

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Protecting and Promoting
the Open Internet

GN Docket No. 14-28

Framework for Broadband
Internet Service

GN Docket No. 10-27

Preserving the Open Internet

GN Docket No. 09-191

Broadband Industry Practices

WC Docket no. 07-52

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Summary

Given the decision of the D.C. Circuit Court of Appeals in *Verizon v. FCC*, the FCC now faces the legal challenge of how to impose *sustainable* legal obligations for network openness on broadband Internet access service providers to address concerns underlying the vacated no blocking and no unreasonable discrimination rules. Any FCC decision pursuant to the *Open Internet Access NPRM* will induce further litigation, whether the FCC proceeds under section 706 authority in conjunction with Title I jurisdiction or reclassification under Title II. Moreover, by whatever jurisdictional authority the FCC proceeds, it is likely that litigation will continue until the courts rule on First Amendment challenges of broadband Internet access service providers.

Professor Barbara A. Cherry and Assistant Professor Julien Mailland have written a research paper, titled *Toward Sustainable Network-Openness Obligations on Broadband in the U.S.: Surviving Providers' First Amendment Challenges*, that examines anticipated legal challenges to future FCC rules to impose network openness obligations on broadband Internet access services providers pursuant to the *Open Internet Access NPRM*, comparing the likely outcomes if the FCC's authority is based on the exercise of authority under Title II or under section 706 in conjunction with Title I. The analysis provides litigation advice for how the FCC should exercise its authority given evaluation of differential legal uncertainties arising from these two approaches. This research paper was presented on September 13, 2014, at the 42nd Research Conference on Communication, Information and Internet Policy (Arlington, Virginia), and is attached hereto and submitted as reply comments. The following summarizes the conclusions of the analysis in this paper.

Professor Cherry and Assistant Professor Mailland conclude that legal challenges to an FCC order are less likely to succeed if the FCC exercises its Title II – whether solely or perhaps in conjunction with section 706 – rather than solely its section 706 statutory authority in conjunction with

Title I. First, the courts give great deference to FCC expertise in interpreting existing statutory language, including a change in interpretation, with such deference applicable to an FCC reclassification of service under Title II based on a reassessment of circumstances. Second, the reclassification of broadband Internet access service as a Title II telecommunications service not only provides a greater scope of authority to act under the terms of Title II itself, but it also likely expands the permissible scope of the FCC’s regulatory authority to act under section 706. Third, reclassification under Title II also strengthens the FCC’s ability to defeat a constitutional challenge to its regulatory authority under the First Amendment. Critical to the differences between the FCC’s exercise of Title II or section 706 authority in conjunction with Title I are the differing levels of First Amendment rights of common carriers relative to non-common carriers. Therefore, although requiring an additional administrative step of service reclassification, the FCC’s exercise of authority under Title II is a superior legal strategy to reliance solely on section 706 under Title I for purposes of providing *sustainable* legal obligations in terms of network openness on broadband Internet access service providers given its greater likelihood of withstanding – highly inevitable – constitutional challenge under the First Amendment.

The analysis also reveals how the attempt to describe the FCC’s choices of jurisdictional authority to impose network openness rules as simply “section 706 or Title II” may be misleading. A more accurate way of articulating the FCC’s choices of how to exercise its authority is: (1) exercising a narrow scope of section 706 authority coexisting with Title I classification of the service; or (2) reclassifying the service (at least of a transmission component) as Title II, and then exercising Title II jurisdiction either by itself or in conjunction with a now expanded scope of section 706 authority.

Conclusion

For the reasons stated above and explained in the attached research paper, the Commission should exercise its jurisdiction under Title II, either by itself or in conjunction with a resultant expanded scope of authority under section 706, to establish sustainable legal obligations for network openness on broadband Internet access service providers.

Respectfully submitted,

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Toward Sustainable Network-Openness Obligations on Broadband in the U.S.:
Surviving Providers' First Amendment Challenges

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Introduction

On January 14, 2014, the D.C. Circuit Court of Appeals decided *Verizon v. FCC*, vacating and remanding parts of the FCC's network neutrality rules released on December 23, 2010 in the *Open Internet Order*. The court affirmed the FCC's authority to regulate, at least in some manner, broadband Internet access service under section 706 of the Telecommunications Act of 1996, but vacated the FCC's no-blocking and no unreasonable-discrimination rules as impermissible common carrier regulation of an information service. In response, the FCC declined to seek appeal before the U.S. Supreme Court. Instead, the FCC opened a new proceeding, *Open Internet Access NPRM* (2014), within which to consider how the FCC should proceed in light of the court's guidance in *Verizon v. FCC*.

The FCC now faces the legal challenge of how to impose *sustainable* legal obligations for network openness on broadband Internet access service providers to address concerns underlying the vacated no blocking and no unreasonable discrimination rules as well as paid prioritization of traffic through charges assessed on edge providers of content as expressed in the *Open Internet Access NPRM*. Any FCC decision pursuant to the *Open Internet Access NPRM* will induce further litigation. Some claim that the FCC's use of Title II authority under the Communications Act to impose obligations on

broadband Internet access service providers “would lead to massive litigation and would be a ‘ticking time bomb’ that would reverberate throughout the Internet ecosystem” (Schwartz, 2014, p. 1). Matthew Brill, attorney at Latham Watkins and speaking on behalf of NCTA, predicts that “[b]asing net neutrality regulations on Title II authority would cause ‘World War III’ and years of litigation” (Murakami, 2014a, p. 6). According to Anna-Maria Kovacs, visiting senior policy scholar at the Georgetown Center for Business and Public Policy who has been retained to do research for AT&T, “[l]itigation likely to be caused by a Title II approach could take as much as a decade to sort out and create uncertainty for investors” (Murakami, 2014b, p. 12). Others assert that greater uncertainty lies with FCC reliance on section 706 authority. Free Press Policy Director Matt Wood states “[i]f you’re looking for uncertainty, [Section] 706 is where you’ll find it...The question is whether the agency will act on firm ground this time, or continue to swing and miss with another patched-together compromise” (Murakami, 2014b, p. 13). Former FCC General Counsel, Sean Lev, stresses that section 706 authority is unclear: “if and when the commission ultimately finds, someday, that advanced telecommunications capabilities are being deployed in a reasonable and timely basis ...[w]hat does that mean for existing rules in which the commission has invoked 706(b)?” (Schwartz, 2014, p. 2).

By whatever jurisdictional authority the FCC proceeds, it is likely that litigation will continue until the courts rule on the First Amendment challenges of broadband Internet access service providers. First, in *Verizon v. FCC*, Verizon challenged the constitutionality under the First Amendment of the FCC’s network neutrality rules adopted in the *Open Internet Order* (2010); however, the D.C. Circuit Court of Appeals did not rule on this constitutional challenge, leaving the issue open. Second, broadband Internet access service providers have the incentive to pursue litigation strategy “to end disputes in [their] favor by foreclosing opponent’s further legislative options by having the relevant (adverse) regulatory/legal mechanism declared unconstitutional. Winning a dispute in this manner is

considered the ultimate victory – trumping the legislature itself – as constitutional amendments are notoriously difficult to obtain” (Cherry, 2007, p. 3). For these reasons, assessment of litigation uncertainty as to future FCC action pursuant to the *Open Internet Access NPRM* is incomplete without consideration of the likely outcome of litigation over First Amendment challenges.

