825 F.3d 674
United States Court of Appeals,
District of Columbia Circuit.

United States Telecom Association, et al., Petitioners
v.
Federal Communications Commission and United States of America, Respondents
Independent Telephone & Telecommunications Alliance, et al., Intervenors

No. 15-1063
|
Consolidated with 15-1078, 15-1086, 15-1090, 15-1091, 15-1092, 15-1095, 15-1099, 15-1117, 15-1128, 15-1151, 15-1164
|
Argued December 4, 2015
|
Decided June 14, 2016

**Synopsis**

**Background:** Broadband internet service providers and industry associations petitioned for review of a Federal Communications Commission (FCC) order, which sought to compel internet openness, commonly known as "net neutrality," by reclassifying broadband service as telecommunications service subject to common carrier regulation under Title II of the Communications Act, forbearing from applying certain Title II provisions to broadband service, and promulgating rules to ban blocking, throttling, and paid prioritization.

**Holdings:** The Court of Appeals, Tatel and Srinivasan, Circuit Judges, held that:

[1] FCC acted reasonably by reclassifying broadband service as telecommunications service;

[2] FCC's notice of proposed rulemaking (NPRM) was adequate with respect to reclassification of broadband service as telecommunications service;

[3] FCC provided valid reason for changing its policy and promulgating rule reclassifying broadband service as telecommunications service;

[4] NPRM provided adequate notice that FCC would regulate interconnection arrangements;

[5] FCC reasonably reclassified mobile broadband service as commercial mobile service;

[6] any deficiency in FCC's NPRM was harmless with respect to redefinition of terms "public switched network" and "interconnected service";

[7] NPRM provided adequate notice of rules from which FCC later decided to forbear;

[8] FCC reasonably decided to forbear from applying mandatory network connection and facilities unbundling requirements;

[9] NPRM provided adequate notice that FCC would issue general conduct rule;

[10] general conduct rule was not impermissibly vague, and thus did not violate Due Process Clause; and

[11] new rules did not force broadband providers to transmit speech with which they might disagree, in violation of First Amendment.

Petitions denied.

Williams, Senior Circuit Judge, filed opinion concurring in part and dissenting in part.

Before: Tatel and Srinivasan, Circuit Judges, and Williams, Senior Circuit Judge.

**Opinion**

Tatel and Srinivasan, Circuit Judges:

For the third time in seven years, we confront an effort by the Federal Communications Commission to compel internet openness—commonly known as net neutrality—the principle that broadband providers must treat all internet traffic the same regardless of source. In our first decision, *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010), we held that the Commission had failed to cite any statutory authority that would justify its order compelling a broadband provider to adhere to certain open internet practices. In response, relying on section 706 of the Telecommunications Act of 1996, the Commission issued an order imposing transparency, anti-blocking, and anti-discrimination requirements on broadband providers. In our second opinion, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), we held that section 706 gives the Commission authority to enact open internet rules. We nonetheless vacated the anti-blocking and anti-discrimination provisions because the Commission had chosen to classify broadband service as an information service under the Communications Act of 1934, which expressly prohibits the Commission from applying common carrier regulations to such services. The Commission

then promulgated the order at issue in this case—the 2015 Open Internet Order—in which it reclassified broadband service as a telecommunications service, subject to common carrier regulation under Title II of the Communications Act. The Commission also exercised its statutory authority to forbear from applying many of Title II's provisions to broadband service and promulgated five rules to promote internet openness. Three separate groups of petitioners, consisting primarily of broadband providers and their associations, challenge the Order, arguing that the Commission lacks statutory authority to reclassify broadband as a telecommunications service, that even if the Commission has such authority its decision was arbitrary and capricious, that the Commission impermissibly classified mobile broadband as a commercial mobile service, that the Commission impermissibly forbore from certain provisions of Title II, and that some of the rules violate the First Amendment. For the reasons set forth in this opinion, we deny the petitions for review.

