NOT YET SCHEDULED FOR ORAL ARGUMENT

Nos. 11-1355, 11-1356, 11-1403 and 11-1404

In the

United States Court of Appeals

for the

District of Columbia Circuit

VERIZON, *et al.*

Appellants-Petitioners,

– v. –

FEDERAL COMMUNICATIONS COMMISSION, *et al.*

Appellees-Respondents.

APPEAL FROM THE FEDERAL COMMUNICATIONS COMMISSION,
NO. FCC-76FR59192

BRIEF OF *AMICI CURIAE* REED HUNDT, TYRONE BROWN, MICHAEL COPPS, NICHOLAS JOHNSON, SUSAN CRAWFORD AND THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS IN SUPPORT OF APPELLEE

SEAN H. DONAHUE
Counsel of Record
DONAHUE & GOLDBERG, LLP
2000 L Street, N.W., Suite 808
Washington, D.C. 20036
(202) 277-7085

DAVID T. GOLDBERG
DONAHUE & GOLDBERG, LLP
99 Hudson Street, 8th Floor
New York, New York 10013
(212) 334-8813

Attorneys for Amici Curiae Reed Hundt, Tyrone Brown, Michael Copps, Nicholas Johnson, Susan Crawford and The National Association of Telecommunications Officers and Advisors

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(A) Parties and Amici

The parties are listed in the Joint Brief for Verizon and MetroPCS, except that CTIA—The Wireless Association is no longer a party to this case.

The parties before the Federal Communications Commission are listed in the Joint Brief for Verizon and MetroPCS.

Amici in support of Appellant/Petitioners are Cato Institute, Competitive Enterprise Institute, Free State Foundation, TechFreedom; Commonwealth of Virginia; and the National Association of Manufacturers.

Amici in support of Appellee/Respondents are Scott Bradner, Douglas B. Comer, John Klensin, Jim Kurose, David Reed and Paul Vixie; Tim Wu; Center for Democracy & Technology, Marvin Ammori, Jack M. Balkin, Michael J. Burstein, Anjali S. Dalal, Rob Frieden, Ellen P. Goodman, David R. Johnson, Dawn C. Nunziato, David G. Post, Pamela Samuelson, Rebecca Tushnet, Barbara van Schewick, and Jonathan Weinberg; Reed Hundt, Tyrone Brown, Michael Copps, Nicholas Johnson, Susan Crawford, and the National Association of Telecommunications Officers and Advisors; Scott Bradner, Douglas B. Comer, John Klensin, Jim Kurose, David Reed and Paul Vixie.

(B) Rulings under Review

The FCC order challenged here is cited in the Joint Brief for Petitioners Verizon and MetroPCS at ii.

(C) Related Cases.

The positions of the parties concerning a potentially related case, *Cellco Partnership d/b/a Verizon Wireless v. FCC*, Nos. 11-1135, *et al*., are set out at Joint Brief of Verizon and MetroPCS at vii-viii, and Brief for Appellee/Respondents at ii.

Respectfully submitted,

Sean H. Donahue
Sean H. Donahue

November 15, 2012

RULE 26.1 STATEMENT

The National Association of Telecommunications Officers and Advisors ("NATOA") is a national trade association that promotes local government interests in communications and serves as a resource for local officials as they seek to promote communications infrastructure development. NATOA has no parent company and no publicly held company has a 10% or greater ownership interest in NATOA.

The other amici are individuals.

Respectfully submitted,

Sean H. Donahue
Sean H. Donahue

November 15, 2012

RULE 29 STATEMENTS

This brief is filed with the consent of all of the parties.

Pursuant to Fed. R. App. P. 29(c)(5), *amici* state that no party or party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person—other than the *amici* and their counsel—contributed money that was intended to fund preparing or submitting the brief.

Pursuant to D.C. Cir. Rule 29(d), amici state that a separate brief is necessary for the following reasons. Amici submit this brief based upon their extensive experience in the formulation and implementation of telecommunications policy – for four of the amici, as former FCC Commissioners; for another, as a former White House telecommunications policy advisor, and for the other amicus, as an association bringing together state and local officials and bodies with interests and expertise in telecommunications policy. As such, amici submit this brief from a different perspective from any other amicus (or party) and with a different objective – focusing less on the particular merits of the FCC regulations at issue, and instead on the distinctive harms to the policymaking process that would flow from adopting the rules of constitutional law advocated by petitioners in this case. Amici also wish to limit their participation to these

arguments, rather than a detailed discussion of the important policy issues this case presents.

Amici are aware of three other amicus briefs to be filed in support of the FCC in this case, one from a legal scholar addressing the relevant historical background; another, on behalf of a public interest organization and legal scholars concerned with internet freedom, that addresses certain First Amendment issues (though not the Takings issue); and another from a group of internet engineers and technologists. Amici understand the coverage of these briefs to be significantly different from ours, and that none of the other amicus briefs will address the institutional and separation of powers concerns that are central to our argument.

Respectfully submitted,

Sean H. Donahue
Sean H. Donahue

November 15, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutory and Regulatory Provisions and Administrative Orders

Other Materials

*Authorities chiefly relied upon are marked with asterisks.

GLOSSARY OF ABBREVIATIONS

DMCA	Digital Millennium Copyright Act
FCC	Federal Communications Commission
ISP	Internet Service Provider
NATOA	National Association of Telecommunications Officers and Advisors
Open Internet Rules	*In re Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 76 Fed. Reg. 59192 (Sept. 23, 2011)

Introduction and Statement of Interest

As described more fully in the Addendum, *Amici* include individuals and an organization whose members have long experience with the Nation's communications laws – administering, enforcing, and commenting upon legal frameworks that govern the mediums of information exchange and connectedness vital to modern economic, civic, and social life. *See* Add. A-1.

We submit this brief to respond to – and urge that the Court reject – the startling constitutional arguments that Verizon raises in opposition to the FCC's action here. Verizon submits that because corporations like Verizon own some of the physical facilities that transmit the electromagnetic waves which in turn carry the digitized information that composes the experience of the Internet for all users, and because much of the data that passes over Verizon's property is itself constitutionally protected Speech, (1) these network operators enjoy a "First Amendment" right to decide what shall be communicated by means of the Internet akin to a newspaper publisher's control of its editorial page and (2) that Congress presumptively may make no law that inhibits Verizon's choices, whether made to disadvantage a competitor or to suppress views Verizon disapproves.

These arguments are startling on their own terms – *Verizon* recognized in a recent submission to the FCC that the regime it urges here would be "the beginning of the end of the Net." Their premises and implications contradict public

understandings and legal rules Verizon itself has encouraged (and benefitted from) before all three branches of government. And Verizon's arguments fail as a matter of constitutional principle: that transmission enables someone else's constitutionally-protected expression does not mean that it is *itself* Speech.

But the need for this Court to reject Verizon's claims of constitutional immunity from regulation goes beyond their doctrinal unsoundness. Were Verizon's theories credited, Congress's historic power to take and authorize measures to preserve openness of communication networks would be unsettled and dramatically narrowed. However the Court rules on the challenges to the FCC's action here, it should vindicate that authority and explicitly repudiate Verizon's effort to "constitutionalize" matters, involving adjustment of complex, competing private and public interests, that have long and properly been understood to be for legislative and administrative resolution.

ARGUMENT

I. The Court Should Reject Verizon's Constitutional Claims

> *The minute that anyone, whether from the government or the private sector, starts to control how people access and use the Internet would be the beginning of the end of the Net as we know it….When a person accesses the Internet, he or she should be able to connect with any other person that he or she wants to[.]*
>
> – Google and Verizon Joint Submission on the Open Internet, submitted in GN Docket No. 09-191 (Jan. 14, 2010) ("Joint Submission") (Add. A-20)

> *You can install a driveway and get a fair return from the consumer for installing that driveway, but that does not give you the right to dictate to the household where they go on the highway.*
>
> –Testimony of William Barr, General Counsel, GTE, *Hearing on H.R. 1686 and H.R. 1685 Before the H. Comm. on the Judiciary*, 106th Cong. 20 (June 30, 1999) (Add A-3)

A. The FCC's Rules Do Not Implicate, Let Alone Abridge, Any "Free Speech" Right of Verizon's

What Verizon not long ago described as harkening "the end of the Net as we know it" – *i.e.*, "private … control [over] how people access and use the Internet," Joint Submission at 7, its brief now posits to be a *constitutional imperative.* According to Verizon, a rule prohibiting it and others who operate the "last mile" of the Internet from blocking their customers' access to lawful content of their choice violates its First Amendment right to "control …which speech they transmit and how they transmit it," Br. 44; is "compel[led] … speech," *id.*, akin to a law directing a newspaper what to publish, *id.* at 43.

These assertions – advanced by Verizon alone among the many broadband internet access providers who, on Verizon's theory, have suffered the same "injuries" – do not state any valid or even seriously plausible constitutional claim. On the contrary, they are at odds with common sense, with settled First Amendment law, and with legal and societal understandings that Verizon has encouraged and benefitted from.

1. Verizon Is Not Speaking When It Transmits Communications Between Edge Users and Its Internet Access Customers

Verizon's Free Speech arguments rest on an undefended and mistaken premise: that because much of the data that passes over the network Verizon operates is "speech" protected by the First Amendment, *see Reno v. ACLU*, 521 U.S. 844 (1997), Verizon's act of *transmitting* it in the course of providing its customers access to the Internet is *itself* within "the Freedom of Speech." The law is otherwise: precisely because the consequences of First Amendment protection are so significant, the Supreme Court has set a threshold to guard against clever "First Amendment" claims that "trivialize the freedom" it protects. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47, 62 (2006). "The Freedom of Speech," the Court has held, encompasses only conduct that is (1) "inherently expressive," *id.* at 64 or (2) evinces "[a]n intent to convey a particularized message' . . . that 'would be understood [as such]" by its audience. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418

U.S. 405, 410–411 (1974)). *See generally* Stuart M. Benjamin, *Transmitting, Editing, and Communicating: Determining What "The Freedom of Speech" Encompasses*, 60 Duke L.J. 1673 (2011).

Thus, in *FAIR,* the Court rejected a "Free Speech" challenge to a statute requiring law schools and other recipients of federal educational aid to host military recruiters, notwithstanding the schools' disapproval of the recruiters' views about gay and lesbian students' fitness for service. *See* 547 U.S. at 63–64. The Court held that the claim failed because the conduct "compelled" was not within "the Freedom of Speech": It was not enough that the *recruiters* were communicating a message, "because *the schools* [were] *not speaking* when they host[ed] interviews and recruiting receptions" at which the military expressed itself. *Id*. at 64 (emphasis added).

Verizon's claim here – and its resumed entitlement to heightened "First Amendment" scrutiny, Br. 45-48 – likewise fails at the threshold. There is nothing inherently expressive about transmitting others' data packets, at a subscriber's direction, over the Internet. Nor does Verizon explain what particularized message (of Verizon's) such transmission would seek or likely be understood to convey.

Indeed, the law, and Verizon itself, have long recognized a sharp distinction between providing a facility whereby someone else's speech is transmitted and expression itself. The Communications Decency Act, which was enacted as part of

the same 1996 statute on which Verizon relies to attack the Open Internet Rules here, provides that "No provider … of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c). That provision, which Verizon and other internet access providers have often invoked, builds upon longstanding common law rules precluding liability for transmission of others' unlawful content. *See*, *e.g.*, *Doe v. GTE Corp.*, 347 F.3d 655, 656, 659, 661 (7th Cir. 2003) (affirming dismissal of case against "subsidiaries of Verizon" for hosting website that featured illegally-recorded videos, explaining that the company, "like a delivery service or phone company, is an intermediary and [not] … liable for the sponsor's deeds"); David S. Ardia, *Free Speech Savior or Shield For Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of The Communications Decency Act*, 43 Loy. L.A. L. Rev. 373, 390 (2010) (explaining historic protections for "conduit intermediaries").