Our paper examines anticipated legal challenges to future FCC rules to impose network openness obligations on broadband Internet access services providers pursuant to the *Open Internet Access NPRM*, comparing the likely outcomes if the FCC’s authority is based on the exercise of authority under Title II or under section 706 in conjunction with Title I. Our analysis provides litigation advice for how the FCC should exercise its authority given evaluation of differential legal uncertainties arising from these two approaches. We conclude that legal challenges to an FCC order are less likely to succeed if the FCC exercises its Title II – whether solely or perhaps in conjunction with section 706 – rather than solely its section 706 statutory authority in conjunction with Title I. First, the courts give great deference to FCC expertise in interpreting existing statutory language, including a change in interpretation, with such deference applicable to an FCC reclassification of service under Title II based on a reassessment of circumstances. Second, we explain how the reclassification of broadband Internet access service as a Title II telecommunications service not only provides a greater scope of authority to act under the terms of Title II itself, but it also likely expands the permissible scope of the FCC’s regulatory authority to act under section 706. Third, reclassification under Title II also strengthens the FCC’s ability to defeat a constitutional challenge to its regulatory authority under the First Amendment. Critical to the differences between the FCC’s exercise of Title II or section 706 authority in conjunction with Title I are the differing levels of First Amendment rights of common carriers relative to non-common carriers. Therefore, although requiring an additional administrative step of service reclassification, we conclude that the FCC’s exercise of authority under Title II is a

superior legal strategy to reliance solely on section 706 under Title I for purposes of providing *sustainable* legal obligations in terms of network openness on broadband Internet access service providers given its greater likelihood of withstanding – highly inevitable – constitutional challenge under the First Amendment.

Our analysis also reveals how the attempt to describe the FCC’s choices of jurisdictional authority to impose network openness rules as simply “section 706 or Title II” may be misleading. A more accurate way of articulating the FCC’s choices of how to exercise its authority is: (1) exercising a narrow scope of section 706 authority coexisting with Title I classification of the service; or (2) reclassifying the service (at least of a transmission component) as Title II, and then exercising Title II jurisdiction either by itself or in conjunction with a now expanded scope of section 706 authority.

I. Litigation Uncertainties Under Administrative Law

A. Litigation Uncertainty Under FCC Section 706 Statutory Authority

To date, the FCC’s reliance on section 706 authority to impose obligations on broadband Internet access service providers has been laden with legal obstacles. In *Comcast v. FCC* (2010), the D.C. Circuit Court of Appeals held that the FCC failed to cite any statutory authority that would justify its order compelling a broadband provider, Comcast, to adhere to open network management practices. In particular, as the D.C. Circuit observed in *Verizon v. FCC*, the FCC could not rely on section 706 at that time because the Commission “had previously determined, in the still-binding *Advanced Services Order*, that the provision ‘does not constitute an independent grant of authority’” (740 F.3d at 636, citation omitted).

Given the decision in *Comcast v. FCC*, the FCC later changed its understanding of section 706 in its *Open Internet Order* (2010), concluding that section 706(a) does constitute an affirmative grant

of regulatory authority. In *Verizon v. FCC* (2014), the D.C. Circuit Court found that “the Commission has offered a reasoned explanation for its changed understanding of section 706(a)” (740 F.3d at 636), and that this understanding was a reasonable interpretation of an ambiguous statute under the *Chevron* doctrine of deference to agency interpretation established in *Chevron v. Natural Resources Defense Council* (1984). Moreover, in this regard, the court observed:

[W]hen Congress passed section 706(a) in 1996, it did so against the backdrop of the Commission’s long history of subjecting to common carrier regulation the entities that controlled the last-mile facilities over which end users accessed the Internet. Indeed, one might have thought, as the Commission originally concluded, that Congress clearly contemplated that the Commission would continue regulating Internet providers in the manner it had previously. (740 F.3d at 638-639, citations omitted).

Thus, the FCC’s changed understanding of section 706(a) to provide an independent grant of statutory authority is consistent with - and perhaps even more compelling given - the FCC’s historical exercise of its Title II statutory authority over common carriers to regulate their last-mile facilities over which end users accessed the Internet. The court also found the FCC’s interpretation of section 706(b) to be reasonable, based on a more cursory analysis given that “[s]ection 706(b) has a less tortured history” (740 F.3d at 640).

Yet, notwithstanding *some* statutory authority to act under section 706, the court emphasized in *Verizon v. FCC* that the *scope* of FCC statutory authority under section 706 is narrower than that provided under Title II. As a starting point, the court found:

We think it obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers. Given the Commission’s still-binding decision to classify broadband providers not as providers of “telecommunications services” but instead as providers of “information services,” such treatment would run afoul of section 153(51): “A telecommunications carrier shall be treated as a common carrier under this [Act] only to the extent that it is engaged in providing telecommunications services.” (740 F.3d at 650, citations omitted).

The court stated that “[t]he only remaining question, then, is whether the *Open Internet Order’s* rules has so limited broadband providers’ control over edge providers’ transmission that the regulations constitute common carriage *per se*” (740 F.3d at 655). The court found that the disclosure rules were permissible under section 706, but vacated the anti-discrimination and anti-blocking rules because they constituted common carriage *per se*. Thus, exercise of FCC authority under section 706, *so long as broadband providers are considered to not provide a telecommunications service*, is constrained to prohibit the imposition of common carriage obligations. However, it is unclear – and could only be determined through future litigation – how *far* section 706 authority does extend. In other words, what additional requirements could be imposed (i) to address the concerns underlying the anti-discrimination and anti-blocking rules that were adopted in the *Open Internet Order*, and (ii) still not constitute common carriage obligations? Moreover, as former FCC general counsel, Sean Lev, observed (as described in the Introduction), for *how long* would such authority be effective?

Given the D.C. Circuit Court’s reasoning in *Verizon v. FCC*, the above uncertainty as to the scope of section 706 authority to impose rules related to concerns of blocking and discrimination could be eliminated if the FCC reclassified broadband Internet access providers as providers of “telecommunications services”. Such reclassification would effectively broaden the permissible scope of section 706 authority so as to be co-extensive with that provided under Title II. Legal challenges to reclassification under Title II are considered in the next section.

