable Association (ACA), the Cellular Telephone Industries Association (CTIA), USTelecom, CenturyLink, and Alamo Broadband
- The NCTA/ACA petition argues that the FCC's **Title II reclassification of broadband service** "rests upon factual findings that contradict those which underlay its prior policy"
- Alamo Broadband additionally asserted, "the rules strip broadband providers of their **First Amendment right** to exercise discretion about whether and how to carry Internet traffic over their networks"



Response

- FCC Chairman Tom Wheeler released a statement that the FCC was "confident that the full court will agree with the **panel's affirmation of the FCC's clear authority to enact its strong Open Internet rules**, the reasoned decision-making upon which they are based, and the adequacy of the record from which they were developed"
- Free Press Research Director S. Derek Turner remarked, "I honestly **don't see success**. The dissent's main argument is that the FCC didn't explain why it was changing its mind, and spent quite a bit of ink on the issue of the market's competitiveness. But how competitive a market is or is not has no bearing on the classification issue, only the nature of the service itself... the FCC had **satisfied the standard in Fox** for reversing a prior opinion."



Next steps

- Petitioners must now await the approval of the DC Circuit Court
- Andrew Schwartzman, Benton Senior Counselor at the Public Interest Communications Law Project, writes that the **chances of the court agreeing to hear the case, "much less reverse the panel's decision, is extremely remote"**
- While federal courts usually respond to en banc petitions within weeks, Schwartzman notes that the court might not respond until **September or October**
- **If approved**, the case will be reheard in front of all of the active circuit judges in the court
- **If rejected**, the broadband industry has 90 days to file petitions for certiorari to the Supreme Court

Sources: "Petitioner CTIA'S petition for rehearing en banc," CTIA, July 29, 2016; Jon Brodtkin, "Broadband industry tries again to kill net neutrality and Title II," ArsTechnica, July 29, 2016; Sam Gustin, "Big telecom wants a DC Circuit Court net neutrality review. Here's why that's unlikely," Motherboard, July 29, 2016; Tom Wheeler, "Chairman Wheeler statement on industry petitions to rehear Open Internet court case," FCC, July 29, 2016; "Why we Filed for en banc review," NCTA, July 29, 2016; Karl Bode, "Mega-ISPs request en banc appeal of net neutrality ruling," DSL Report, July 29, 2016; Noun Project, 2016.

The majority of active DC Circuit Judges are Democratic appointees

The Current DC Circuit Court Judges

Bush appointees	Clinton appointees	Obama appointees
<div><div>1. Judge Karen Henderson</div><div>2. Judge Janice Brown</div><div>3. Judge Thomas Griffith</div><div>4. Judge Brett Kavanaugh</div></div>	<div><div>1. Judge Judith Rogers</div><div>2. Judge David Tatel Tatel was a member of the panel of DC Circuit judge who heard the original case, and ruled in favor of the FCC and its Title II reclassification of broadband service</div><div>3. Chief Judge Merrick Garland Garland has stated that he will sit out all cases while his Supreme Court nomination pends; his SCOTUS nomination is the longest pending nomination in history</div></div>	<div><div>1. Judge Sri Srinivasan Srinivasan was a member of the panel of DC Circuit judges who heard the original case, and ruled in favor of the FCC and its Title II reclassification of broadband service)</div><div>2. Judge Patricia Millett</div><div>3. Judge Nina Pillard</div><div>4. Judge Robert Wilkins</div></div>

Sources: Zoe Tillman and C. Ryan Barber, "D.C. Circuit upholds FCC net neutrality rules," Law.com, June 14, 2016; United States Court of Appeals: District of Columbia Circuit, 2016.

Net neutrality has become a highly politicized topic, but the issues involved in this case may not be clearly partisan

The current Supreme Court Justices' actions on issues related to net neutrality



Chief Justice John Roberts

- Wrote the dissenting opinion in *Arlington v. FCC* (2013) against Scalia's majority opinion about regulatory powers, stating "a court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference"



Justice Anthony Kennedy

- Joined the majority opinion in *NCTA v. Brand X* (2005), deferring to the FCC's interpretation of the Telecommunications Act
- Joined in Roberts' dissenting opinion in *Arlington v. FCC* about deference to regulatory agencies



Justice Clarence Thomas

- Wrote the *NCTA v. Brand X* majority opinion, stated federal courts must accept reasonable agency interpretations of ambiguous statutes, even if it differs from the court's statutory interpretation, citing *Chevron v. NRDC* (1984)



Justice Samuel Alito

- Joined in Roberts' dissenting opinion in *Arlington v. FCC* about deference to regulatory agencies



Justice Ruth Bader Ginsburg

- Joined in part with Souter in a dissenting opinion written by Scalia in *NCTA v. Brand X* that cable broadband services offer telecommunications service, and are subject to Title II regulation as common carriers



Justice Stephen Breyer

- Joined the majority opinion in *NCTA v. Brand X*, deferring to the FCC's interpretation of the Telecommunications Act



Justice Sonia Sotomayor

- Deferred to authority of Congress and legislative intent for issues of net neutrality, but highlighted the importance of Internet access to society when Sen. Al Franken (D-MN) questioned her on the issue during her Supreme Court nomination hearing in 2009



Justice Elena Kagan

- Considered in 1996 the *Buckley* principle, that government cannot "restrict the speech of some... in order to enhance the relative voice of others," a 1st Amendment "rule" and extended it to some corporations

Sources: Martin Ammori, "Citizens United," *Huffington Post*, May 10, 2010; *Chevron v. NRDC*, 1984; *Arlington v. FCC*, 2013; www.supremecourt.gov, *Supreme Court of the United States*, 2016; *NCTA v. Brand X*, 2005; "Sen. Franken questions Judge Sotomayor at Supreme Court nomination hearings," *Washington Post*, July 15, 2009.