This same understanding animates the "safe harbor" provisions of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512. That law, whose soundness and importance Verizon emphasized in FCC proceedings related to this one, precludes "service provider" liability "for infringement of copyright by reason of [its] transmitting, routing, or providing connections" when (among other things) "the transmission is initiated and directed by an internet user." *Id.* § 512(a); *see*

Joint Submission at 3 (urging that "any policy governing the role of online intermediaries should continue to be governed by the carefully crafted compromise in the [DMCA]").

In *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003) (*RIAA*), this Court, at Verizon's urging, overturned a DMCA subpoena seeking from Verizon – which it described as "acting as a mere conduit for the transmission of information sent by others," *id.* at 1234 – the names of customers suspected of infringing copyrights. Verizon argued there that:

> The DMCA … makes clear that Internet service providers, such as Verizon, enjoy the same immunities that have traditionally applied to other entities that provide pure "transmission" or "conduit" functions.

Br., No. 03-7015, at 23. Accord *In re Charter Communications, Inc.*, 393 F.3d 771, 777 (8th Cir. 2005) (quashing subpoena on cable internet access provider, because it was "acting as a conduit"); *cf. Cartoon Network v. CSC Holdings, Inc.*, 536 F.3d 121, 132 (2d Cir. 2008) (cable system operator did not "make" unauthorized copies of copyrighted broadcasts its equipment recorded at subscribers' direction).[1]

[1] The same logic prevails in the Fourth Amendment privacy context. *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010), rejected the government's argument that the defendant's contractual relationship with an ISP, which allowed the provider to access his email for "routine" system maintenance purposes, *id.* at 286, extinguished his privacy interests in its contents. *See id.* at 287 (describing ISP as "functional equivalent" of "post office or telephone company" and noting that right was upheld in *Katz v. United States*, 389 U.S. 347 (1967)).

As *RIAA* itself illustrates, this settled understanding does not mean that laws regulating providers cannot *implicate* Free Speech. There, Verizon sought to vindicate First Amendment rights – of its *subscribers* – to communicate anonymously. *See* Verizon *RIAA* Br. at 32-40. And other decisions have invalidated government efforts to suppress disfavored speech by imposing requirements on those who transmit it. *See*, *e.g.*, *Sable Communications v. FCC*, 492 U.S. 115 (1989). But the teaching of those cases is not that the act of transmitting is itself inherently expressive, but that government may not pursue constitutionally forbidden ends through indirect regulatory means. *Cf. RAV v. St. Paul*, 505 U.S. 377 (1992) (First Amendment prohibits viewpoint-based regulation of *unprotected* "fighting words").[2] Here, of course, there is no allegation of a suspect, let alone impermissible, governmental purpose. The Open Internet Rules simply forbid providers of general-purpose broadband service from using their physical control over a portion of the Internet to interfere with transmission of content their customers lawfully seek to access for themselves.

[2] Nor does it mean that Verizon is unprotected when it does speak, *e.g.*, by posting content on its website. *Cf. C&P Tel. Co. v. United States*, 42 F.3d 181, 196 (4th Cir. 1994) (holding that telephone companies "are not members of 'the press'" when transmitting telephone calls, but had speech rights in providing video programming), *vacated as moot*, 516 U.S. 415 (1996).

2. Non-Interference Is Not "Compelled Speech"

FAIR also forecloses any argument that – whether or not transmission of data at its customers' request constitutes *its* speech – a conduit's act of *refusing* transmission must be protected, because such interference might express disagreement with the content being transmitted. The Supreme Court made clear that the mandate that law schools "host" those whose speech they disapprove did not warrant any First Amendment scrutiny – because the conduct "compelled" was not itself speech.

Indeed, Verizon's claim suffers numerous additional embarrassments. Unlike the (unsuccessful) plaintiffs in *FAIR*, who sought to exclude the military from their facilities in order to express their opposition to its discriminatory policies, Verizon does not claim that it engages or intends to engage in prohibited blocking. Its legal and public policy arguments against the Rules insist that customers would rebel against such conduct. *See* Br. 51 ("broadband providers today generally provide subscribers access to all lawful [Internet] content … and have strong economic incentives to continue to do so").

And such behavior would be less likely than that in *FAIR* to be understood to convey any intelligible message. Known instances of blocking and degrading were undertaken in ways that sought to elude detection rather than to announce the network operator's "point of view." *See In re Comcast Corp.*, 23 FCC Rcd 13028,

13032 & nn.22-24 (2008) (noting that Comcast had denied purposefully degrading service and had accomplished its aim by injecting "forged RST packets," which told "both ends to stop communicating"); *id*. at 13065 (Statement of Chairman Kevin J. Martin) ("Comcast was delaying subscribers' downloads and blocking their uploads.…Even worse, Comcast was hiding that fact by making affected users think there was a problem with their Internet connection or the application.").

But in any event, as *FAIR* makes clear, conduct does not become constitutionally-protected Free Speech every time it has an expressive motive. Were that the law, many tax evaders and copyright and trademark violators could not be punished, and every business's decision to not deal with another would be immunized if it could claim to be expressing some idea. (Indeed, the immunitywould not be limited to communications: A railroad owner might as easily express its disapproval for one side of the abortion debate by refusing to ship adherents' coal as their pamphlets). The breadth – and deficiency – of the theory becomes more apparent in light of what Verizon implies degrading or blocking might "express": its wish to disadvantage a competitor or "disapproval" of an application unwilling to pay Verizon to prioritize data packets. *See* Br. 44. If business decisions made for business reasons were constitutionally-protected Speech, every government regulation would be a presumptively unconstitutional abridgment.

3. Verizon Enjoys No Constitutionally Protected "Discretion" to Discriminate Against Internet Communications to and from its Customers

Verizon's efforts to liken its position to that of a newspaper publisher, *see Miami Herald Pub. Co. v. Tornillo,* 418 U.S. 241 (1974), or of the cable system operator in *Turner Broadcasting v. FCC*, 512 U.S. 622 (1994), *see* Br. 43, likewise blink reality. Even leaving aside salient market differences, newspaper publishers are treated as and understood to be speakers – and responsible for the content they publish. A reader of The Miami Herald – unlike one who signs up for broadband internet access – does not expect "to be able," as Verizon told the Commission, "to connect with any other person … he or she wants to," Joint Submission at 2, or be provided with unmediated *access* to "content …as diverse as human thought." *Reno*, 524 U.S. at 870 (citation omitted). Indeed, it is because newspapers "exercise … journalistic judgment as to what shall be printed." *Tornillo*, 418 U.S. at 259, that publishers are held responsible for their contents: Unlike a "provider … of an interactive computer service," 47 U.S.C. § 230(c), a "newspaper may not defend a libel suit on the ground that the falsely defamatory statements [it published] are not its own," *Pittsburgh Press Co. v. Pittsburgh Human Relations*

Comm'n, 413 U.S. 376, 386 (1973) (citing *New York Times v. Sullivan*, 379 U.S. 276, 279 (1964)).[3]

No more plausible is Verizon's claim to the mantle of the cable operators who challenged the "must carry" provisions in *Turner Broadcasting*. *Turner* did not hold that every "transmission" over a cable company's wires is protected Free Speech. Rather, the Court concluded that cable system operators can "communicate messages" either through their own "original programming or by exercising editorial discretion over which stations or programs to include in [their channel] repertoire." 512 U.S. at 636 (quotation marks omitted). *Compare Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 793 (1996) (Kennedy, J.) ("In providing public access channels under their franchise

[3] *Tornillo* implicated further fundamental First Amendment principles entirely absent here: the right-of-response law challenged there was triggered by the content and viewpoint of newspapers' editorials, and the measure's obligation was itself content-based: the newspaper was compelled to publish views about a particular subject with which it disagreed. As such, the "danger" was real that the statute would "'dampe[n] the vigor and limi[t] the variety of public debate' by deterring editors from publishing in the first place controversial political statements." *PruneYard Shopping Center v. Robbins*, 447 U.S. 74, 88 (1980) (quoting *Tornillo*, 418 U.S. at 256). By contrast, the Commission's Rules are unconcerned with the viewpoint of the transmission network owners might block or degrade.

agreements, cable operators … are not exercising their own First Amendment rights. They serve as conduits for the speech of others.").[4]

Cable systems selling pay-TV programming, unlike Verizon selling general purpose internet access, provide their subscribers with access to only a small subset of potentially available programming – and do so by means of contracts with content owners seeking audiences for their material. Thus, the rules in *Midwest Video II* could be said to have "transferred control of the content of … cable channels from cable operators to [programmers] who wish to communicate by the cable medium." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700 (1979). Here, "control" resides with the provider's *customers*; the "wish" of any edge provider to communicate with a Verizon subscriber has no purchase, absent a directive *from the customer* to access their material. *Accord Cartoon Network*, 536 F.3d at 132 (for Copyright purposes, subscribers, not cable system implementing their directions, "made" unauthorized recordings).[5]

---

[4] Contrary to Verizon's suggestion (Br. 43 n.12), *Turner* did not suggest that the conduit "function[]" is itself Speech, but noted instead that cable operators' transmissions were protected "[o]nce the[y] … selected the programming sources," 512 U.S. at 628.

[5] Nor do these user-selected applications obtain anything like a "dedicated channel" that would preclude Verizon's connecting that or any other customer to other lawful content of their choosing. The First Amendment concern that most troubled the dissenters in *Turner* was that the law specified particular speakers, local broadcasters whose programming it required be carried, notwithstanding the views and preferences of the cable systems and their customers. (Indeed, the

Indeed, briefs *Verizon* submitted to this Court and to the Supreme Court refute its central assertions here. In *NCTA v. Gulf Power*, 534 U.S. 327 (2002), Verizon explained that the statutory definitions of "cable service," *see* 47 U.S.C. §§ 522(6); 153(7), "plainly cannot encompass" "broadband internet access" – which Verizon described as a "transport service" and a "transparent conduit for content … selected by an end user and []originated by a third party." Verizon *Gulf Power* Amicus Br. at 19, 22 (Add. A-8, A-10). Congress, Verizon maintained, had ratified this Court's conclusion in *NCTA v. FCC*, 33 F.3d 66 (D.C. Cir. 1994) that "'*transmitting*' a video signal ['obviously'] implies at least choosing the signal, or originating it," *id.* at 72; Verizon explained that "once the cable operator connects customers to their ISPs, the cable operator does no selection of the information transported … Customers are in complete control of the information sent and received." Verizon *Gulf Power* Br. at 17, 21. This Court's decision, in turn, had agreed with the brief filed by Verizon's predecessor, which emphasized the fundamental distinction between "a cable television operator['s] … 'send[ing] out' programming to its subscribers, and "provid[ing[a] … platform" that merely "transport[s] (or 'carr[ies]') signals chosen and sent by multiple programmers on a

---

dissenters indicated that their Free Speech objections would be obviated had the law instead treated the plaintiffs as "common carriers," giving the government no role in directing which broadcasters would benefit, *see* 512 U.S. at 684 (O'Connor, J.).

nondiscriminatory, common carriage basis," explaining that in the latter situation,"[i]t is the programmer, not the [network operator] that 'transmits' programming." Verizon *NCTA* Br. at 15 (Add. A-14-15).