B. Comparatively Less Litigation Uncertainty for FCC Reclassification under Title II

It is undisputed that the FCC’s choice to reclassify some portion of broadband Internet access service as a Title II service would engender legal challenges by broadband Internet access service providers. After all, as stated by John Bergmayer, Senior Staff Attorney for Public Knowledge, “Court challenges are a fact of life for the modern FCC” (Murakami, 2014b, p. 13). The specifics of such legal

challenge, however, would depend on those aspects of the service that are classified as Title II service. For purposes of analysis here, we assume that FCC exercise of Title II authority would consist of classifying the transmission component of broadband Internet access service as a “telecommunications service.” Such reclassification would be consistent with the FCC’s regulatory framework of basic v. enhanced services developed in the *Computer Inquiry* proceedings,¹ found by the FCC to be embraced in the Telecommunications Act of 1996 in its *Universal Service Report* to Congress in 1998. Importantly, such reclassification would restore common carriage status for the transmission component of the service in both retail and wholesale markets. Thus, reclassification under Title II would essentially be restoring a critical attribute of the framework that existed prior to the FCC’s *Cable Modem Declaratory Ruling* (2002), upheld by the U.S. Supreme Court in *NCTA v. Brand X* (2005), and *Wireline Broadband Internet Access Order* (2005).

1. Agency deference under the *Chevron* doctrine

The FCC’s reclassification of the transmission component of broadband Internet access service as common carriage could be challenged as “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” under the Administrative Procedure Act (5 U.S.C. sec. 706(2)(A)). In this regard, “[t]he *Chevron* inquiry overlaps substantially with that required under the Administrative Procedure Act (APA)” (*Verizon v. FCC*, 740 F.3d at 635). Moreover, the U.S. Supreme Court stated in *NCTA v. Brand X*:

Agency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act. For if the agency adequately explains the reasons for a reversal of policy, “change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.” (545 U.S. at 981, citations omitted).

¹ There was a series of proceedings before the FCC referred to as the *Computer Inquiry* proceedings, important aspects of which are discussed in Cannon (2003).

Thus, to the extent that the definition of “telecommunications service” is deemed ambiguous, the analyses in *Verizon v. FCC* and *NCTA v. Brand X* illustrate how the courts would review such a legal challenge to reclassification of the transmission component of broadband Internet access service.

Under the *Chevron* doctrine in *Verizon v. FCC*, the FCC was able to change its interpretation of section 706 in the “still-binding *Advanced Services Order*” that restricted its authority in *Comcast v. FCC* so as to enable reliance on section 706 statutory authority in its *Open Internet Order*. Given reasoned explanation, the FCC could likewise change its “still-binding decision to classify broadband providers not as providers of ‘telecommunications services’” that restricted its authority under section 706 in *Verizon v. FCC*. Reasoned explanation to support reclassification could include, although not be limited, to the following points: broadband Internet access requires the provision of transmission capacity; end users recognize a distinction between the provision of transmission capacity and the information service provided through such transmission; failure to classify the transmission component as a telecommunications service creates incentives for regulatory arbitrage by telecommunications service providers to pursue business and technical strategies to reduce and potentially eliminate their offering of telecommunications services; and such reclassification would broaden the scope of FCC statutory authority (under both Title II, and under section 706 in conjunction with Title II) so as to more effectively preserve the “virtuous circle of innovation” that has driven the growth of the Internet.²

Similarly, the analysis in *NCTA v. Brand X* also supports deference to FCC reclassification based on such reasoned explanation. In *NCTA v. Brand X*, the U.S. Supreme Court upheld the FCC’s reversal of policy in its *Cable Modem Declaratory Ruling*, which declined to extend the *Computer Inquiry* framework applicable to DSL offered by telephone companies to cable modem service offered by cable companies. The FCC could likewise reverse its policy again, given reasoned explanation. In

² In its *Open Internet Order*, the FCC stated that its rules furthered the statutory mandate under section 706 to encourage the deployment of broadband telecommunications capability by preserving unhindered the “virtuous circle of innovation” that had long driven growth of the Internet. See, *Verizon v. FCC*, 740 F.3d at 634.

addition to the points mentioned above, the FCC could point to further legal developments since *NCTA v. Brand X*. For example, in *NCTA v. Brand X*, the Majority stated “the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction” (545 U.S. at 996). Yet, in his dissenting opinion, Justice Scalia asserted “there is reason to doubt whether [the Commission] can use its Title I powers to impose common-carrier-like requirements, since § 153(44) specifically provides that a ‘telecommunications carrier shall be treated as a common carrier under this chapter *only to the extent* that it is engaged in providing telecommunications services’ (emphasis added), and ‘this chapter’ includes Titles I and II” (545 U.S. at 1014, fn. 7). As discussed above, Justice Scalia’s prediction was confirmed by the D.C. Circuit’s analysis in *Verizon v. FCC*. Therefore, the FCC could find that reclassification of the transmission component as a telecommunications service would enable it to more effectively (1) preserve the “virtuous circle of innovation” espoused in the FCC’s *Open Internet Order*, and (2) ensure that the sale of information services by carriers does not adversely affect the provision of efficient and economic common carrier services, which was one of the regulatory concerns underlying the *Computer Inquiry* framework.³ Additionally, from a First Amendment standpoint as discussed later in this paper, such reclassification would strengthen the marketplace of ideas and sustain a digital soapbox.

2. Common carrier status under *NARUC I* and *II*

The FCC could also respond to a legal challenge to its reclassification of the transmission component of broadband Internet access service as a telecommunications service by relying on *NARUC I* and *NARUC II*, both decided by the D.C. Circuit Court of Appeals. In these cases, the D.C. Circuit “concluded that the circularity and uncertainty of the common carrier definitions set forth in the statute and regulations [under the Communications Act of 1934] invite recourse to the common law of carriers” (*NARUC II*, 533 F.2d at 608, footnotes omitted). Under the common law “the primary *sine*

³ See *Computer Inquiry I*, (28 FCC 2d at 269).

qua non of common carrier status is a quasi-public character, which arises out of the undertaking ‘to carry for all people indifferently.’ ... A second prerequisite to common carrier status ... is the requirement ... with peculiar applicability to the communications field, that the system be such that customers ‘transmit intelligence of their own design and choosing’” (*NARUC II*, 533 F.2d at 608-609, footnotes omitted).

Importantly, “[t]he common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities. A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so” (*NARUC I*, 525 F.2d at 644, footnote omitted). Therefore, the nature of the service offered to customers – not FCC discretion – is determinative of whether an entity is a common carrier. Moreover, notwithstanding the FCC expectations of how an entity may provide service, “[i]f practice and experience show the [class of entities] to be common carriers, then the Commission must determine its responsibilities from the language of the Title II common provisions” (*NARUC I*, 525 F.2d at 644). Finally, “it is clear that the Commission ha[s] discretion to require [entities] to serve all potential customers indifferently, thus making them common carriers within the meaning of the statute” (*NARUC I*, 525 F.2d at 644 n. 76).

