

The Mozilla oral arguments and the ongoing hell of the “net neutrality” debate  
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[Gus Hurwitz](#)

In the opening seconds of what was surely one of the worst oral arguments in a high-profile case that I have ever heard, Pantelis Michalopoulos, arguing for petitioners against the FCC’s 2018 Restoring Internet Freedom Order (RIFO) expertly captured both why the side he was representing should lose and the overall absurdity of the entire net neutrality debate: “This order is a stab in the heart of the Communications Act. It would literally write ‘telecommunications’ out of the law. It would end the communications agency’s oversight over the main communications service of our time.”

The main communications service of our time is the Internet. The Communications and Telecommunications Acts were written before the advent of the modern Internet, for an era when the telephone was the main communications service of our time. The reality is that *technological evolution* has written “telecommunications” out of these Acts – the “telecommunications services” they were written to regulate are no longer the important communications services of the day.

The basic question of the net neutrality debate is whether we expect Congress to weigh in on how regulators should respond when an industry undergoes fundamental change, or whether we should instead allow those regulators to redefine the scope of their own authority. In the RIFO case, petitioners (and, more generally, net neutrality proponents) argue that agencies should get to define their own authority. Those on the other side of the issue (including me) argue that that it is up to Congress to provide agencies with guidance in response to changing circumstances – and worry that allowing independent and executive branch agencies broad authority to act without Congressional direction is a recipe for unfettered, unchecked, and fundamentally abusive concentrations of power in the hands of the executive branch.

These arguments were central to the DC Circuit’s evaluation of the prior FCC net neutrality order – the Open Internet Order. But rather than consider the core issue of the case, the four hours of oral arguments this past Friday were instead a relitigation of long-ago addressed ephemeral distinctions, padded out with irrelevance and esoterica, and argued with a passion available only to those who believe in faerie tales and monsters under their bed. Perhaps some revelled in hearing counsel for both sides clumsily fumble through strained explanations of the difference between standalone telecommunications services and information services that are by definition integrated with them, or awkward discussions about how ISPs may implement hypothetical prioritization technologies that have not even been developed. These well worn arguments successfully demonstrated, once

again, how many angels can dance upon the head of a single pin - only never before have so many angels been so irrelevant.

This time around, petitioners challenging the order were able to scare up some intervenors to make novel arguments on their behalf. Most notably, they were able to scare up a group of public safety officials to argue that the FCC had failed to consider arguments that the RIFO would jeopardize public safety services that rely on communications networks. I keep using the word "scare" because these arguments are based upon incoherent fears peddled by net neutrality advocates in order to find unsophisticated parties to sign on to their policy adventures. The public safety fears are about as legitimate as concerns that the Easter Bunny might one day win the Preakness - and merited as much response from the FCC as a petition from the Racehorse Association of America demanding the FCC regulate rabbits.

In the end, I have no idea how the DC Circuit is going to come down in this case. Public Safety concerns - like declarations of national emergencies - are often given undue and unwise weight. And there is a legitimately puzzling, if fundamentally academic, argument about a provision of the Communications Act (47 USC 257(c)) that Congress repealed after the Order was adopted and that was an noteworthy part of the notice the FCC gave when the Order was proposed that could lead the Court to remand the Order back to the Commission.

In the end, however, this case is unlikely to address the fundamental question of whether the FCC has any business regulating Internet access services. If the FCC loses, we'll be back here in another year or two; if the FCC wins, we'll be back here the next time a Democrat is in the White House. And the real tragedy is that every minute the FCC spends on the interminable net neutrality non-debate is a minute not spent on issues like closing the rural digital divide or promoting competitive entry into markets by next generation services.

So much wasted time. So many billable hours. So many angels dancing on the head of a pin. If only they were the better angels of our nature.

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Postscript: If I sound angry about the endless fights over net neutrality, it's because I am. I live in one of the highest-cost, lowest-connectivity states in the country. A state where much of the territory is covered by small rural carriers for whom the cost of just following these debates can mean delaying the replacement of an old switch, upgrading a circuit to fiber, or wiring a street. A state in which if prioritization were to be deployed it would be so that emergency services would be able to work over older infrastructure or so that someone in a rural community could remotely attend classes at the University or consult with a primary care physician (because forget high speed Internet - we have counties without doctors in them). A state in which if *paid* prioritization were to be developed it would be to help raise capital to build out service to communities that have never had high-speed Internet access.

So yes: the fact that we might be in for another year of rule making followed by more litigation because some firefighters signed up for the wrong wireless service plan and then were duped into believing a technological, economic, and political absurdity about net neutrality ensuring they get free Internet access does make me angry. Worse, unlike the hypothetical harms net neutrality advocates are worried about, the endless discussion of net neutrality causes real, actual, concrete harm to the people net neutrality advocates like to pat themselves on the back as advocating for. We should all be angry about this, and demanding that Congress put this debate out of our misery.

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