Indeed, Verizon's claims here to be speaking – or exercising editorial judgment – whenever content travels without interference over its wires is fundamentally at odds with what the company is publicly understood to be doing (and what it *says* it is doing) in providing internet access. In its early 2010 FCC submission, Verizon explicitly endorsed the Commission's "existing … principles," which prohibited blocking, describing "the minute that anyone, whether from the government or the private sector, starts to control how people access and use the Internet," as "the beginning of the end of the Net as we know it," Joint Submission at 7. Indeed, if interfering with content of which network operators disapprove (or disapprove of transmitting, unless given additional revenues) were part of providing internet access, these would be the subject of promotion and competition between providers – and there would be no reason for objecting to the FCC's requirement, *see* 47 C.F.R. § 8.3, that "network management" practices be disclosed. But Verizon and others do not compete over the quality of their content-blocking policies.

Nor, finally, does the potential that Verizon might earn greater revenues if left unregulated, *see* Br. 44, state a First Amendment concern: "One liable for a

civil damages award has less money to spend on paid political announcements…, yet no one would suggest that such liability gives rise to a valid First Amendment claim.…we have not traditionally subjected every criminal and civil sanction [to scrutiny] simply because [it] …will have some effect on the First Amendment activities of those subject to sanction." *Arcara v. Cloud Books*, *Inc.*, 478 U.S. 697, 706 (1986).

Accordingly, as in *FAIR*, there is simply no lawful basis here for the heightened judicial scrutiny applicable to genuine First Amendment claims – nor for resorting to canons that suspend ordinary interpretive deference in order to avoid confronting "serious" constitutional problems.

* * *

What Verizon invites is no mere "trivialization," but an *inversion* of the relevant principles. The claimed "Free Speech" right to interfere with users' internet activities, by virtue of Verizon's position operating the "last mile" of the Internet (operational contracts themselves acquired through valuable government licenses and benefits), is in derogation of "the policy of the United States" to "maximize user control over what information is received" over the Internet, 47 U.S.C. § 230(b)(2) & (3), and of the principle "[a]t the heart of the First Amendment…that each person should decide for himself or herself the ideas and

beliefs deserving of expression, consideration, and adherence." *Turner*, 512 U.S. at 641.

The "constitutional immunity" sought by Verizon here is no less misconceived than the similarly "strange" one the Supreme Court rebuffed decades ago:

> It would be strange indeed however if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the [regulations], here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

Associated Press v. United States, 326 U.S. 1, 20 (1945) (footnote omitted).

B. Verizon's "Takings" Claim Is Also Meritless

Verizon's efforts to enlist the Takings Clause likewise fail. Citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), Verizon insists (Br. 49) that the Open Internet Rules be adjudged a "per se" violation, on the ground that by forbidding network operators like Verizon from blocking transmissions,

they effect a "permanent physical occupation" of their property or a deprivation of their "right to exclude."

That contention is also plainly wrong. It ignores Supreme Court precedent squarely rejecting claims that laws providing for nondiscriminatory access to business premises are Takings. *See Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 261 (1964); *PruneYard*, 447 U.S. at 84 (explaining that 'the fact that [petition solicitors] may have 'physically invaded''[the owners'] property cannot be viewed as determinative," because "the owner had not exhibited an interest in excluding all persons from his property").

For reasons explained by the Second Circuit, in refusing to extend *Loretto* to a cable system owner's "must carry" transmission of a local broadcast signal, *Cablevision Sys. Corp. v. FCC*, 570 F.3d 83, 98 (2d Cir. 2009), it is doubtful there is any physical occupation here, *see id.,* and surely not the "permanent" kind to which *Loretto*'s avowedly "very narrow," 458 U.S. at 441, rule applies. *Cf.* 17 U.S.C § 512(a) (shielding those who enable "Transitory Digital Network Communications"). Unlike even in that case, where the unwelcome local broadcaster could be described as taking up "a channel" the cable system preferred to put to different use, the supposed "occupation" of Verizon's wires is neither "absolute [nor] exclusive," 570 F.3d at 98 (quoting in *Southview Associates, Ltd. v. Bongartz,* 980 F.2d 84, 94-95 (2d Cir. 1992)). *See Loretto*, 458 U.S. at 434

(distinguishing *PruneYard* on the ground that "the invasion was temporary and limited in nature").

And this Court's decision in *Building Owners & Mgrs. Ass'n Int'l v. FCC*, 254 F.3d 89 (D.C. Cir. 2001) (*BOMA*), gives further ground for rejecting Verizon's effort to stretch *Loretto*. Considering residential landlords' challenge to FCC rules requiring them to accede to tenant requests for permission to mount satellite television receiving equipment, *BOMA* reasoned that while the *cable companies* in *Loretto* (and presumably satellite providers) were uninvited "strangers," subject to the historic right to exclude, the *tenant*-subscribers were lawful occupants, whose property interests qualified the landlords'. *See* 254 F.3d at 98; a*ccord Loretto*, 458 U.S. at 439 (observing that the law before the Court did "not purport to give the *tenant* any enforceable property rights with respect to CATV installation") (emphasis original).

That reasoning controls here: having invited its *subscribers* to use its facilities to connect to the Internet (on financial and other terms Verizon proposes), Verizon does not maintain a broad property right to refuse passage to data those subscribers choose to obtain from edge providers. Indeed, the Takings claim here is far weaker than the one *BOMA* rejected: the federal regulation upheld there overrode terms in *residential leases*, whereas these Rules implicate the FCC's core jurisdiction over "all interstate and foreign communication by wire or radio," 47

U.S.C. § 152(a); they require transmission practices Verizon says it is *already* following; they involve no physical attachment; and (unlike in *Loretto* or *BOMA*) the alleged "beneficiary" is no one particular third party.[6]

Nor can Verizon satisfy the test that does govern – for the subset of "regulatory actions" claimed to be so burdensome as to be "functionally equivalent to … oust[ing] the owner from his domain," *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 539 (2005). On Verizon's own account, the FCC's action *deprives* it (and other broadband providers) of nothing: Verizon maintains that it has *not* been engaging in the kind of conduct the Open Internet Rules prohibit, and the evidence shows a significant *upswing* in infrastructure investment by those affected since their promulgation, *see* FCC Br. at 40.

Although Verizon highlights its extensive investments, it cannot show these were induced by a constitutionally-protected "expectation" that it would enjoy untrammeled power to exclude. Unlike in *Kaiser Aetna v. United States,* 444 U.S.

[6] The decision *BOMA* principally relied on, *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987), also resonates here. The plaintiff utility owners there brought a Takings challenge to the Pole Attachments Act, 47 U.S.C. § 224, maintaining that the attachments were a "physical occupation" and that the statute deprived them of their "right to exclude" cable companies unwilling to pay their full rate, however high that rate might exceed the owners' costs. (The challengers did not have the temerity to advance a "First Amendment" claim). The Supreme Court saw the implications of accepting that argument: almost any land use regulation (and many other economic regulations) could be described as "requiring" the regulated party to forfeit a right to "exclude" those willing to do business on reasonable terms – but not the terms the business prefers. *See* 480 U.S. at 252.

164, 176 (1979), where the consequence of the property owner's investments was a radical alteration of its rights vis-à-vis the general public, Verizon's actions (including its investments) in the wireless spectrum occur with the explicit understanding that *the United States* "maintain[s]… control … over all the channels of radio transmission," 47 U.S.C. § 301, and that the FCC has power, *inter alia*, to impose new conditions on existing licenses, *id*. § 316.

Any "expectation" by *wireline* internet access providers that they would be free to block could only date to 2005, when the Supreme Court decided *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, and the FCC issued its deregulatory *Wireline Broadband Order*, 20 FCC Rcd 14853 (2005). But *Brand X* highlighted the Commission's power to reverse course in the future, 545 U.S. at 981 (as well as its "freed[om]" to regulate under its "Title I" jurisdiction, *id*. at 996) and the Order was issued the same day as the *Internet Policy Statement*, 20 FCC Rcd 14986 (2005), which confirmed consumers' right to "access the lawful Internet content of their choice" and to "run applications and use services of their choice," *Id*. at 14987-14988. *See* Joint Submission at 7 (endorsing these "existing … principles"). Verizon's only real claim is that it is being "deprived" of hoped-for future revenues. But "[n]o person has a vested interest in any rule of law, entitling

him to insist that it shall remain unchanged for his benefit." *New York Cent. R.R. v. White,* 243 U.S. 188, 198 (1917).[7]

Finally, if there were any "Taking" here – itself a radical and unserious proposition – it would not be an *uncompensated* one. Verizon can and does collect revenues from its internet access subscribers, who cause any less-welcome applications or content to travel over Verizon's wires. Indeed, the Rules make explicit that providers may charge fees based on the *amount* of bandwidth they use, Order ¶72, and impose no limit on those fees.

II. The Court Should Reject, Not Postpone Decision of, the Constitutional Claims and Affirm Congress's Authority to Enact Communications Law

A. Verizon's Arguments Would Create a Sweeping Immunity To Forms of Regulation Long Recognized as Constitutionally Unproblematic

Verizon's efforts to transmogrify qualified property interests into categorical "Free Speech" rights warrant rejection not only because they are doctrinally wrong, but also because they disregard and threaten to disrupt settled understandings of Congress's power to regulate (and authorize regulation) in this

[7] Basic features of the Internet medium make Verizon's claim especially untenable. Unlike with communication using earlier technologies, Verizon does not provide all the inputs or even the physical infrastructure used in an internet communication; other facilities and much open-source software are required, and Verizon's customers pay it for access to a broad realm of services, functions, and information that Verizon does not generate, own or control.

field. Verizon's claims – that a network operator's transmission of its customers' communication is its speech and therefore potentially "compelled" speech (or a "per se" Taking) and that simple nondiscrimination obligations are presumptively unconstitutional incursions on its "editorial discretion" – draw into question historic pillars of communications law, as well as more recent innovations, and they would place beyond legislative and administrative resolution complex matters that have been, and should be, addressed through study, the application of accumulated expertise, and open deliberation.

Because this sort of distortion is especially serious in a field whose "dominant characteristic" remains "the rapid pace of its unfolding," *National Broadcasting Co. v. United States,* 319 U.S. 190, 219 (1943), it is important that Verizon's errors here be explicitly rejected, and Congress's "constitutional authority and … institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by … new technology," *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984), vindicated.

Beginning with its first regulation of telephone and telegraph network operators as "common carriers," Congress has, in the interests of promoting competition, protecting the people who use networks to communicate, and safeguarding their access to a multiplicity of voices, exercised its jurisdiction under the Commerce Clause to impose (and authorize the FCC to impose) access and

nondiscrimination requirements much *more* far-reaching than the modest ones at issue here. There is nothing in the First Amendment theories Verizon presents here that would exclude these measures from invalidation. If transmission of data to which any network facility operator objects (or on terms the facility owner would prefer not to accept) is "compelled speech," then so too would be Congress's and the FCC's longstanding requirements that Verizon and other telephone companies route calls between those whose views Verizon disapproves (*e.g.*, between business competitors or unions organizing Verizon workers) or at "reasonable" rates lower than Verizon might otherwise charge.

To be sure, Congress and the FCC have, over time, moved away from imposing the all-encompassing regulation associated with the historic "common carrier" model, but such decisions have been rooted in judgments of policy, not dawning doubts as to constitutional *authority*, let alone "First Amendment" limitations of the sort Verizon proposes. *See* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 Colum. L. Rev. 1323 (1998). Indeed, measures and strategies that Congress and the Commission have increasingly adopted in place of full common carrier regulation would themselves be subject to the same "constitutional" objections.