## I.

Called "one of the most significant technological advancements of the 20th century," ***690** Senate Committee on Commerce, Science and Transportation, Report on Online Personal Privacy Act, Sen. Rep. No. 107-240, at 7 (2002), the internet has four major participants: end users, broadband providers, backbone networks, and edge providers. Most end users connect to the internet through a broadband provider, which delivers high-speed internet access using technologies such as cable modem service, digital subscriber line (DSL) service, and fiber optics. *See* In re Protecting and Promoting the Open Internet ("2015 Open Internet Order" or "the Order"), 30 FCC Rcd. 5601, 5682–83 ¶ 188, 5751 ¶ 346. Broadband providers interconnect with backbone networks—"long-haul fiber-optic links and high-speed routers capable of transmitting vast amounts of data." *Verizon*, 740 F.3d at 628 (citing In re Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control, 20 FCC Rcd. 18,433, 18,493 ¶ 110 (2005)). Edge providers, like Netflix, Google, and Amazon, "provide content, services, and applications over the Internet." *Id.* at 629 (citing In re Preserving the Open Internet ("2010 Open Internet Order"), 25 FCC Rcd. 17,905, 17,910 ¶ 13 (2010)). To bring this all together, when an end user wishes to check last night's baseball scores on ESPN.com, his computer sends a signal to his broadband provider, which in turn transmits it across the backbone to ESPN's broadband provider, which transmits the signal to ESPN's computer. Having received the signal, ESPN's computer breaks the scores into packets of information which travel back across ESPN's broadband provider network to the backbone and then across the end user's broadband provider network to the end user, who will then know that the Nats won 5 to 3. In recent years, some edge providers, such as Netflix and Google, have begun connecting directly to broadband providers' networks, thus avoiding the need to interconnect with the backbone, 2015 Open Internet Order, 30 FCC Rcd. at 5610 ¶ 30, and some broadband providers, such as Comcast and AT&T, have begun developing their own backbone networks, *id.* at 5688 ¶ 198.

Proponents of internet openness "worry about the relationship between broadband providers and edge providers." *Verizon*, 740 F.3d at 629. "They fear that broadband providers might prevent their end-user

subscribers from accessing certain edge providers altogether, or might degrade the quality of their end-user subscribers' access to certain edge providers, either as a means of favoring their own competing content or services or to enable them to collect fees from certain edge providers." *Id.* Thus, for example, "a broadband provider like Comcast might limit its end-user subscribers' ability to access the *New York Times* website if it wanted to spike traffic to its own news website, or it might degrade the quality of the connection to a search website like Bing if a competitor like Google paid for prioritized access." *Id.*

Understanding the issues raised by the Commission's current attempt to achieve internet openness requires familiarity with its past efforts to do so, as well as with the history of broadband regulation more generally.

**A.**

Much of the structure of the current regulatory scheme derives from rules the Commission established in its 1980 Computer II Order. The Computer II rules distinguished between "basic services" and "enhanced services." Basic services, such as telephone service, offered "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." In re Amendment of Section 64.702 of the Commission's Rules and Regulations ("Computer II"), 77 F.C.C. 2d 384, 420 ¶ 96 (1980). Enhanced services consisted of "any offering over the telecommunications ***691** network which is more than a basic transmission service," for example, one in which "computer processing applications are used to act on the content, code, protocol, and other aspects of the subscriber's information," such as voicemail. *Id.* at 420 ¶ 97. The rules subjected basic services, but not enhanced services, to common carrier treatment under Title II of the Communications Act. *Id.* at 387 ¶¶ 5–7. Among other things, Title II requires that carriers "furnish ... communication service upon reasonable request," 47 U.S.C. § 201(a), engage in no "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services," *id.* § 202(a), and charge "just and reasonable" rates, *id.* § 201(b).

The Computer II rules also recognized a third category of services, "adjunct-to-basic" services: enhanced services, such as "speed dialing, call forwarding, [and] computer-provided directory assistance," that facilitated use of a basic service. *See* In re Implementation of the Non-Accounting Safeguards ("Non-Accounting Safeguards Order"), 11 FCC Rcd. 21,905, 21,958 ¶ 107 n. 245 (1996). Although adjunct-to-basic services fell within the definition of enhanced services, the Commission nonetheless treated them as basic because of their role in facilitating basic services. *See* Computer II, 77 F.C.C. 2d at 421 ¶ 98 (explaining that the Commission would not treat as an enhanced service those services used to "facilitate [consumers'] use of traditional telephone services").