The FCC’s *Computer Inquiry* framework was consistent with *NARUC I* and *II*. It recognized – as it must - telephone companies as common carriers in the provision of telecommunications services to end users. For policy reasons, it also imposed the requirement for telephone companies to provide transmission facilities to non-facilities-based, enhanced (information) service providers on a common carriage basis. Consistent with the earlier *Computer Inquiry* framework, the FCC could likewise reclassify the transmission component of broadband Internet access service as a common carriage service – whether in recognition of the nature of the service already offered and/or in its discretion to

impose the requirement of common carriage provision of service on facilities-based, broadband Internet access service providers.

II. Litigation Uncertainties Under the First Amendment

In order to assess the strength of possible First Amendment claims by either party, we must map out the various categories of speakers, speech, and context under existing case law. We disagree with the Center for Democracy & Technology (CDT) when it states, as part of its First Amendment analysis, that "how the FCC chooses to categorize a particular service under the Communications Act has no bearing on the constitutional analysis" (Center for Democracy & Technology, 2012 p.17 footnote 1). Categorization does matter, because whether or not speech is protected, in what fashion, and to which extent, varies depending on categories outlined by the courts. Different tests apply to these different categories.

The first distinction is whether or not the broadband provider is considered a common carrier. We will first map out the body of case law that applies to non-common-carriers, and then discuss how Title II reclassification would strengthen the FCC's position vis a vis a Verizon First Amendment claim.

B. First Amendment Challenges When the FCC Exercises Section 706 Statutory Authority

In its brief filed in *Verizon v. FCC*, Verizon broadly argues that it is a speaker, and that as a result, any rules that would limit "broadband providers' own speech and compel carriage of others' speech cannot survive scrutiny" (Verizon & MetroPCS, 2012, pp. 42-43). Verizon is incorrect, since case law provides a myriad of examples where the First Amendment has not precluded lawful limitations on speech or required certain parties to carry the speech of others. The FCC, on its side,

argues that "broadband providers are not 'speakers' at all, but only 'conduits for speech' of others and that the Open Internet Rules therefore do not implicate the First Amendment" (Federal Communications Commission and United States of America, 2013, p.69). The FCC is incorrect as well: the fact that an entity is not a "speaker" does not exclude a topic from being a part of First Amendment jurisprudence. In fact, several cases have placed strings, conditions under which a non-speaker can be compelled to carry the speech of others, and this body of cases applies in the present litigation. The drastic opposition on this point between Verizon and the FCC has the merit of establishing an important point of stasis: whether or not broadband providers are speakers. Depending on the answer, different rules will apply. We must therefore first establish the criteria with which to define a "speaker" (*Spence*). We subsequently map out the various routes that a court would then take based on that determination, applying First Amendment arguments based on an FCC assertion of regulatory authority under Section 706 in conjunction with Title I jurisdiction. Namely, if the person being regulated is not a speaker, which rules apply (*Pruneyard*)? If the person being regulated is a speaker, but that the government regulates its conduct, not its speech, can conduct be separated from speech in ways that make the regulation of the conduct immune from First Amendment challenges (*Rumsfeld*)? And if the conduct cannot be separated from speech, can the mixed speech/nonspeech activity nonetheless be properly regulated by the government under the First Amendment (*O'Brien, Turner*)?

1. What is speech?

In *United States v. O'Brien* (1968), the U.S. Supreme Court stated that "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea" (391 U.S. at 376). In establishing whether or not a broadband provider's conduct constitutes speech, we cannot rely on the parties' broad

invocations, but must turn to the tests established by the courts. In *Spence v. Washington* (1974), the U.S. Supreme Court, in reference to its former statement in *O'Brien*, explores what it means for an activity to be "sufficiently imbued with elements of communication to fall within the scope [of the First Amendment]." The Court provides a two-prong test to determine whether, in that case, appellant had "engaged in a form of protected expression." Under the two-prong test, the questions are: (1) whether or not the party at stake had "[a]n intent to convey a particularized message"; and (2) if "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it" (418 U. S. at 410-411).

Whether or not broadband providers would be considered as engaging in a form of protected expression will be left to the opinion of the court in future litigation. Based on current evidence, it seems that the FCC would have a much stronger case establishing that the broadband providers are not engaged in speech acts, than Verizon the opposite. We subscribe to the analysis contained in the CDT brief regarding the application of the *Spence* test to Verizon's behavior (Center for Democracy & Technology, 2012, pp.11-12). Based on the facts available at the time of the D.C. Circuit Court's ruling in *Verizon v. FCC*, Verizon would fail to meet the requirements of both prongs of the *Spence* test. First, Verizon cannot prove an intent to convey a personal message: its business is in the transmission of internet content, content that is created by others. As the CDT noted (Center for Democracy & Technology, 2012, p.11), Verizon, both in past litigation, and through its terms of service, has explicitly disclaimed any endorsement of the content that users receive or send through its service:

*Verizon assumes no responsibility for . . . any Content . . . and . . . Verizon does not endorse any advice or opinion contained therein.*⁴

⁴ See *Verizon Online Terms of Service* 12(5), (visited August 12, 2014), http://my.verizon.com/central/vzc.portal?_nfpb=true&_pageLabel=vzc_help_policies&id=TOS. The citation in the CDT brief appears as "See *Verizon Online Terms of Service* 11(5), (Dec. 31, 2011), http://my.verizon.com/central/vzc.portal?_nfpb=true&_pageLabel=vzc_help_policies&id=TOS" –

[T]he Internet service provider performs a pure transmission or “conduit” function ... This function is analogous to the role played by common carriers in transmitting information selected and controlled by others. Traditionally, this passive role of conduit for the expression of others has not created any duties or liabilities under the copyright laws⁵.

For the same reason, Verizon fails the second prong of the *Spence* test: the likelihood is thin that any user would think that Verizon is conveying any message, since Verizon itself disclaims any endorsement of the content provided.

For these reasons, the FCC has a much stronger case arguing that Verizon should not be classified as a speaker, than Verizon arguing it deserves speaker protection. Before we turn to the criteria applicable to non-speakers on the one hand, and speakers on the other, it is worth noting that the outcome of the classification depends on the broadband provider's business model and more specifically on the way the public perceives the nature of the service. In the current business model, broadband providers are simple conduits that transmit the message of others. However, this could change in two ways. First, broadband providers could move to a model when their main service is not to provide access to an open internet but to curate content and provide it through a gated community. This was the business model of most information-distribution network access providers in the 1980's and until the point where NSFNET was privatized ("It's not the Internet, it's AOL"). In this case, the broadband provider would more likely be considered a speaker under the *Spence* test. Second, short of becoming a gated community as were AOL, CompuServe, and services of the like, broadband providers of today could move towards providing a dual service: access to the open internet on the one hand, and access to a private community of content on the other. Such is, in the wireless world,

It is therefore interesting to note that as of August 2014, Verizon has not modified its terms of service relative to when the CDT visited the link in 2011 – the only change being that the provision at stake is now contained in article 12.5 rather than formerly 11.5. This shows consistency in Verizon's position on the topic.