The Telecommunications Act of 1996, for example, required incumbent local exchange carriers to provide access to elements of their local networks to

competitors at unbundled, regulated rates, *see* 47 U.S.C. § 251(c)(3). Although these complex provisions provoked ample litigation (including constitutional claims), no court perceived that obligations to permit another party's calls to pass over an incumbent phone company's lines as raising any plausible "compelled speech" concern.

As noted above, Congress enacted legislation requiring power companies to open their utility poles to cable companies on reasonable terms – a right later extended to wireless carriers like Verizon (and MetroPCS), *see Gulf Power*, 534 U.S. at 340. That law responded to utilities' history of using their control over facilities "essential" to cable and wireless service to extract artificially high rents. *Id.*at 330. *See also* Amicus Br., Wireless Communications Ass'n, Int'l, in No. 00-832 at 9 ("Just as with wireline carriers, … providers of wireless services … depend upon access to the utilities' poles, ducts, conduits, and rights-of-way to provide the congressionally-desired competition."). Although the utilities mounted and lost a Takings challenge, they did not claim that limiting their right to set prices impinged on "editorial discretion."

Congress also gave cable system operators (and later satellite ones) a statutory copyright license, *see* 17 U.S.C. §§ 111(c), 119, allowing them to transmit copyrighted programming (notwithstanding the originator's "constitutional" right not to speak, *cf. CBS Broad., Inc. v. EchoStar*

Communications Corp., 265 F.3d 1193, 1208 (11th Cir. 2001) (rejecting as "wholly without merit" satellite provider's claim that First Amendment entitled it to a *broader* license), and, as noted, satellite customers were given the right to install receiving equipment over their landlords' objections. *See BOMA*, 254 F.3d 89.

More recently, smaller wireless providers such as appellant Metro/PCS have persuaded the FCC to mandate interconnection through "roaming" requirements, so that first voice transmissions and, more recently, data ones, will be handled whenever a customer travels outside his provider's service area. *See* 22 FCC Rcd 15817 (2007); 26 FCC Rcd 5411 (2011). *See also* Verizon Br. 1 (noting MetroPCS's disavowal of Verizon's takings and common carriage arguments).

Decisions whether to impose these and other access and nondiscrimination obligations – up to and including common carrier ones – have reflected difficult predictive judgments about the extent of competition and the magnitude and imminence of threats; competing economic interests and expectations of regulated parties; and disagreement over the importance of particular public values and how these should be advanced. And incumbents have, unsurprisingly, maintained that regulatory measures were not needed or counterproductive. So, too here: some commentators, members of the Commission, and legislators have argued that even the modest Open Internet requirements are unwise or premature; others, including

some *Amici*, have favored applying some – or all – of the "common carrier" duties to broadband internet access providers, highlighting both similarities to industries and technologies historically so regulated as well as characteristics specific to the Internet that make openness especially important. *See, e.g.,* Susan P. Crawford, *Transporting Communications*, 89 B.U. L. Rev. 871, 877–886 (2009),

But debates about the wisdom of particular policies for particular communications media have properly been conducted on their merits, free of Verizon's distorting premise here: that the *First Amendment* imposes stringent limits on Congress's power to authorize access, nondiscrimination, or even full common carrier duties – or that "common carrier" regulation is, as a *constitutional* matter, limited to the monopolies or, even more narrowly, to the historic Bell System monopoly.[8]

Indeed, the costs of constitutionalizing policy questions like those here would be far-reaching: The "strict scrutiny" Verizon briefly advocates (Br. 45 & n.13) entails reviewing every enactment with a presumption of unconstitutionality, and the ostensibly "modest" "avoidance" canon, Br. 41, authorizes courts to reject legislatively-intended constructions of statutes in favor of minimally plausible

[8] While mature threats to competition can be important reasons for impositing antidiscrimination or equal access obligations, they are not constitutionally-required prerequisites. *See*, *e.g.*, *Heart of Atlanta Motel*, 379 U.S. at 257-58.

ones, and strips administrative bodies of the deference to which they are normally entitled by virtue of expertise and their place in the Constitution's lawmaking process.

B. Verizon's Position Here Contradicts Its Own Repeated Arguments Before Congress, the Courts and the FCC.

The extent of the departure from long-accepted understandings Verizon invites can be seen by contrasting the contentions in Verizon's brief here with specific ones it (and corporate predecessors) advanced – in a many-year effort to persuade courts that Congress *had* imposed common carrier obligations on cable internet access providers, and to persuade Congress to enact legislation imposing those duties unequivocally, denying the FCC any authority to forbear.

Far from seeing any constitutional limitation on Congress's power, William Barr, General Counsel of Verizon's predecessor, GTE, emphasized in congressional testimony that the "choice" to impose common carrier duties was one that could (and should *"be made"*) by Congress. *See* Add. A-2. While recognizing that "[h]igh-speed Internet access will become the most important communications medium in the country," his testimony emphasized that "the fundamental issue" facing Congress was the same as "for all telecommunications[:] how to allow the consumer to communicate with and obtain information from anyone anywhere in the world," and that the threats to that objective likewise were familiar. Summoning "bitter experience over the twentieth

century," when "large corporations came to leverage [their control over] …a large percentage of the local pipelines into the home" to "forc[e] the consumer to do business only with companies affiliated with the owner of the pipeline," he described cable companies' practices of providing "a lower-quality connection" and "limit[ing] video streaming over the Internet" as "discrimination pure and simple" and impermissibly "insulat[ing] their own television product from competition." Add.. A-2-4.

The necessary response, Verizon told Congress, was to apply "central tenet of ... telecommunications [regulation]" and impose "a simple legal mandate that cable operators deliver traffic on an open and nondiscriminatory basis to other ISPs." Add, A-3. This "open access" common carrier treatment, his testimony continued (*id*.):

> is not regulation of the Internet, as some opponents suggest, but simply ensures access to the Internet and Internet interconnection to guarantee competition on the Internet and freedom of choice for the consumer…
>
> The right to install a driveway and get a fair return from the consumer for installing that driveway, but that does not give you the right to dictate to the household where they go on the highway.[9]

[9] Mr. Barr's successor, Thomas J. Tauke, testified in favor of the same measures the following year, announcing that the need for "congressional action [had become] even more urgent." H. Jud. Comm. Hearing (June 28, 2000). Add. A-5.

During that same time period, Verizon sought, repeatedly, to persuade the Commission and the courts that Congress had *already* required common carrier treatment. Its Supreme Court amicus brief in *Gulf Power* explained that:

These reversals call to mind a recent submission in which Verizon, urging the Commission not to reverse course on its classification of broadband internet service, warned the FCC of courts' antipathy to instances "'[w]here a party assumes a certain position in a legal proceeding, . . . succeeds in maintaining that position, . . . [and then,] simply because his interests have changed, assume[s] a contrary position." Comments, Dkt. GN 10-127 at 39 (citations omitted) (Add. A-23-24). But we do not invoke such reversals (as Verizon did) in service of a plea for judicial estoppel. On the contrary, we believe it would be far preferable that the Court consider – and reject – Verizon's claims on their merits and find it unsurprising (and not necessarily unsavory) that an enterprise that aggressively sought access and nondiscrimination obligations when a market outsider would, having become a dominant insider, take a different stance. But this record of dramatic reversals *does* reinforce the need to guard against – and actively

---

> cable modem service "consists of two elements: a 'pipeline' … and the Internet service transmitted through that pipeline." To the extent that a cable operator makes available the service of an affiliated or exclusive ISP, its activities are that of an information service. However, to the extent that a cable operator provides its "subscribers Internet transmission over [a] cable broadband facility," it is "providing a telecommunications service as defined in the Communications Act."

Br. at 22-23 (quoting *AT&T v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000)). (Add. A-7).

discourage – efforts to cloak matters of policy and economic interest in "constitutional" garb.

CONCLUSION

The Court should expressly repudiate Verizon's baseless constitutional claims.

Respectfully submitted,

/s/ Sean H. Donahue
Sean H. Donahue
Donahue & Goldberg, LLP
2000 L St., N.W., Suite 808
Washington, D.C. 20036
(202) 277-7085
sean@donahuegoldberg.com

David T. Goldberg
Donahue & Goldberg, LLP
99 Hudson St., 8th Floor
New York, NY 10013
(212) 334-8813

November 2012

ADDENDUM

TABLE OF CONTENTS

DESCRIPTION OF AMICI

Reed Hundt served from 1993 to 1997 as Chairman of the FCC. He is currently the chair of the Aspen Institute's International Digital Economy Accords (IDEA) Project. A graduate of Yale College and the Yale Law School, he is the author of three books, including *You Say You Want a Revolution* (2000) and *In China's Shadow* (2006) as well as a recent e-book, *The Politics of Abundance* (2012).

Tyrone Brown was FCC Commissioner from 1977 to 1981. His career includes service in all three branches of government, beginning as a law clerk to Chief Justice Earl Warren. His diverse telecommunications experience includes stints in academia, as a business executive, as an attorney in private practice, representing Black Entertainment Television and other major media companies, and as President of the nonprofit Media Access Project.

Michael Copps served two terms as FCC Commissioner, including six months as the Commission's Acting Chairman, before stepping down in 2012. Prior to joining the FCC, he was Assistant Secretary of Commerce for Trade Development and served for over a dozen years as Chief of Staff for Senator Ernest Hollings (D-SC). He has also held positions at a Fortune 500 company and at a major trade association.

Nicholas Johnson served as an FCC Commissioner from 1966 to 1973. He currently teaches at the University of Iowa College of Law. The recipient of three Presidential appointments, Johnson is the author of several books and has also served as a public television host, columnist, school board member, congressional candidate, Supreme Court law clerk, public interest advocate, administrator, manager and corporate representative.

Susan Crawford served as a Special Assistant to the President for Science, Technology, and Innovation Policy in 2009. From 2005 to 2008, she was on the Board of the Internet Corporation for Assigned Names and Numbers (ICANN). She is currently the Visiting Stanton Professor of the First Amendment at Harvard's Kennedy School of Government and a Visiting Professor at Harvard Law School.

The National Association of Telecommunications Officers and Advisors (NATOA) is a national trade association, founded in 1980, that promotes local government interests in communications, and serves as a resource for local officials as they seek to promote communications infrastructure development. NATOA's members include municipalities of all sizes, elected and appointed officials, and a broad range of technical professionals.

INTERNET FREEDOM ACT AND INTERNET GROWTH AND DEVELOPMENT ACT OF 1999

HEARING BEFORE THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES, ONE HUNDRED SIXTH CONGRESS, FIRST SESSION ON H.R. 1686 and H.R. 1685, pp. 50-55 (JUNE 30, 1999) (Serial No. 46)

PREPARED STATEMENT OF WILLIAM BARR, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, GTE CORPORATION, WASHINGTON, DC

Thank you, Mr. Chairman, for the opportunity to testify before the Committee. I am Bill Barr, Executive Vice President and General Counsel for GTE.

Within the near future, high-speed or broadband Internet access will become the most important communications medium in the country. As a result, the Internet soon will become central not only to our economic vitality, but to our communal life. It will be the public commons, a forum for ideas, a marketplace, a medium of entertainment, a vast public library, and the primary means for the dissemination of news, opinion, and information.

The Internet market currently suffers, however, from severe constraints on competition caused by *ad hoc* and irrational government regulation that has been lifted from the telephone and cable television markets and haphazardly applied to the very different Internet market.

First, existing law prevents one set of competitors—local telephone companies—from competing freely in the Internet market, thus insulating cable companies from full competition.