Fifteen years later, Congress, borrowing heavily from the Computer II framework, enacted the

Telecommunications Act of 1996, which amended the Communications Act. The Telecommunications Act subjects a "telecommunications service," the successor to basic service, to common carrier regulation under Title II. 47 U.S.C. § 153(51) ("A telecommunications carrier shall be treated as a common carrier under [the Communications Act] only to the extent that it is engaged in providing telecommunications services."). By contrast, an "information service," the successor to an enhanced service, is not subject to Title II. The Telecommunications Act defines a "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." *Id.* § 153(53). It defines telecommunications as "the 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." *Id.* § 153(50). An information service is an "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." *Id.* § 153(24). The appropriate regulatory treatment therefore turns on what services a provider offers to the public: if it offers telecommunications, that service is subject to Title II regulation.

Tracking the Commission's approach to adjunct-to-basic services, Congress also effectively created a third category for information services that facilitate use of a telecommunications service. The "telecommunications management exception" exempts from information service treatment—and thus treats as a telecommunications service—"any use [of an information service] for the management, control, or operation of a telecommunications system or the management of a telecommunications service." *Id.*

The Commission first applied this statutory framework to broadband in 1998 when it classified a portion of DSL service—broadband internet service furnished over telephone lines—as a telecommunications service. *See* ***692** In re Deployment of Wireline Services Offering Advanced Telecommunications Capability ("Advanced Services Order"), 13 FCC Rcd. 24,012, 24,014 ¶ 3, 24,029–30 ¶¶ 35–36 (1998). According to the Commission, the transmission component of DSL—the phone lines that carried the information—was a telecommunications service. *Id.* at 24,029–30 ¶¶ 35–36. The Commission classified the internet access delivered via the phone lines, however, as a separate offering of an information service. *Id.* at 24,030 ¶ 36. DSL providers that supplied the phone lines and the internet access therefore offered both a telecommunications service and an information service.

Four years later, the Commission took a different approach when it classified cable modem service—broadband service provided over cable lines—as solely an information service. In re Inquiry Concerning High–Speed Access to the Internet over Cable and Other Facilities ("Cable Broadband Order"), 17 FCC Rcd. 4798, 4823 ¶¶ 39–40 (2002). In its 2002 Cable Broadband Order, the Commission acknowledged that when providing the information service component of broadband—which, according to the Commission, consisted of several distinct applications, including email and online newsgroups, *id.* at 4822–23 ¶ 38—cable broadband providers transmit information and thus use telecommunications. In the Commission's view, however, the transmission functioned as a

component of a "single, integrated information service," rather than as a standalone offering. *Id.* at 4823 ¶ 38. The Commission therefore classified them together as an information service. *Id.* at 4822–23 ¶¶ 38–40.

The Supreme Court upheld the Commission's classification of cable modem service in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 986, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005). Applying the principles of statutory interpretation established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the Court explained that the key statutory term "offering" in the definition of "telecommunications service" is ambiguous. *Brand X*, 545 U.S. at 989, 125 S.Ct. 2688. What a company offers, the Court reasoned, can refer to either the "single, finished product" or the product's individual components. *Id.* at 991, 125 S.Ct. 2688. According to the Court, resolving that question in the context of broadband service requires the Commission to determine whether the information service and the telecommunications components "are functionally integrated ... or functionally separate." *Id.* That question "turns not on the language of [the Communications Act], but on the factual particulars of how Internet technology works and how it is provided, questions *Chevron* leaves to the Commission to resolve in the first instance." *Id.* Examining the classification at *Chevron*'s second step—reasonableness—the Court deferred to the Commission's finding that "the high-speed transmission used to provide [the information service] is a functionally integrated component of that service," *id.* at 998, 125 S.Ct. 2688, and upheld the order, *id.* at 1003, 125 S.Ct. 2688. Three Justices dissented, arguing that cable broadband providers offered telecommunications in the form of the "physical connection" between their computers and end users' computers. *See id.* at 1009, 125 S.Ct. 2688 (Scalia, J., dissenting).