⁵ Brief for Appellant at 23, *Recording Indus. Ass'n of Am. v. Verizon Internet Serv.*, 351 F.3d. 1229 (D.C. Cir. 2003) (Nos. 03-7015 & 03-7053), as cited by CDT brief, p.12.

Apple's iOS model. There is evidence suggesting that broadband providers are moving towards such a model as well (Claffy & Clark, 2013). In such case, broadband providers would likely be classified as both conduits for the speech of others and speakers themselves; we will analyze this prospect from the standpoint of the First Amendment through the lens of *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (2006) in the subsequent sections.

2. Regime applicable to non-common carriers who are not engaging in speech acts

We now turn to the regime applicable to parties whom the courts have determined are not engaging in speech acts. The U.S. Supreme Court case most relevant to this classification is *Pruneyard Shopping Ctr. v. Robins* (1980). At contention was the constitutionality of a California State Constitution provision that guaranteed individuals the right to reasonably exercise free speech rights on the property of a privately owned shopping center to which the public is invited. This case is relevant to Verizon because we are facing federal regulations that guarantee edge speakers the right to reasonably exercise free speech rights through Verizon's privately owned infrastructure, to which the public (end-users) are invited. The Pruneyard shopping center contended that while it was not engaging in speech acts, it had a First Amendment right not to be forced by the State to use its property as a forum for the speech of others, which it claimed the state provision violated. Further, it argued that as a private property owner, it had a right to exclude others from its property, and that the state provision that precluded it from excluding others constituted, under the Fifth Amendment, an unconstitutional taking. The Supreme Court rejected both arguments and held that "State constitutional provisions, as construed to permit individuals reasonably to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited, do not violate the shopping center owner's property rights under the Fifth and Fourteenth Amendments or his free speech rights under the First and Fourteenth Amendments" (447 U. S. at 88).

At the core of the First Amendment part of the decision was the three-prong reasoning that "[t]he shopping center, by choice of its owner, is not limited to the personal use of appellants, and the views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. Furthermore, no specific message is dictated by the State to be displayed on appellants' property, and appellants are free to publicly dissociate themselves from the views of the speakers or handbillers. *Wooley v. Maynard*, 430 U. S. 705; *West Virginia State Board of Education v. Barnette*, 319 U. S. 624; and *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, distinguished" (447 U.S. at 75)

This case seems to undermine any similar claims Verizon may make. First, Verizon's service, by choice of its owner, is not limited to Verizon's personal use,⁶ and thus the content pushed by edge providers is unlikely to be identified with the views of Verizon. As we previously discussed, Verizon explicitly disclaims any endorsement of the content that flows through its private facilities. Second, under federal rules mandating neutrality from broadband providers when it comes to treating the messages flowing through their private facilities, no specific message is being dictated by the State. Broadband providers have not been, and are unlikely to be required to recite the pledge of allegiance or to display "live free or die" banners. Therefore, as in *Pruneyard*, there "is no danger of governmental discrimination for or against a particular message" (447 U.S. at 87). Finally, just as in *Pruneyard*, Verizon can - and in fact already does - "expressly disavow any connection with the message [of the edge providers] by simply posting signs in the area where the speakers ... stand," in this case, through the many disclaimers its users have to acknowledge (ibid). Therefore, it is safe to say that under *Pruneyard*, net neutrality rules of the nature adopted by the FCC in the stricken *Open Internet Order* (2010) would pass First Amendment muster.

⁶As noted, this would be different if Verizon changed its business model to limit the delivery of content to Verizon-specific content.

While under *Pruneyard* the FCC's position seems strong, there is, however, a question as to whether *Pruneyard* would apply at all. Part of the *Pruneyard* rationale was that the private property was open to the public. *In practice*, so is Verizon's facility. As Susan Crawford recently noted, "the providers of high-speed Internet access unquestionably hold themselves out to the public as being willing to 'carry for all people indifferently'" (2014, p. 2371, citing the *NARUC II* test). However, the FCC has classified Verizon as a private carrier, meaning that under that classification the FCC does not seem to recognize that Verizon is holding itself out to carry for all people indifferently. From a purely logical standpoint, then, by classifying Verizon's service under Title I, the FCC provides Verizon with an indisputable argument that a key factual element of the *Pruneyard* rationale is not met, and that the *Pruneyard* case is therefore not presently applicable. This would therefore leave a First Amendment claim open for discussion. In contrast, the implication of a Title II reclassification is that the facilities are indeed open to the public. Under such reclassification, then, the key elements of *Pruneyard* seem to be met, which would lead to a conclusion that Verizon does not, under a Title II reclassification, have a valid First Amendment claim.

3. Regime applicable to non-common carriers who are engaging in speech acts

Going back to the *Spence* test, even if the courts were to find that Verizon is indeed engaging in speech acts, it would not necessarily follow that any governmental regulation of speech impacting Verizon would be subject to strict scrutiny (which is what Verizon contends: *Verizon & MetroPCS*, 2012, p.45, footnote 13). The courts have found that when a person is both acting as a speaker and as a non-speaker at the same time, incidental regulations of speech can be acceptable, and are subject not to heightened, but to intermediate scrutiny. In *O'Brien*, the U.S. Supreme Court stated:

However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that, when "speech" and

“nonspeech” elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest (391 U.S. at 376-377, footnotes omitted).

O’Brien is relevant because while Verizon’s current business model undoubtedly involves mostly nonspeech elements, an evolution of its business model could make both speech and nonspeech elements inextricably cohabitate. This would be the case if Verizon was to develop its own curated-content service. In applying the *O’Brien* test to the present case, we turn to a recent application of said test in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (2006). *Rumsfeld* is the most relevant case because, unlike *O’Brien*, it involves an allegation by the mixed non-speaker/speaker that it was compelled by the government to speak in ways that interfered with its speech rights, which is the very argument Verizon brought forward in the present case (Verizon & MetroPCS, 2012, p.44).

In *Rumsfeld*, under a federal law, the Solomon Amendment, law schools that receive federal funding were forced to provide the same access to career placement services to military recruiters that they provide to other employers. This requirement conflicted with most law schools' policies of non-discrimination that withhold career placement services from employers who exclude employees on the basis of race, gender, religion or sexual orientation. The Forum for Academic and Institutional Rights (“FAIR”) challenged the Solomon Amendment on the ground that it violated the law schools’ freedom of speech.