Second, exploiting their insulation from full competition, cable companies are engaged in a classic anticompetitive tactic—tying their services together, which permits cable companies to leverage control from one market into others. Specifically, AT&T and the cable giants are requiring consumers who want broadband access transport also to purchase the cable company's affiliated ISP instead of the ISP of the consumer's choice.

The bills introduced by Congressmen Goodlatte and Boucher deal directly with these problems and are highly pro-competitive. The bills would break down the existing barriers to telephone company competition and simultaneously prevent improper cable company leveraging—and thus would ensure free, equal, and open competition on the Internet, which would greatly benefit consumers.

First, the bills would allow the local telephone companies, including the Bell companies, to compete freely in the Internet transport markets. I want to stress, however, that the bills would not in any way remove the requirements on the Bell companies to open their local telephone markets to competition in order to enter the long-distance phone market, but would simply free them to participate fully in the Internet market. *Second*, the bills would prohibit the cable companies' current anticompetitive practice of tying and would impose open-access requirements on all broadband access transport providers, cable companies and telephone companies alike.

I. GUARANTEEING OPEN ACCESS AND FREEDOM OF CHOICE

Let me turn first to open access.

The principle of open access is not newly minted: It has been the central tenet of the telecommunications industry for the last 15 years. The notion has been a simple one: You can install a driveway and get a fair return from the consumer for installing that driveway, but that does not give you the right to dictate to the household where they go on the highway.

That fundamental principle has been applied to open up the telephone markets and to protect independent programming in the video market.

That's why consumers today can choose their long-distance carrier. It's not dictated by the local company. Consumers have a choice. That's open access.

That's why cable company operators are not allowed to favor video programmers owned by the cable company in providing cable television service.

And that's also why consumers have a choice today when they use the telephone line to get to the Internet. They can choose their ISP—whether America Online or GTE Internetworking or Mindspring or one of the other ISPs in operation. Again, open access.

This policy of open access was not dreamed up in some utopian classroom. Rather, it is the product of bitter experience over the twentieth century. Twice in this century, large corporations successfully came to dominate key parts of the telecommunications industry through a simple two-step strategy. First, buy up a large percentage of the local pipelines into the home. Second, close off consumer access to any other provider of services—forcing the consumer to do business only with companies affiliated with the owner of the pipeline into the home.

In the first decade of this century, as the newborn telephone industry was exploding, AT&T bought up the bulk of local exchanges and forced its consumers to choose AT&T as the long-distance provider. Competition quickly withered away, and AT&T succeeded in establishing its monopoly.

Similarly, in the 1980s, cable companies used their control over cable access to try to take over video programming and content. The cable companies used their ownership of the wire to get a piece of the action on content and to require that content providers be affiliated. The Congress finally took steps to curb this practice in 1992 and require nondiscriminatory access.

In both of these cases, regulators *eventually* stepped in and required open and equal access. But the key point is that the regulators stepped in only *after* the damage had been done—*after* competition had been thwarted. Through a series of regulatory devices over the past 15 years, regulators have been struggling to recreate competition and to return to open access principles in these markets.

It's therefore ironic that the same companies that tried these tactics earlier—AT&T and the cable giants—are now combining into one huge firm and putting the same tactics into effect to try to dominate the Internet, which is the telecommunications marketplace of the 21st century. AT&T is buying a large percentage of high-speed Internet lines into the home and is also seeking to close off the consumer's ability to choose any ISP other than one controlled by AT&T.

Many cable companies, in offering Internet access, are compelling their customers to sign up for, pay for, and use their ISPs if they want to use a cable modem. Basically, customers do not have a choice. If they obtain cable modem service, they must choose the cable company's ISP.

The cable companies are enforcing their lock on the customer with three penalties. First, they are telling customers who want to use another ISP that they still have to pay for the cable company's ISP—in other words, a consumer who wants choice has to pay twice.

Second, beyond this financial penalty, they impose a performance penalty. They provide a direct connection to their own ISP, but the traffic of customers who want to reach another ISP travels on the public Internet, leading to a lower-quality connection. This is discrimination pure and simple.

Finally, by making customers go through their ISP, the cable companies can block competitive products from reaching their customers. A perfect example is the cable companies' anticompetitive limit on video streaming over the Internet—a restriction obviously designed to insulate their own television product from competition.

All that is required to end the cable companies' current monopoly leveraging is a simple legal mandate that cable operators deliver traffic on an open and nondiscriminatory basis to other ISPs. The bills offered by Congressmen Goodlatte and Boucher would accomplish that goal and thus would greatly promote competition and consumer choice.

Cable companies respond that, regardless of the policy justifications, it is not technically feasible for them to provide open access to other ISPs. But GTE has proved just the opposite in trials recently conducted in Clearwater, Florida. Open access to the cable system is technically feasible.

Open access is not regulation *of the Internet*, as some opponents suggest, but simply ensures *access to the Internet* and Internet *interconnection*to guarantee competition on the Internet and freedom of choice for the consumer. The principle of open access is a free-market principle that if imposed now, will avoid the need for truly massive regulation later. In that regard, recall that the Telecom Act of 1996 was largely necessary because of the failure to impose open-access requirements at the dawn of a previous communications medium: the telephone.

The policy of open access thus not only is necessary, but is necessary *now*. Those who are taking a ''wait and see'' attitude with respect to open access to the Internet are wrong. Once a firm gets a head start in closing off competition—as AT&T is attempting to do in the Internet access and ISP markets—the results can take years to undo. In fast-growing, network industries, anticompetitive tactics can lead to disastrous results very quickly. It is therefore imperative for legislators and regulators to act now to ensure open access.

PREPARED TESTIMONY OF THOMAS J. TAUKE SENIOR VICE PRESIDENT, VERIZON COMMUNICATIONS BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY - SUBJECT - H.R. 1686 -- THE "INTERNET FREEDOM ACT" AND H.R. 1685 -- THE "INTERNET GROWTH AND DEVELOPMENT ACT" (July 18, 2000)

Thank you, Mr. Chairman, for the opportunity to testify before the Committee. I am Tom Tauke, Senior Vice President for Public Policy and External Affairs of Verizon Communications, the new company formed by the merger of Bell Atlantic and GTE.

Last year, Bill Barr of GTE, one of our predecessor companies, urged you to quickly pass these bills. Nothing has changed in those 13 months to make passage any less important. In fact, recent developments demonstrate that Congressional action is even more urgent.

[* * * *]

Second, exploiting their insulation from full competition, some cable companies are engaged in a classic anticompetitive tactic -- tying their services together, which permits cable companies to leverage control from one market into others. Specifically, AT&T and other cable giants are denying access to other providers and requiring consumers who also want broadband access to purchase the cable company's affiliated ISP instead of the ISP of the consumer's choice.

Verizon supports open access. The principle of open access is nothing new: It has been the central tenet of the telecommunications industry for more than 15 years. That fundamental principle has been applied to open up the telephone markets and to protect independent programming in the video market.

That's why consumers today can choose their long-distance carrier. It's not dictated by the local company. Consumers have a choice. That's open access.

That's why cable company operators are not allowed to favor video programmers owned by the cable company in providing cable television service.

And that's also why consumers have a choice today when they use the telephone line to get to the Internet. They can choose their ISP -- whether America Online or Verizon.net or Mindspring or one of the other ISPs in operation. Again, open access.

We support the open access requirements for all providers.

Recent legal developments take a major step in the direction of open access. A resounding victory in the fight for open access was won just last month when the U.S. Court of Appeals for the Ninth Circuit ruled that AT&T provides a "telecommunications service" -- not a "cable service" -- when it provides high-speed Internet service over its cable lines. 1 While AT&T won on its narrow claim that the City of Portland did not have authority to impose open access (because the City had acted only pursuant to its authority to regulate cable services), it lost a much bigger battle. As the Ninth Circuit held, the principles of nondiscrimination and interconnection that apply to common carriers of telecommunications apply fully to cable broadband because it is a telecommunications service.

What this means is that AT&T and other providers of cable broadband service, by force of existing law and without any further action from the FCC, are now subject to open access obligations in all the States in the Ninth Circuit. In particular, providers of cable broadband service must "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers" (section 251(a)(1) of the Communications Act) and must furnish their services to everyone (including unaffiliated ISPs) on request and without discrimination (sections 201 and 202).

The open access war, however, is far from over. The issue decided by the Ninth Circuit remains to be addressed and decided in other circuits. We, of course, have never advocated a state-by-state, circuit-by-circuit, or other fragmented treatment of open access, believing that a national open access approach of the sort contained in these bills to be the proper public policy outcome.

In light of the Portland decision, the FCC has indicated that it will open a proceeding regarding the appropriate regulatory treatment of cable Internet access. While we welcome this action, there are very significant dangers. First, the FCC could succumb to further delay, which only allows ISPs affiliated with cable operators to lock up market share and lock out independent ISP in the interim. Second, and perhaps more important, we expect AT&T and other cable broadband providers to ask the FCC to forbear from applying to them the provisions of the Communications Act that effectively impose open access on them. But it would be patently unreasonable for the FCC to forbear from applying these provisions to cable broadband providers without also forbearing from applying them to DSL providers. Cable broadband, after all, is the market leader. Congress must, therefore, be vigilant to ensure that the FCC does not try to use its forbearance authority to exercise such arbitrary discrimination.

Some of the opponents of open access claim that open access is "regulation of the Internet." This is dead wrong. It is simply access to the Internet and Internet interconnections to guarantee competition on the Internet and freedom of choice for the consumer. The principle of open access is a free-market principle that if imposed now, will avoid the need for truly massive regulation later.

The Internet has already become central not only to our economic vitality, but also to our communal life. High-speed Internet access will become the most important communications medium in the country. In the end, the fundamental issue with respect to the Internet, as with all telecommunications, is how to allow the consumer to communicate with and obtain information from anyone anywhere in the world. There are only two ways this can occur: either monopoly control of the entire network of wires and connections, or a network of networks governed by principles of interconnection, open access, and free competition. The choice between those two approaches for the Internet is now before us. The choice must be made, and inaction itself will be a choice. Will Congress side with AT&T and the other cable giants and allow a replay of the 20th century this time in the Internet market rather than the telephone market? Or will the Congress heed the lessons of history and ensure free competition by all?

Thank you.

BRIEF FOR THE UNITED STATES TELECOM ASSOCIATION AND VERIZON COMMUNICATIONS AS AMICI CURIAE IN SUPPORT OF REVERSAL, National Cable Television Ass'n, Inc. v. Gulf Power Co., 2001 WL 345191 (U.S.) (April 6, 2001)

Pages 16-24:

***16** B. Cable-Delivered High-Speed Internet Access Includes The Provision Of A Telecommunications Service

The Communications Act sharply distinguishes three categories of services provided by wire: telecommunications services, cable services, and information services. See 47 U.S.C. § 153(7) (cable service), (20) (information service), (43) (telecommunications), (46) (telecommunications service); see also 47 U.S.C. § 541(b) (distinguishing cable service from telecommunications services); In re Federal-State Joint Board on Universal Service, Report to Congress, CC Docket No. 96-45, 13 FCC Rcd 11,830, at ¶ 39 (Apr. 10, 1998) (explaining that "telecommunications services" and "information services" are "mutually exclusive") ["FCC Report to Congress "]. The Commission's orders applying these statutory definitions compel the conclusion that a cable operator's offering of high-speed Internet access includes a separate "telecommunications service" and, at a minimum, is not solely a "cable service" or "information service." Accordingly, Section 224(e) applies to the dual-use attachments at issue in these cases.