Following *Brand X*, the Commission classified other types of broadband service, such as DSL and mobile broadband service, as integrated offerings of information services without a standalone offering of telecommunications. *See, e.g.*, ***693** In re Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks ("2007 Wireless Order"), 22 FCC Rcd. 5901, 5901–02 ¶ 1 (2007) (mobile broadband); In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities ("2005 Wireline Broadband Order"), 20 FCC Rcd. 14,853, 14,863–64 ¶ 14 (2005) (DSL).

**B.**

Although the Commission's classification decisions spared broadband providers from Title II common carrier obligations, the Commission made clear that it would nonetheless seek to preserve principles of internet openness. In the 2005 Wireline Broadband Order, which classified DSL as an integrated information service, the Commission announced that should it "see evidence that providers of telecommunications for Internet access or IP-enabled services are violating these principles," it would "not hesitate to take action to address that conduct." 2005 Wireline Broadband Order, 20 FCC Rcd. at 14,904 ¶ 96. Simultaneously, the Commission issued a policy statement signaling its intention to

"preserve and promote the open and interconnected nature of the public Internet." In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 14,986, 14,988 ¶ 4 (2005).

In 2007, the Commission found reason to act when Comcast customers accused the company of interfering with their ability to access certain applications. *Comcast*, 600 F.3d at 644. Because Comcast voluntarily adopted new practices to address the customers' concerns, the Commission "simply ordered [Comcast] to make a set of disclosures describing the details of its new approach and the company's progress toward implementing it." *Id.* at 645. As authority for that order, the Commission cited its section 4(i) "ancillary jurisdiction." 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."); In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer–to–Peer Applications, 23 FCC Rcd. 13,028, 13,034–41 ¶¶ 14–22 (2008). In *Comcast*, we vacated that order because the Commission had failed to identify any grant of statutory authority to which the order was reasonably ancillary. 600 F.3d at 644.

## C.

Following *Comcast*, the Commission issued a notice of inquiry, seeking comment on whether it should reclassify broadband as a telecommunications service. *See* In re Framework for Broadband Internet Service, 25 FCC Rcd. 7866, 7867 ¶ 2 (2010). Rather than reclassify broadband, however, the Commission adopted the 2010 Open Internet Order. *See* 25 FCC Rcd. 17,905. In that order, the Commission promulgated three rules: (1) a transparency rule, which required broadband providers to "disclose the network management practices, performance characteristics, and terms and conditions of their broadband services"; (2) an anti-blocking rule, which prohibited broadband providers from "block[ing] lawful content, applications, services, or non-harmful devices"; and (3) an anti-discrimination rule, which established that broadband providers "may not unreasonably discriminate in transmitting lawful network traffic." *Id.* at 17,906 ¶ 1. The transparency rule applied to both "fixed" broadband, the service a consumer uses on her laptop when she is at home, and "mobile" broadband, the service a consumer uses on her iPhone when she is riding the bus to work. *Id.* The anti-blocking rule applied in full only to fixed broadband, but the order prohibited mobile broadband providers from "block[ing] lawful websites, or block[ing] applications that compete with their voice or video telephony services." *Id.* The anti-discrimination ***694** rule applied only to fixed broadband. *Id.* According to the Commission, mobile broadband warranted different treatment because, among other things, "the mobile ecosystem is experiencing very rapid innovation and change," *id.* at 17,956 ¶ 94, and "most consumers have more choices for mobile broadband than for fixed," *id.* at 17,957 ¶ 95. In support of its rules, the Commission relied primarily on section 706 of the Telecommunications Act, which requires that the Commission "encourage the deployment on a reasonable and timely basis of advanced

telecommunications capability to all Americans," 47 U.S.C. § 1302(a). 25 FCC Rcd. at 17,968–72 ¶¶ 117–23.