The Supreme Court found that "[t]he Solomon Amendment neither limits what law schools may say nor requires them to say anything... [a]s a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must do--afford equal access to military recruiters--not what they may or may not say" (547 U.S. 60). In the present case, the FCC's Order also regulates the conduct of Verizon, as a conduit, not its speech: it affects what Verizon must do -- afford equal access to edge providers -- not what Verizon may or may not say. First, just as in the *Pruneyard* case, the Court noted that the law schools were not required to perform an affirmation of belief such as the pledge of allegiance. Second, the Supreme Court's decision revolved around the perception by users of the facilities. In deciding that the "accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school" (547 U.S. 64), the Court again referred to *Pruneyard*, stating that "there was little likelihood that the views of those engaging in the expressive activities would be identified with the owner, who remained free to disassociate himself from those views and who was 'not ... being compelled to affirm [a] belief in any governmentally prescribed position or view' (547 U.S. 65, citing 447 U. S. 74 (1980) at 88.) The same held true in *Rumsfeld*: "We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy... Surely students have not lost that ability by the time they get to law school" (547 U.S. 65). In the present case, it is unlikely as of today that Verizon's customers would confuse Netflix's message for Verizon's message, since Verizon has repeatedly distinguished itself from the edge users for whose speech it serves as a conduit. A weak point, however, appears here for the government should the FCC proceed with rules under Title I classification, since Verizon once again has the unilateral power to alter that perception by the public, in particular by altering its business model. Such a weak point would not appear under a Title II classification. Third,

[h]aving rejected the view that the Solomon Amendment impermissibly regulates speech, we must still consider whether the expressive nature of the conduct regulated by the statute brings that conduct within the First Amendment's protection. In *O'Brien*, we recognized that some forms of " 'symbolic speech' " were deserving of First Amendment protection. 391 U. S., at 376. But we rejected the view that "conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Ibid.* Instead, we have extended First Amendment protection only to conduct that is inherently expressive (547 U.S. 65, 66).

So the question in the Verizon case is as follows: is Verizon's conduct as a conduit "so inherently expressive that it warrants protection under *O'Brien*" (547 U.S. 66)? If so, then the FCC regulation is subject to intermediate scrutiny as defined in the *O'Brien* test. If not, Verizon has no further First Amendment claims, as long as the courts establish, as is likely, that there is no compelled speech.

In *Rumsfeld*, the Court did not decide whether or not FAIR's conduct was sufficiently expressive to afford *O'Brien* protection; it just went ahead and applied the *O'Brien* test anyways (547 U.S. at 66). Let us turn, as did the *Rumsfeld* court, to the *O'Brien* test, in order to address any potential argument, would a Verizon court find that just like in *O'Brien*, "'speech' and 'nonspeech' elements are combined in the same course of conduct." (391 U.S. at 367).

Under *O'Brien*, "[w]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important government interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms" (391 U.S. at 367), that is, on the speech element which is mixed with the nonspeech element that is the target of regulation. Specifically, "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the interest" (391 U.S. at 377).

The most relevant guidance on how to apply the *O'Brien* test to the present case is to be found in *Turner Broadcasting System, Inc. v. FCC* (1994) (*Turner I*) and *Turner Broadcasting System, Inc. v. FCC* (1997) (*Turner II*), jointly known as *Turner*, because in *Turner*, the government had imposed must-carry provisions on network operators. In *Turner I*, the U.S. Supreme Court examined the constitutionality of must-carry provisions imposed by Congress on cable operators. It found that “the appropriate standard by which to evaluate the constitutionality of the must-carry provisions is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech” (512 U.S. at 622), as defined in *O'Brien*. Here, just as in *Turner*, the rules at stake “are content neutral, and thus are not subject to strict scrutiny” (512 U.S. at 623). As we’ve previously discussed, the FCC rules, just as in *Turner*, “are content neutral in application, and they do not force ... operators to alter their own messages to respond to the [content] they must carry” (512 U.S. at 623). In addition, just as in *Turner*, in the present case “the physical connection between the [receiver] and the ... network gives ... operators bottleneck, or gatekeeper, control over most programming delivered into subscribers’ homes” (512 U.S. at 623, distinguishing from *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) and *Pacific Gas & Elec. Co. v. Public Util. Comm’n of Cal.*, 475 U.S. 1 (1986) where strict scrutiny had been triggered).

We now apply the *O'Brien* test to a hypothetical where the FCC is attempting to impose a form of no blocking and no discrimination rules onto the broadband providers. The analysis requires that we address four questions, set forth as (a)-(d) below.

a) Would such no blocking and no discrimination rules be within the constitutional power of the Government?

The *Verizon v. FCC* court already answered positively: “[d]oes the Commissions’ current understanding of section 706(a) as a grant of regulatory authority represent a reasonable interpretation

of an ambiguous statute? We believe it does” (740 F.3d at 637). From the standpoint of imposing *sustainable* network openness obligations on the broadband providers, however, Section 706 is not the ideal hook. Section 706 gives the FCC jurisdiction to promote broadband deployment, not to mandate net neutrality. In the Order, the net neutrality provisions are designed to trigger competition and broadband deployment: they only serve as a hook. However, once broadband deployment is achieved, the FCC mandate terminates, and there is no further “constitutional power” (in the words of *O’Brien*) to impose network openness. One could conceive of a situation where the purposes of Section 706(a) would have been achieved, maybe even where there would be significant competition between broadband providers at the bottleneck level, but where the providers would still impose discrimination among edge providers. Such a situation is far from hypothetical: it happened in France in 2012. While France has one of the most competitive access provider markets in the world (Baer, 2013; Cassidi, 2013), one of the operators, Free, blocked Google ads from being displayed on its customers’ applications, claiming that Google should pay a fee in order to push YouTube content over Free’s bottleneck facility. Free only stopped its discriminating behavior amid pressure from the local regulatory authority (Marchive, 2013; Bergmayer, 2013). This anecdote exemplifies the need for a separate jurisdictional mandate for the FCC to impose openness rules, aside from Section 706, which is only, by nature, a temporary grant of authority to achieve a purpose other than openness. Reclassification under Title II could provide such a sustainable jurisdictional mandate.

b) Would such no blocking and no discrimination rules further an important or substantial government interest?

Once again, the *Verizon v. FCC* court already answered positively. Noting that the Congressional mandate to the FCC was to “‘encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.’ 47 U.S.C. 1302(a),” (740 F.3d at

640), that the Commission “reached its ‘policy conclusion’ by emphasizing, amongst other things, ... the strength of the effect on broadband investment that it anticipated from edge-provider innovation, which would benefit both from the preservation of the ‘virtuous circle of innovation’ created by the Internet’s openness and the increased certainty in that openness engendered by the Commission’s rules” (740 F.3d at 649), and that “Verizon has given us no persuasive reason to question that judgment,” (Ibid), the court found that that the “Commission’s finding that Internet openness fosters the edge-provider innovation that drives this ‘virtuous cycle’ was ... reasonable and grounded in substantial evidence” (740 F.3d at 644). Once again, however, the *O’Brien* prong is met by reference to the impact of the rules on broadband investment. But if the government interest of reaching high levels of broadband penetration was met at any point in the future, this would subsequently deprive any openness rules from jurisdictional basis under the second *O’Brien* prong: if the government interest is already met without the additional openness regulations, then these regulations are not justified under Section 706.

c) Is the governmental interest unrelated to the suppression of free expression?