1. The Communications Act defines a "telecommunications service" as a service, offered "for a fee directly to the public," and "regardless of the facilities used," that provides "transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received." 47 U.S.C. §§ 153(43) & (46). Telephone service is the archetypal example of a telecommunications service because it allows users to direct unedited voice communications to other individuals. Cable operators are providing just such a service when they provide customers-members of the public served for a fee-high-speed Internet access, which includes unedited transport of information between the customers' homes and an ISP's point of presence (which in turn connects the customers to the Internet).

***17** Thus, once the cable operator connects customers to their ISPs, the cable operator does no selection of the information transported between the customers' homes and the ISPs' facilities. Customers are in complete control of the information sent and received over the wires connecting their homes, through poles, ducts, conduits, and rights of way, with the ISPs and the Internet beyond. Cable operators transport information "of the user's choosing" when delivering e-mail, for example, or conveying data that a user sends to or receives from an Internet site (through the ISPs' facilities)- when reading judicial opinions on-line, purchasing a book on Amazon.com, bidding in an electronic auction on eBay, or participating in a chat-room discussion hosted by America Online. As the National Cable Television Association has explained, "[c]able modem service guarantees subscribers an open environment through which they can reach any content available on the World Wide Web." NCTA Comments at 39.

The FCC's own precedents compel the conclusion that cable operators are offering a telecommunications service when they provide high-speed Internet access over their cable wires. The FCC has repeatedly concluded that DSL service is a telecommunications service. See *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, CC Docket No. 98-147, 15 FCC Rcd 385, at ¶ 9 (Dec. 23, 1999) ("we reaffirm our prior conclusion that xDSL-based advanced services constitute telecommunications services");

In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order, CC Docket No. 98-147, 13 FCC Rcd 24,012, at ¶ 36 (Aug. 7, 1998) [*Advanced Services Order*] (telephone companies are offering "a variety of services in which they use xDSL technology … to provide members of the public with a transparent, unenhanced transmission path"); see also *AT&T Corp. v. City of Portland*, 216 F.3d 871, 879 (9th Cir. 2000) ("the FCC regulates DSL service, a high-speed competitor to cable broadband, as an ***18** advanced telecommunications service subject to common carrier obligations"). Cable-delivered high-speed Internet access includes a transparent high-speed transport service that directly competes with and is functionally indistinguishable from DSL service. As the FCC has stated, "if the same type of Internet access service is offered over cable systems as well as telephone networks, it is not readily apparent why the classification of the service should vary with the facilities used to provide the service." Brief of the FCC as Amicus Curiae, *City of Portland*, 2000 U.S. App. LEXIS 14383, at 25 (9th Cir.; filed Aug. 16, 1999).

Under the statutory definitions, it makes no difference whether the service uses coaxial cable, optical fiber, or copper wire. The Communications Act definition of "telecommunications service" expressly states that the term applies "regardless of the facilities used." 47 U.S.C. § 153(46). The FCC, for its part, has recognized "Congress's direction that the classification of a provider should not depend on the type of facilities used," adding: a "telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure." FCC Report to Congress at ¶ 59. That conclusion is reinforced by the medium-neutrality policy embodied in the specific statutory provision promoting the deployment of "advanced telecommunications capability" (Telecommunications Act of 1996, § 706, 110 Stat. 153; 47 U.S.C. § 157 note), which is expressly defined "without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." Id. § 706(c)(1) (emphasis added). Cable-offered high-speed Internet access service, like DSL service, is an example of such advanced services. See Second Advanced Services Report at ¶ 18.

***19** The Telecommunications Act's repeated policy of neutrality among Internet access technologies thus requires classification of cable-delivered high-speed Internet access as a "telecommunications service." Because DSL and cable broadband services are competitively indistinguishable, and because the Act admits no distinction based on the facilities used, cable-delivered broadband a fortiori constitutes a telecommunications service. The Ninth Circuit recently confirmed this conclusion, holding that cable operators, by offering their subscribers "Internet transmission over [a] cable broadband facility," are "providing a telecommunications service as defined in the Communications Act." *City of Portland*, 216 F.3d at 878; see also *id.* ("The Communications Act includes cable broadband transmission as one of the 'telecommunications services' a cable operator may provide over its cable system.").

2. Cable operators offering high-speed Internet access are not offering what is "solely" a "cable service." § 224(d)(3). The Communications Act defines a "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6); see 47 U.S.C. § 153(7) (adopting Section 522(6) definition for Communications Act as a whole). Whatever that definition could encompass, it plainly cannot encompass the transparent transport service

connecting a customer to an ISP of the customers' own choosing, without editorial interference by the cable operator. That service does not involve the cable operator's "programming" at all. For that reason alone, cable-offered high-speed Internet access service is, at a minimum, not "solely" a cable service.

Although that is enough to render Section 224(d) inapplicable, it is also clear that, even when the ISP service itself is considered, cable-delivered high-speed Internet ***20** access is not "cable service." ISP service is in no way limited to "video programming," which encompasses only "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20). As the FCC has concluded, "Internet access service generally consists of numerous distinct and related elements, such as access to personal, educational, informational, and commercial web sites; the ability to send and receive electronic mail; access to streamed video content; Internet video messaging and conferencing; and a host of other services both realized and forthcoming." *In re Internet Ventures, Inc*., Memorandum Opinion and Order, File No. CSR-5407-L, 15 FCC Rcd 3247, at ¶13 (Feb. 18, 2000). ISP service, with its numerous services in no way "comparable" to traditional video programming, falls outside the definition of "video programming … contemplated by … the Communications Act." Id. ¶ 12.

Nor can the ISP-service part of high-speed Internet access over cable facilities constitute an "other programming service," which is limited to "information that a cable operator makes available to all subscribers generally." 47 U.S.C. § 522(14). Cable operators, insofar as they provide access to the Internet, enable their broadband customers to acquire a wide range of information that is not "available to all subscribers generally." A cable broadband customer is able to access e-mail that is written for, and delivered to, that customer alone. Such a customer is free to create and access a unique home page on a "portal" such as Yahoo!-a page that includes content organized in a format dictated and seen exclusively by that customer. A cable broadband customer can establish a specific identity with electronic merchants, such as Amazon.com, and as a result receive personalized content when accessing such merchant sites. In at least these ways, cable-delivered broadband access provides each customer exclusive use of personal information that the cable ***21** operator does not make available to all of its subscribers. And such access is plainly not limited to "one-way" transmission, as the "cable service" definition requires. 47 U.S.C. § 522(6)(A). The Ninth Circuit summarized these basic differences:

> Internet access is not one-way and general, but interactive and individual beyond the "subscriber interaction" contemplated by the statute. Accessing Web pages, navigating the Web's hypertext links, corresponding via e-mail, and participating in live chat groups involve two-way communication unmatched by the act of electing to receive a one way transmission of cable or pay-per-view television programming.

City of Portland, 216 F.3d at 876. The two-way interactivity and customizing made inherent in use of the Internet disqualifies ISP service from being "cable service."5 See Pet. App. 28a-29a.

In addition, the requirement that it is the cable operator who must be engaged in the "transmission" of a "programming service," along with the "subscriber interaction" needed to select or use such programming, takes ISP service-not all services providing information, but Internet-access service-outside the definition of "cable service." Before the 1996 Act, in *National Cable Television Ass'n v. FCC*, 33 F.3d 66 (D.C. Cir. 1994), the D.C. Circuit, relying on the "transmission" language as it had long been used in the cable provisions, upheld the

Commission's interpretation of "cable service" as not covering a ***22** "transparent conduit" for content-even traditional video content-that is selected by an end user and that is originated by a third party, not by the cable operator. *Id*. at 71; see *id*. at 71-72 (going beyond deference to Commission, citing "[c]ommon usage," and concluding that it is "obvious" that " 'transmitting' a video signal implies at least choosing the signal, or originating it"). Congress, in amending the definition of "cable service" in 1996, did nothing to alter that interpretation.6 An ISP service by cable operators-insofar as it provides transparent unedited access to the Internet (rather than its own proprietary content)-is not a "cable service" for that reason.

3. Finally, cable-delivered high-speed Internet access does not fall within the Communications Act's definition of an "information service": "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). Cable operators, of course, like DSL-providing telephone companies, may offer customers an ISP service, which is an "information service." See FCC Report to Congress at ¶¶ 33-52, 66. But they provide that service along with their telecommunications service, and, as the Commission's orders establish, the two services are statutorily distinct and cannot be conflated. The ***23** Commission concluded when classifying DSL as a "telecommunications service": an "end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: the first service is a telecommunications service (e.g., the enhanced xDSL-enabled transmission path), and the second service is an information service, in this case Internet access." *Advanced Services Order* at ¶ 36. So, too, customers of cable operators, which have configured their cable Internet service to allow bypassing of the content and services offered by their affiliated ISPs, receive, at the least, a "transparent, unenhanced, transmission path" to independent ISPs. *Id*. The Eleventh Circuit's cursory analysis of this issue breaks down precisely because, in speaking simply of "Internet service" (Pet. App. 26a, 31a), it fails to differentiate between the two components of cable Internet service-a telecommunications service delivered over wires attached to poles, ducts, conduits, and rights of way, and an information service provided by the cable operator's affiliated Internet service provider.

The Ninth Circuit's analysis in *City of Portland* confirms the FCC precedents. As the Ninth Circuit concluded, cable modem service "consists of two elements: a 'pipeline' … and the Internet service transmitted through that pipeline." *City of Portland*, 216 F.3d at 878. To the extent that a cable operator makes available the service of an affiliated or exclusive ISP, "its activities are that of an information service. However, to the extent that" a cable operator provides its "subscribers Internet transmission over [a] cable broadband facility," it is "providing a telecommunications service as defined in the Communications Act." *Id*.

In short, even if cable broadband customers are compelled by the cable operator to pay for the affiliated ISP, they are also purchasing a telecommunications service. The dual-use ***24** attachments used to provide that telecommunications service are covered by Section 224(e). They are, accordingly, subject to the rate-regulatory authority of the Commission under Section 224(b).

ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 16, 2003

Nos. 03-7015, 03-7053 (consolidated appeals)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: VERIZON INTERNET SERVICES, INC.
Subpoena Enforcement Matter

RECORDING INDUSTRY ASSOCIATION OF AMERICA,

Appellee,

v.

VERIZON INTERNET SERVICES INC.,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

John Thorne (DC Bar No. 421351)
Sarah B. Deutsch
1515 N. Courthouse Road
Fifth Floor
Arlington, Virginia 22201
Tel: 703.351.3900
Fax: 703.351.3670

Thomas M. Dailey
Leonard Charles Suchyta
VERIZON INTERNET SERVICES INC.
1880 Campus Commons Drive
Reston, Virginia 20191

Andrew G. McBride (DC Bar No. 426697) *
Bruce G. Joseph (DC Bar No. 338236)
Dineen P. Wasylik (DC Bar No. 464908)
Kathryn L. Comerford (DC Bar No. 477745)
WILEY, REIN & FIELDING LLP
1776 K Street NW
Washington, DC 20006
Tel: 202.719.7000
Fax: 202.719.7049

Counsel for Verizon Internet Services Inc.

* *Counsel of Record*

May 12, 2003

protect their copyrights. 17 U.S.C. §§ 1201-1205. Self-help was to be copyright owners' primary remedy in combating infringement. Title II of the DMCA codified immunities for Internet service providers, which turn upon the particular function the service provider performs in the control, storage, and dissemination of Internet content. 17 U.S.C. § 512 (a)-(d). In both titles, Congress recognized the substantial interest in protecting the privacy and freedom of expression of the over 100 million Internet users in America. *See id*. § 512(m) (entitled "Protection of Privacy"); *id*. § 1205 ("savings clause" for all state and federal privacy protections that otherwise apply to Internet communications).