In *Verizon*, we upheld the Commission's conclusion that section 706 provides it authority to promulgate open internet rules. According to the Commission, such rules encourage broadband deployment because they "preserve and facilitate the 'virtuous circle' of innovation that has driven the explosive growth of the Internet." *Verizon*, 740 F.3d at 628. Under the Commission's "virtuous circle" theory, "Internet openness ... spurs investment and development by edge providers, which leads to increased end-user demand for broadband access, which leads to increased investment in broadband network infrastructure and technologies, which in turns leads to further innovation and development by edge providers." *Id.* at 634. Reviewing the record, we concluded that the Commission's "finding that Internet openness fosters ... edge-provider innovation ... was ... reasonable and grounded in substantial evidence" and that the Commission had "more than adequately supported and explained its conclusion that edge-provider innovation leads to the expansion and improvement of broadband infrastructure." *Id.* at 644.

We also determined that the Commission had "adequately supported and explained its conclusion that, absent rules such as those set forth in the [2010 Open Internet Order], broadband providers represent[ed] a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment." *Id.* at 645. For example, the Commission noted that "broadband providers like AT & T and Time Warner have acknowledged that online video aggregators such as Netflix and Hulu compete directly with their own core video subscription service," *id.* (internal quotation marks omitted), and that, even absent direct competition, "[b]roadband providers ... have powerful incentives to accept fees from edge providers, either in return for excluding their competitors or for granting them prioritized access to end users," *id.* at 645–46. Importantly, moreover, the Commission found that "broadband providers have the technical ... ability to impose such restrictions," noting that there was "little dispute that broadband providers have the technological ability to distinguish between and discriminate against certain types of Internet traffic." *Id.* at 646. The Commission also "convincingly detailed how broadband providers' [gatekeeper] position in the market gives them the economic power to restrict edge-provider traffic and charge for the services they furnish edge providers." *Id.* Although the providers' gatekeeper position would have brought them little benefit if end users could have easily switched providers, "we [saw] no basis for questioning the Commission's conclusion that end users [were] unlikely to react in this fashion." *Id.* The Commission "detailed ... thoroughly ... the costs of switching," and found that "many end users may have no option to switch, or at least face very limited options." *Id.* at 647.

Finally, we explained that although some record evidence supported Verizon's insistence that the order would have a ***695** detrimental effect on broadband deployment, other record evidence suggested the opposite. *Id.* at 649. The case was thus one where " 'the available data do[ ] not settle a regulatory issue and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion.' " *Id.* (alteration in original) (quoting *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 52, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). The

Commission, we concluded, had "offered 'a rational connection between the facts found and the choice made.' " *Id.* (quoting *State Farm*, 463 U.S. at 52, 103 S.Ct. 2856).

We nonetheless vacated the anti-blocking and anti-discrimination rules because they unlawfully subjected broadband providers to per se common carrier treatment. *Id.* at 655, 658–59. As we explained, the Communications Act provides that "[a] telecommunications carrier shall be treated as a common carrier ... only to the extent that it is engaged in providing telecommunications services." *Id.* at 650 (quoting 47 U.S.C. § 153(51)). The Commission, however, had classified broadband not as a telecommunications service, but rather as an information service, exempt from common carrier regulation. *Id.* Because the anti-blocking and anti-discrimination rules required broadband providers to offer service indiscriminately—the common law test for a per se common carrier obligation—they ran afoul of the Communications Act. *See id.* at 651–52, 655, 658–59. We upheld the transparency rule, however, because it imposed no per se common carrier obligations on broadband providers. *Id.* at 659.

**D.**

A few months after our decision in *Verizon*, the Commission issued a notice of proposed rulemaking to "find the best approach to protecting and promoting Internet openness." In re Protecting and Promoting the Open Internet ("NPRM"), 29 FCC Rcd. 5561, 5563 ¶ 4 (2014). After receiving nearly four million comments, the Commission promulgated the order at issue in this case, the 2015 Open Internet Order. 30 FCC Rcd. at 5624 ¶ 74.

The Order consists of three components. First, the Commission reclassified both fixed and mobile "broadband Internet access service" as telecommunications services. *Id.* at 5743–44 ¶ 331. . . .