In *Turner I*, the U.S. Supreme Court found that “Congress declared that the must carry provisions serve three interrelated interests: (1) preserving the benefits of free, over the air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming....None of these interests is related to the ‘suppression of free expression,’ *O’Brien*, 391 U. S., at 377, or to the content of any speakers’ messages” (512 U.S. at 662, concluding that the above *O’Brien* prong was met). As mentioned above, in *Verizon v. FCC*, the court found that the Congressional mandate to the FCC was to “‘encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans’” (740 F.3d at 640), and that the Commission “reached its ‘policy

conclusion’ by emphasizing, amongst other things, ... the strength of the effect on broadband investment that it anticipated from edge-provider innovation, which would benefit both from the preservation of the ‘virtuous circle of innovation’ created by the Internet’s openness and the increased certainty in that openness engendered by the Commission’s rules” (740 F.3d at 649). Just as in *Turner I*, then, the FCC’s Order did seem strongly grounded in motivations that are unrelated to suppressing any of the broadband providers’ speech, and, assuming such motivations were restated when issuing new no blocking and no unreasonable discrimination rules as well as paid prioritization of traffic through charges assessed on edge providers going forward. It is therefore very likely that a court would find that this *O’Brien* prong is met.

d) Is the incidental restriction on alleged First Amendment freedoms no greater than is essential to the furtherance of the interest?

This is where the government’s case, applying section 706 statutory authority in conjunction with Title I jurisdiction, presents weak points. While the *Verizon v. FCC* court did not rule on First Amendment grounds, it did address the issue of regulatory costs. It found that the record “contains much evidence supporting the Commission’s conclusion that, ‘[b]y comparison to the benefits of [its] prophylactic measures, the costs associated with the open Internet rules ... are likely small ... [h]ere the Commission reached its ‘policy conclusion by emphasizing, among other things, ... the absence of evidence that similar restrictions of broadband providers had discouraged infrastructure investment ... and Verizon has given us no persuasive reason to question that judgment” (740 F.3d at 649). However, while the court did address the potential cost of the regulation for infrastructure investment by the target of regulation (the broadband providers), it did not address the incidental restriction on alleged First Amendment freedom on the target of the regulation, which is at the core of the *O’Brien* test. In other words, for an FCC regulation to pass First Amendment muster under Title I, the incidental

restriction on the broadband providers' ability to speak must be no greater than is essential to the furtherance of the interest. In order to interpret this last prong of the *O'Brien* test and apply it to the case at stake, we find guidance in *Turner*.

In *Turner I*, the Court, itself finding guidance in *Ward v. Rock Against Racism* (1989), explained that to satisfy the *O'Brien* standard:

a regulation need not be the least speech restrictive means of advancing the Government's interests. "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward, supra*, at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). Narrow tailoring in this context requires, in other words, that the means chosen do not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward, supra*, at 799. (512 U.S. at 662)

At stake, therefore, is a factual determination. The *Turner I* court found that evidence in this respect was lacking:

Also lacking are any findings concerning the actual effects of must carry on the speech of cable operators and cable programmers--i.e., the extent to which cable operators will, in fact, be forced to make changes in their current or anticipated programming selections; the degree to which cable programmers will be dropped from cable systems to make room for local broadcasters; and the extent to which cable operators can satisfy their must carry obligations by devoting previously unused channel capacity to the carriage of local broadcasters. The answers to these and perhaps other questions are critical to the narrow tailoring step of the *O'Brien* analysis, for unless we know the extent to which the must carry provisions in fact interfere with protected speech, we cannot say whether they suppress "substantially more speech than . . . necessary" to ensure the viability of broadcast television. *Ward*, 491 U.S., at 799. (512 U.S. at 667-668)

As a result of the lack of evidence, in *Turner I* the Court remanded the case for further fact finding. Upon remand, and after "18 months of additional fact finding," (520 U.S. at 180), the *Turner II* Court affirmed the summary judgment granted to the government by the District Court, which had concluded that based on evidence the regulation was narrowly tailored and therefore passed the *O'Brien* test (520 U.S. at 180).

Here, for two reasons, lies the FCC's Achilles heel for asserting section 706 authority in conjunction with Title I jurisdiction. First, the *Turner II* decision rested on "significant evidence" indicating that "the vast majority of cable operators have not been affected in a significant manner" (520 U.S. at 182):

[t]his includes evidence that: such operators have satisfied their must-carry obligations 87 percent of the time using previously unused channel capacity; 94.5 percent of the cable systems nationwide have not had to drop any programming; the remaining 5.5 percent have had to drop an average of only 1.22 services from their programming; operators nationwide carry 99.8 percent of the programming they carried before must-carry (520 U.S. at 182).

In the present case, such evidence is lacking, and there is little doubt that Verizon would be quick to point out this flaw. Further, in an era where Netflix uses over a third of the North-American downstream traffic during peak hours to deliver its content (Sandvine, 2014),⁷ and where it has been shown by computer scientists that broadband providers are moving their television content previously provided in analog ways, over their IP platform (Claffy & Clark, 2013), it is not self-evident that a court would find that an FCC must-carry regulation does not "burden substantially more speech than is necessary to further the government's legitimate interests." In other words, if Verizon's own content (for example, television content, or curated Internet content) takes so much bandwidth that requiring Verizon to carry bandwidth hogs such as Netflix could disrupt Verizon's own operations, a court could well find that the *O'Brien* test is not met, and entertain Verizon's First Amendment claims. This leads to the second reason why the last prong of the *O'Brien* test is the government's Achilles heel: the test vests power in Verizon by providing it with incentives to alter its business model in ways that would make the government's burden on its own speech more than the threshold required by *O'Brien* for the regulation to pass First Amendment muster.

⁷According to a May 2014 study by Sandvine, "Netflix continues to be the leader in peak period traffic, accounting for 34.2% of downstream traffic" (p.5).

Thus, if the FCC proceeds under Title I jurisdiction, then *Turner* would provide the broadband providers strong opportunities to derail the regulations. From the standpoint of the FCC, at best, litigation is likely to trigger serious delays in order for factfinding to take place. At worst, the broadband providers would alter their business models in order to trigger a judicial finding that no blocking and/or no discrimination rules protecting edge providers' content and services such as Netflix would indeed impair their own services (television, curated Internet content) in ways that violate their First Amendment rights under *O'Brien*. Such strategy on the part of the FCC, therefore, is unlikely to lead to *sustainable* legal obligations for network openness.

B. First Amendment Considerations When the FCC Exercises Title II Jurisdiction

The government's main Achilles' heel when it comes to imposing sustainable openness obligations on the broadband providers under Title I lies in the unilateral ability of the broadband providers to leverage judicial precedent by altering their business model in ways that would place them under the protection of the First Amendment and would therefore lead to the demise of government openness regulations.

First, we have established that whether or not the broadband providers are considered "speakers" is a key in determining the extent to which they are afforded First Amendment protection. The test for such distinction, however, gives great leeway to the broadband providers to impact the final determination, since it rests around "intent" on behalf of the party at stake, and the perception by receivers of a message (*Spence*). Such perception can be manipulated by the broadband providers, creating a weakness in the FCC's position. This would be solved by a Title II reclassification, since by definition common-carriers are not speakers as to their conduit function. End of story.