Title II of the DMCA codified a distinction long-recognized in copyright law—the difference between i) the Internet service provider acting as a passive conduit for communications created, controlled, and hosted by others, and ii) the service provider hosting information on its own network or systems. *Compare id*. § 512(a) (entitled "Transitory Digital Network Communications"), *with id*. § 512(c) (entitled "Information Residing on Systems or Network at Direction of Users"). The DMCA thus makes clear that Internet service providers, such as Verizon, enjoy the same immunities that have traditionally applied to other entities that provide pure "transmission" or "conduit" functions. *See, e.g*., *E. Microwave, Inc. v. Doubleday Sports*, 691 F.2d 125, 128 (2d Cir. 1982) (discussing historical "common carrier" immunity for copyright infringement); P. Huber, *et al*., Federal Telecommunications Law 1240-55 (2d ed. 1999). Consistent with this recognition, subsection (a) of Section 512 does not impose *any duties* on Internet service providers in the context of transmitting the content of others.

By contrast, subsections (b), (c), and (d) of Section 512 impose limited duties to assist copyright owners in protecting their property interests in contexts where the service provider has some direct access to, or control over, the particular allegedly infringing material. These duties are carefully calibrated depending upon the service provider's involvement with, and control

have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary…. Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.").

A. The Text and Structure of Section 512 Compel the Conclusion that Section 512(h) Applies Only to Material Stored on a Service Provider's Network or Systems.

The district court began its analysis by citing the familiar canon that "'[s]tatutory construction "is a holistic endeavor," and, at a minimum, must account for a statute's full text, language as well as punctuation, structure and subject matter.'" *First Subpoena Opinion* 7 (JA __) (citations omitted). It then proceeded to violate this canon by giving talismanic significance to the general definition of "service provider" contained in subsection (k) in a statute that is organized entirely by *what* service providers do, not *who* they are. *Id*. at 8-11 (JA __-__). Section 512 involves a careful calibration of service provider involvement with content on the one hand, and service provider duties in relation to that content, on the other hand. Thus, subsection (a) deals with the situation where the Internet service provider performs a pure transmission or "conduit" function between its subscribers and the myriad opportunities for political, cultural, commercial and personal exchange that are available on the Internet. This function is analogous to the role played by common carriers in transmitting information selected and controlled by others. In the Internet context, it includes email, web browsing, and, more recently, peer-to-peer functions, where the user selects both the content and the destination of the communication. Traditionally, this passive role of conduit for the expression of others has not created any duties or liabilities under the copyright laws.

1994 WL 16777169 (C.A.D.C.) (Appellate Petition, Motion and Filing)
United States Court of Appeals, District of Columbia Circuit.

NATIONAL CABLE TELEVISION ASSOCIATION, INC., et al., Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents.
No. 91-1649.
February 9, 1994.
On Petitions for Review of Orders of the Federal Communications Commission

Joint Brief for Intervenors in Support of Respondents

INTRODUCTION AND SUMMARY OF ARGUMENT

***15** As generally understood in the communications context, "transmitting" involves "sending out" signals. Thus, a cable television operator provides cable service when it "sends out" programming to its subscribers. Telephone companies, however, do not initiate delivery of programming when they provide a video dialtone platform. They instead transport (or "carry") signals chosen and sent by multiple programmers on a nondiscriminatory, common carriage basis. It is the programmer, not the telephone company, that "transmits" programming to that programmer's subscribers.
[* * * *]
I. Telephone Companies Providing Video Dialtone Service Are Not "Cable Operators"

***21** In a video dialtone system, there is no single, discrete "facility" that meets the "cable system" definition. The telephone company must allow multiple programmers to connect their own signal generation equipment to the common-carriage network, so neither it, nor any individual programmer, determines the physical elements of the whole video dialtone system. Individual programmers may connect equipment that is both separate from, and under different ownership than, the telephone company's network. In contrast, cable operators control both the physical elements of the network and programmer access to subscribers. Every subscriber of a traditional cable system receives the same signals from the same signal generation equipment, without which there would be no programming at all.6

The Commission determined that when Congress defined "cable service" to include the "transmission [of programming] to ***24** subscribers," it intended to describe a particular relationship between the cable operator and the viewer in which the operator exercises control over the selection and distribution of programming received by its subscriber. *Memorandum Opinion,* 7 FCC Rcd at 5071 (J.A. 80). Not only is this interpretation reasonable, it follows from

a natural reading of the legislative language.

To "transmit," in the field of telecommunications, is to "send out (a signal) either by radio waves or over a wire." *Webster's Ninth New Collegiate Dictionary* 1254 (1991). Cable service therefore involves "sending out" programming signals to subscribers. But in their capacity as video dialtone platform providers, telephone companies do not initiate the delivery of programming; no programming goes out unless sent by a programmer. Telephone companies only carry the programming selected, generated, and "sen[t] out" by prorammers.

Common-carrier services, in the words of the House Report, *"allow* transmission of ... signals to and from" distant locations;8 these services do not constitute transmission. When a telephone customer accesses a legal database like Lexis via a modem on a home computer, Lexis (not the telephone company) transmits the relevant case law to its subscriber. Lexis selects information and initiates its delivery; in its common-carrier role, the telephone company merely transports that information to the ***25** Lexis subscriber. Similarly, when a homeowner uses the video dialtone network to access, for example, the MGM film library, it will be MGM, not the telephone company, that transmits the video programming.9

This distinction between transmission and simple common carriage is confirmed by Congress' use of the phrase "transmission *to subscribers."* In using the word "subscriber," Congress adopted a term that already had acquired administrative meaning. FCC rules dating from the 1970s define a subscriber as "[a] member of the general public who receives broadcast programming *distributed by a cable television system* and does not further distribute it." 47 C.F.R. § 76.5(ee) (emphasis added). *See In re Amendment of Part* ***26** *76,* 63 F.C.C.2d 956, 965-66 (1977). This definition indicates that a cable television subscription relationship necessarily involves distribution of programming by a supplier, not simple provision of common-carriage services. That understanding is further supported by the FCC's distinction between "customers" of telephone company channel service (who buy carriage) and "subscribers" of those channel-service customers (who buy programming). *See In re Better T.V., Inc.,* 34 F.C.C.2d 153, 154 (1972).

Whereas "subscribers" to cable television, information services like Prodigy, and newspapers and magazines all contract with a provider to receive edited information, customers of common-carriage services pay for transport of information that the common carrier has no role in selecting. The video dialtone provider's customers are the video programmers who "transmi[t] " programming to their own "subscribers." This can be seen from the language of subsection 522(6) (B), which adds to the definition of "cable service" the "subscriber interaction" needed to select programming transmitted within the terms of subsection (A). That the "subscriber interaction" in subsection (B) is aimed solely at determining program content provides further evidence that the subscribers at issue in subsection (A) subscribe to programming, not to common carriage.

[****]

In traditional cable service, one cable operator controls what programming is provided and how that programming is delivered. In video dialtone, however, the telephone company makes available facilities for the nondiscriminatory carriage of programming provided by multiple programmers. When they operate video dialtone platforms, telephone companies do not "provide" programming to end users in the ordinary sense of the word, see *Webster's Ninth New Collegiate Dictionary* 948 (defining "provide" as "supply or make available"); accordingly, they are not be within the intended scope of the "cable service" definition.10

***28** It is not surprising that Congress would distinguish between nondiscriminatory common carriage and cable transmission, for the copyright laws already drew the very same line. Since the 1970s, Congress had subjected cable operators' "secondary transmissions" of broadcast programming to compulsory licensing, *see* 17 U.S.C. §-111(c), (d), while specifying that "any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others" would not be subject to compulsory licensing. 17 U.S.C. § 111(a) (3).

Congress also was aware that telephone companies had long provided video transport in the form of tariffed channel service. While prohibiting common carriers from "provid[ing] video programming directly to subscribers," 47 U.S.C. § 533(b), legislators intended that telephone companies would remain free to lease video distribution facilities under tariff, as they had been under prior FCC rules. House Report at 57. The House Report explained that section 533(b) allows telephone companies to offer channel service as long as the common carrier does not "selec[t] or provid[e] the video programming to be offered over a cable system." Ibid. Since telephone companies offering common-carrier transport of video programming as part of channel service have never been ***29** thought to provide "cable service," *see Memorandum Opinion,* 7 FCC Rcd at 5071 (J.A. 80), it follows that telephone companies would not provide "cable service" when they transport programming over video dialtone networks.

[* * * *]

Just as individual telephone users lack control over other connections to the network and other users, no customer/programmer has control over whose equipment is connected to the common-***33** carriagee network or what programming is sent over the network. For its part, the telephone company merely acts as a transparent conduit between subscribers and multiple providers of video programming. Under the video dialtone scenario, there is no "cable operator."

January 14, 2010

Chairman Julius Genachowski
Commissioner Michael J. Copps
Commissioner Robert M. McDowell
Commissioner Mignon Clyburn
Commissioner Meredith Atwell Baker
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: Google and Verizon Joint Submission on the Open Internet
GN Docket No. 09-191; WC Docket No. 07-52

Dear Chairman Genachowski and Commissioners Copps, McDowell, Clyburn and Baker:

On October 21, 2009, Verizon and Google shared our preliminary thinking on how we might find common ground with respect to an open Internet, the central issue in the current debate about network neutrality. We committed to engage on important policy issues that underlie the debate and suggested that, because our businesses rely on each other, it is appropriate for us to jointly discuss a number of things: how we ensure that consumers get the information, products and services they want online; encourage investment in advanced networks; and ensure the openness of the web around the world. Today, each of us has filed separately in this docket on our individual views of the statutory authority and empirical basis for the FCC to take specific actions as noticed in its proposed rulemaking. We continue to disagree on some of these matters. We each stand by our individual positions in our separate filings, and nothing in this filing waives those positions.

We do agree, however, on a number of important matters that are crucial to the formulation of an enlightened, sustainable Internet policy for the United States. We believe that we need a policy that will ensure openness and preserve the essential character of the Internet as a global, interconnected network of networks and users that is thriving based on a common set of core values.

Below we have laid out several overarching values that create a framework to guide players throughout the Internet space – including communications networks, providers of applications, content, and devices, and the full panoply of Internet users – and policymakers as they consider certain issues regarding all elements of the Internet ecosystem. These values, as discussed below, while operating in a largely decentralized environment, drive a self-directed ecosystem that continues to innovate and invest without unnecessarily restrictive government intervention. At bottom these values should help ensure that the Internet continues to grow and succeed with minimal interference from the government, while acknowledging the role for appropriate oversight (and enforcement) over practices on the Internet where market forces, self-governance, and existing federal and state statutes and regulations are inadequate to protect

competition and consumers. In particular, consumers should continue to have access to the information, products, and services of their choice online; to encourage investment in robust, advanced networks; and to protect and promote Internet openness.

A. Google and Verizon agree that the Internet is a unique, worldwide network of networks that was created, operates and will continue to thrive based on a common set of overarching values that are embraced by all players in the eco-system to support continuing innovation and investment.

From the beginning, the Internet has thrived in an environment of minimal regulation. Various entities throughout the Internet space – whether providers or users of network services, applications, content, devices, or a combination – have worked together cooperatively to make the Internet what it is, to address legitimate challenges as they arise, and to meet users' evolving needs and expectations. The Internet has flourished largely as a result of these cooperative efforts, backed more recently by significant levels of private investment and innovation.

While we do not agree on every issue, we do agree as a matter of policy that this framework of minimal government involvement should continue going forward. We also agree as a matter of policy that certain core values should continue to provide guidelines for the conduct of all players in the Internet.

1. Preserving Openness.

It is essential that the Internet remains an unrestricted and open platform, where people can access the lawful content, services, and applications of their choice. These are the core values underlying the FCC's existing wireline principles, and all providers in the Internet ecosystem should act in accordance with these values. To us, this means that when a person accesses the Internet, he or she should be able to connect with any other person that he or she wants to -- and that other person should be able to receive his or her message. An open Internet also is one in which no central authority can impose rules that limit or prescribe the services that are being made available, where an entrepreneur with a big idea can launch his or her service online with a potential audience of billions, and where anyone, including network providers, are able to innovate without permission and provide any applications or services of their choosing, either on their own or in collaboration with others.

2. Encouraging Investment and Innovation in Broadband Networks.

The "innovation without permission" that has characterized the Internet has forever changed how people conduct business, promoting unprecedented levels of collaboration, creativity, and opportunity. We strongly believe that open, robust, and advanced broadband networks are essential to the future development of the Internet, and public policies should continue to provide appropriate incentives for commercial investment and innovation. We recognize the significance of continued, private investment and innovation to increase the capacity and intelligence of broadband infrastructure and achieve our Nation's broadband potential. These networks will make the Internet more useful for consumers and will enable new and innovative applications and services that empower consumers, grow the economy, create

jobs, and address a wide range of additional national priorities from energy independence to improved health care. In short, continued private investment is essential to increase the reach and capabilities of advanced intelligent networks, which will in turn support the development of ever more sophisticated applications.

3. Providing Users with Control.

Consumers should continue to have control over all aspects of their Internet experience, from the networks and software they use, to the hardware they plug in to the Internet and the services they choose to access online. No entity from either the government or the private sector should wrest control from consumers over how they choose to use the Internet, and the government should not implement policies that would limit consumers' ability to choose for themselves.

4. Providing Users with Information.

Transparency will ensure an environment of informed user choice. Providers throughout the Internet space should give users clear and meaningful information concerning Internet services, applications and content to facilitate informed choices. Transparency could also benefit the Internet more generally, as network operators could improve their services as a result of increased visibility into the demands of new applications, and vice versa.

5. Maintaining Balanced Intellectual Property Policy.

We both recognize the importance of protecting intellectual property in the digital environment and each of us engages in efforts to assist content owners in enforcing their rights and deterring online copyright infringements. US copyright law affords not only protections to copyright owners but also important limitations, often grounded in the First Amendment, such as fair use and safe harbors for intermediaries. We agree that any policy governing the role of online intermediaries should continue to be governed by the carefully crafted compromise in the Digital Millennium Copyright Act ("DMCA"). Government agencies should be mindful to promote the full balance of US intellectual property laws, and avoid taking actions that usurp legislative or judicial determinations over the scope of copyright protection as technology evolves.

6. Keeping Internet Applications, Content, and Services Free from Communications Regulation.

Google and Verizon agree that communications laws and regulations should not apply to Internet applications, content, or services. Because communications regulatory bodies, such as the FCC, are agencies of limited jurisdiction, at a minimum they must have requisite jurisdiction before they can subject any Internet application, content, or service to regulation. There is also no sound reason to impose communications laws or regulations on the robust marketplace of Internet content, applications, and services. In the United States, competitive or consumer protection concerns about such offerings generally should be directed instead to government agencies of general jurisdiction, such as the U.S. Federal Trade Commission.

rules (although the opposite is not necessarily true). If the agency determines that a prima facie showing has been made, it could consider need for a temporary restraining order directing the defendant to cease and desist from the activities alleged to violate any network neutrality rules for the duration of the complaint proceeding.

Each party to the case should be provided with an opportunity to present facts and legal or policy arguments. In those instances in which the parties first pursued dispute resolution before a TAG, the complaining party should state in its complaint all exceptions to the fact finding and other analysis contained in any advisory opinion, and support its exceptions with citations to record evidence and argumentation. Government authorities should be given discretion to determine the need for any additional fact finding, including where applicable the need for any initial or additional discovery not provided before the proposed TAG.

After considering evidence presented by the parties, any decision issued by an agency should include findings of fact concerning the underlying dispute and the parties' practices. The agency could provide due consideration to previous findings of fact from a TAG's advisory opinion, unless those findings are clearly erroneous. Any policy directives issued by a government agency in a particular dispute should be subject to an opportunity for public comment.

C. Verizon and Google agree on a number of policy goals advanced in the FCC's NPRM

1. The FCC's Wireline Broadband Principles have provided useful statements of general policy.

While Google and Verizon differ on the need for, and potential effects of, FCC rules, Google and Verizon agree that the Commission's existing wireline broadband principles provide useful statements of general policy. These principles make clear that consumers are, and should continue to have, the final say on their web experience. As Google and Verizon jointly noted previously, the minute that anyone, whether from the government or the private sector, starts to control how people access and use the Internet, it is the beginning of the end of the Net as we know it.

2. The Commission's NPRM correctly recognizes the role of network management in preserving a robust, open Internet.

We also continue to agree – as do virtually all parties – on the importance of network management. Network operators must have flexibility to manage their networks to deal with a range of network-impacting issues, including traffic congestion, spam, "malware" and denial of service attacks, as well as other network threats or challenges that may emerge in the future. Of course, operators' network management practices should be reasonable, consistent with their customers' preferences, and not unreasonably discriminate in ways that are anticompetitive or harm users.

3. The Commission similarly recognizes the potential value of allowing network providers to provide additional service options to consumers over their broadband infrastructure.

Google and Verizon acknowledge that broadband network providers, in addition to offering traditional Internet access services, should have the ability to offer consumers additional service options over their broadband facilities. Clearly, broadband infrastructure has multiple uses, and network operators should continue to have the ability to offer users the choice of service options in addition to traditional Internet access services. It is important that such services not reduce financial incentives for network operators to provide open and robust broadband capacity to support traditional Internet access to consumers. At the same time, we recognize that the ability to offer such services could expand the range of choices available to consumers, and help support investments in higher capacity, more advanced broadband networks – including, of course, capacity to benefit the traditional Internet access services offered over such networks.

4. The Commission rightly emphasizes the importance of transparency.

As noted above, we are committed to increasing transparency and providing consumers with meaningful information to allow informed consumer choice. Increased transparency protects consumers and decreases the chances of bad acts or harmful practices on the Internet.

5. The Commission is not an arbiter of US intellectual property laws.

Copyright is a delicate balance, carefully crafted by Congress and the courts. The FCC should not impose mandates in this area - whether mandates that require filtering, monitoring or other activities not included in the DMCA or mandates that would prohibit the development of future voluntary cooperative efforts to deter copyright infringement. Steering clear of such mandates helps ensure that consumers continue to be able to access lawful content, products and services while encouraging investment and openness in evolving applications and advanced networks.

D. Google and Verizon agree that the focus of any nondiscrimination rule should be to prevent harm to users or to competition

With respect to traditional Internet access services, the parties agree that differential treatment of Internet traffic by network operators may be either beneficial or harmful to users. Particular practices could be acceptable or unacceptable discrimination, depending on their effect on competition and on users. While we do not necessarily agree on which side of the line various practices may fall, we do agree that such practices should be evaluated on a case-by-case basis.

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Framework for Broadband Internet Service	)	GN Docket No. 10-127
	)	

COMMENTS OF VERIZON AND VERIZON WIRELESS

Of Counsel:
Michael E. Glover

Edward Shakin
William H. Johnson
VERIZON
1320 North Court House Road, 9th Floor
Arlington, Virginia 22201
(703) 351-3060

Walter E. Dellinger
Irv Gornstein
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, DC 20006

John T. Scott, III
William D. Wallace
VERIZON WIRELESS
1300 I Street N.W., Suite 400 West
Washington, DC 20005

Samir C. Jain
WILMER CUTLER PICKERING HALE
AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

Helgi C. Walker
William S. Consovoy
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006

July 15, 2010

3. Judicial Estoppel Bars The Commission From Disclaiming Its Previous Factual Representations in *Brand X* Regarding the Integrated Nature of Broadband Internet Service.

In any event, the Commission would be estopped from opportunistically changing the facts related to broadband Internet access service simply because its interests have now changed. The Commission's prior decision classifying broadband Internet service as an "information service" in the *Cable Modem Order* was based on the factual determination that broadband was an integrated offering without a separate transmission component.[73] Not only did the Commission reach this factual conclusion in the *Cable Modem Order* and in at least three subsequent orders, but agency counsel also made this same factual representation to the Supreme Court in *Brand X*. The Commission is barred from now disclaiming these representations by the doctrine of judicial estoppel.

"Courts may invoke judicial estoppel '[w]here a party assumes a certain position in a legal proceeding, . . . succeeds in maintaining that position, . . . [and then,] simply because his interests have changed, assume[s] a contrary position.'"[74] In particular, playing "'fast and loose with the courts'" by "found[ing] successive claims on inconsistent facts" is "an evil the courts should not tolerate" because "self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice."[75] The Commission is not immune from the doctrine of judicial estoppel. In fact, courts have applied judicial estoppel to bar the

---

[73] Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, ¶¶ 38-39 (2002) ("*Cable Modem Order*"); *see also* NOI ¶ 17.

[74] *Comcast Corp.*, 600 F.3d at 647 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)).

[75] *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953).

Commission from conveniently disavowing a position it previously asserted in the Supreme Court for the sake of a subsequent litigation advantage.[76]

The requirements for judicial estoppel likewise would be satisfied here if the Commission found, "because [its] interests have changed,"[77] that the facts that it represented to the Supreme Court in *Brand X* are now otherwise.[78] The Commission successfully defended its classification of broadband Internet service as an "information service" before the Supreme Court in *Brand X* by correctly explaining, as a factual matter, that broadband is a single integrated offering without a separate transmission component. Rebutting the contention that "most of what the end user purchases and values is raw, unadulterated transmission,"[79] the Commission expressly represented that "the fact is that the Internet access obtained by end users is integrally tied to information-processing functionality."[80] "Cable modem service subscribers," the Commission asserted, "do not typically obtain or use pure transmission capacity, divorced from all information-processing features."[81] According to the Commission, "subscribers pay a single price for all the capabilities of the service," and "the transmission component serves no function other than to enable the subscriber to utilize Internet access."[82]

---

76 *See, e.g.*, *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 756 (8th Cir. 2000) (concluding that the Commission was "estopped from trying to now revive the proxy prices" because it "represented to the Supreme Court that it was not establishing rates and depriving the state commissions of their role in implementing the Act"), *aff'd in part, rev'd in part on other grounds sub nom.*, *Verizon Commcn's, Inc. v. FCC*, 535 U.S. 467 (2002).

77 *Comcast*, 600 F.3d at 647 (quoting *New Hampshire*, 532 U.S. at 749).

78 *Brand X*, 545 U.S. at 990-91.

79 Reply Brief for the Federal Petitioners at 5-6, *NCTA v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (No. 04-277) ("FCC *Brand X* Reply Br.").

80 *Id.* at 6.

81 *Id.* at 5.

82 *Id.* at 16 (internal quotation marks and alterations omitted).

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify that the forgoing brief is printed in proportionally spaced font of 14 point and that, according to the word-count feature of Microsoft Word 2010, it contains 6978 words.

CERTIFICATE OF SERVICE

I certify that on this 15th day of November, 2012, the foregoing brief was filed via CM/ECF, which will serve it on all registered counsel.

Sean H. Donahue
Sean H. Donahue
Donahue & Goldberg, LLP
2000 L St., NW, Suite 808
Washington, D.C. 20036
(202) 277-7085
sean@donahuegoldberg.com

DATED: November 15, 2012