Second, assuming a broadband provider would be considered as being both a conduit and a speaker, under *Rumsfeld*, conduct can only be permissibly regulated under the First Amendment

insofar as the receivers of the speech can differentiate what is conduct and what is speech. The weak point in the government's case, here, is again that the outcome of First Amendment litigation under *Rumsfeld* could be favorable to Verizon if Verizon sufficiently modified its activities to make it difficult for the end-user to distinguish, among all the content received through the Verizon facility, what is Verizon content and what is edge-provider content. This puts power into Verizon's hands to avoid openness obligations. In contrast, under a Title II reclassification, the conduit function would, by law, be separated from the speech function, precluding First Amendment claims by Verizon when it comes to the conduit function.

Finally, where conduct and speech cannot be separated, the application of the *O'Brien* and *Turner* test reveal two weaknesses in the FCC's position. First, the FCC's mandate under Section 706 is to further broadband penetration, not to promote openness in itself. Any openness rules taken under Section 706 would therefore become baseless, from a jurisdictional standpoint, should satisfactory levels of broadband penetration be achieved. A reclassification under Title II, on the other hand, would provide openness rules with their own jurisdictional basis, making such rules much more sustainable in the long run. Second, under *Turner*, network openness rules - including no blocking and no unreasonable discrimination rules - imposed on broadband providers would likely be considered unconstitutional as a violation of the First Amendment if they actually interfered with the broadband providers' ability to distribute their own speech. Where under *Turner*, an 18-month investigation revealed that cable companies were barely affected by must-carry rules, the situation today could be very different. Since Netflix, according to independent studies, accounts for over a third of the North-American downstream traffic during peak hours (Sandvine, 2014, p.5), it wouldn't be unreasonable to think that must-carry rules could indeed impair the ability of broadband providers to roll out their own

video streaming, bandwidth-hungry services. Again, such issue could be avoided at once under a Title II classification, where the conduit function would be clearly separated from the speech function.

If broadband providers are reclassified as common carriers under Title II, then the evolution of their business model related to possible speech becomes irrelevant, because when it comes to the conduit function it is well established that no First Amendment issues exist. As Benjamin aptly summarizes, "[t]he longstanding historical practice and understanding was that common carriers of speech were mere transmitters who were not speakers for purposes of the First Amendment...No court has ever suggested that regulation of such carriage triggers First Amendment scrutiny. On the contrary, courts have long treated common carriage regimes as not raising First Amendment issues ... [Courts] have held that conduits do not have free speech rights of their own" (2011, pp. 1686-1687). Whenever rules discriminating against certain types of content being distributed over common carriers' facilities have been put in place and validated by the courts, the rules were imposed by Congress, not by the common carriers themselves, and were designed to protect the recipient of information against unwanted material, not to protect any alleged common carrier's First Amendment right:

In *United States v. Reidel*, 402 U. S. 351 (1971), we said that Congress could prohibit the use of the mails for commercial distribution of materials properly classifiable as obscene, even though those materials were being distributed to willing adults who stated that they were adults. Similarly, we hold today that there is no constitutional stricture against Congress' prohibiting the interstate transmission of obscene commercial telephone recordings. (*Sable Communications v. FCC*, 1989, 492 U.S. at 125)

In fact, common carriers themselves have not before challenged their no-unreasonable-discrimination obligations under the First Amendment. If Verizon were to challenge no-unreasonable-discrimination rules that could be imposed on it as a common-carrier under Title II, precedent would strongly favor the government: common carriers "are obliged to provide a conduit for the speech of others" (*Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 1996, 518 U.S. at 796, Opinion of

KENNEDY, J.). By contrast, classification of broadband providers as common carriers would sustain the edge providers' First Amendment rights; in the words of Justice Holmes, discussing the federally-run post office: "[t]he United States may give up the post office when it sees fit, but, while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues" (*Milwaukee Social Democratic Pub. Co. v. Burlison*, 1921, 255 U.S. at 437, dissenting opinion).

Conclusion

In its attempt to establish new rules for network openness pursuant to its *Open Internet Access NPRM*, the FCC has a choice of two basic strategies. One strategy is based on the FCC's exercise of solely section 706 authority in conjunction with Title I; the other is premised on the FCC's exercise of its Title II authority as a starting point. Our analysis examines differential legal uncertainties arising from these two basic strategies. We conclude that legal challenges to an FCC order are less likely to succeed if the FCC exercises its Title II authority – whether solely or perhaps in conjunction with section 706 – rather than solely its section 706 statutory authority in conjunction with Title I. First, the courts give great deference to FCC expertise in interpreting existing statutory language, including a change in interpretation, with such deference applicable to an FCC reclassification of service under Title II based on a reassessment of circumstances. Second, the reclassification of broadband Internet access service as a Title II telecommunications service not only provides a greater scope of authority to act under the terms of Title II itself, but it also likely expands the permissible scope of the FCC's regulatory authority to act under section 706. Third, reclassification under Title II also strengthens the FCC's ability to defeat a constitutional challenge to its regulatory authority under the First Amendment. Critical to the differences between the FCC's exercise of Title II or section 706 authority in conjunction with Title I are the differing levels of First Amendment rights of common carriers relative to non-common carriers. Therefore, although requiring an additional administrative step of service

reclassification, we conclude that the FCC’s exercise of authority under Title II is a superior legal strategy to reliance solely on section 706 in conjunction with Title I for purposes of providing *sustainable* legal obligations in terms of network openness on broadband Internet access service providers given its greater likelihood of withstanding – highly inevitable – constitutional challenge under the First Amendment.

Our analysis also reveals how the attempt to describe the FCC’s choices of jurisdictional authority to impose network openness rules as simply “section 706 or Title II” may be misleading. A more accurate way of articulating the FCC’s choices of how to exercise its authority is: (1) exercising a narrow scope of section 706 authority coexisting with Title I classification of the service; or (2) reclassifying the service (at least of a transmission component) as Title II, and then exercising Title II jurisdiction either by itself or in conjunction with a now expanded scope of section 706 authority. There are important differences between options (1) and (2), in addition to those related to the ability to withstand First Amendment challenges. As a matter of statutory law, under option (2) the FCC may not only apply its direct authority under Title II provisions, but also the scope of its authority to act directly under section 706 is itself broadened. This is because there is no longer the need to constrain the scope of section 706, to not include common carriage-type obligations, by virtue of a Title I classification of the underlying service. Moreover, section 706 authority by its own terms is “time-bound”, as it grants the FCC authority to act to provide a remedy based only on the existence of certain circumstances; whereas, Title II authority is “timeless”, as its provisions apply to a service given its nature or function. The “timeless” statutory authority under Title II, including forbearance powers granted under section 10 (codified at 47 U.S.C. 160), provides the FCC greater regulatory flexibility to respond to changing circumstances.

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