In the third portion of the Order, the Commission promulgated five open internet rules, which it applied to both fixed and mobile broadband service. The first three of the Commission's rules, which it called "bright-line rules," ban blocking, throttling, and paid prioritization. *Id.* at 5647 ¶ 110. The anti-blocking and anti-throttling rules prohibit broadband providers from blocking "lawful content, applications, services, or non-harmful devices" or throttling—degrading or impairing—access to the same. *Id.* at 5648 ¶ 112, 5651 ¶ 119. The anti-paid-prioritization rule bars broadband providers from "favor[ing] some traffic over other traffic ... either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity." *Id.* at 5653 ¶ 125. The fourth rule, known as the "General Conduct Rule," prohibits broadband providers from "unreasonably interfer[ing] with or unreasonably disadvantag[ing] (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users." *Id.* at 5660 ¶ 136. The Commission set forth a nonexhaustive list of factors to guide its application of the General Conduct Rule, which we discuss at greater length below. *See id.* at 5661–64 ¶¶ 138–45. Finally, the Commission

adopted an enhanced transparency rule, which builds upon the transparency rule that it promulgated in its 2010 Open Internet Order and that we sustained in *Verizon*. *Id.* at 5669–82 ¶¶ 154–85.

Several groups of petitioners now challenge the Order: US Telecom Association, an association of service providers, along with several other providers and associations; Full Service Network, a service provider, joined by other such providers; and Alamo Broadband Inc., a service provider, joined by an edge provider, Daniel Berninger. TechFreedom, a think tank devoted to technology issues, along with a service provider and several individual investors and entrepreneurs, has intervened on the side of petitioners US Telecom and Alamo. Cogent, a service provider, joined by several edge providers, users, and organizations, has intervened on the side of the Commission.

In part II, we address petitioners' arguments that the Commission has no statutory authority to reclassify broadband as a telecommunications service and that, even if it possesses such authority, it acted arbitrarily and capriciously. In part III, we address challenges to the Commission's regulation of interconnection arrangements under Title II. In part IV, we consider arguments that the Commission lacks statutory authority to classify mobile broadband service as a "commercial mobile service" and that, in any event, its decision to do so was arbitrary and capricious. In part V, we assess the contention that the Commission impermissibly forbore from certain provisions of Title II. In part VI, we consider challenges to the open internet rules. And finally, in part VII, we evaluate the claim that some of the open internet rules run afoul of the First Amendment.

* * * * *

## VII.

We finally turn to Alamo and Berninger's First Amendment challenge to the open internet rules. Having upheld the FCC's reclassification of broadband service as common carriage, we conclude that the First Amendment poses no bar to the rules.

* * * * *

### B.

[71]Alamo argues that the open internet rules violate the First Amendment by forcing broadband providers to transmit speech with which they might disagree. We are unpersuaded. We have concluded that the Commission's reclassification of broadband service as common carriage is a permissible exercise of its Title II authority, and Alamo does not challenge that determination. Common carriers have long been subject to nondiscrimination and equal access obligations akin to those imposed by the

rules without raising any First Amendment question. Those obligations affect a common carrier's neutral transmission of *others'* speech, not a carrier's communication of its own message.

Because the constitutionality of each of the rules ultimately rests on the same analysis, we consider the rules together. The rules generally bar broadband providers from denying or downgrading end-user access to content and from favoring certain content by speeding access to it. In effect, they require broadband providers to offer a standardized service that transmits data on a nondiscriminatory basis. Such a constraint falls squarely within the bounds of traditional common carriage regulation.

[72]The "basic characteristic" of common carriage is the "requirement [to] hold[ ] oneself out to serve the public indiscriminately." *Verizon*, 740 F.3d at 651 (internal quotation marks omitted). That requirement prevents common carriers from "mak[ing] individualized decisions, in particular cases, whether and on what terms to deal." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979) (internal quotation marks omitted). In the communications context, common carriers "make[ ] a public offering to provide communications facilities whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing." *Id*. (alteration and internal quotation marks omitted). That is precisely what the rules obligate broadband providers to do.

[73] [74]Equal access obligations of that kind have long been imposed on telephone companies, railroads, and postal services, without raising any First Amendment issue. *See* ***741** *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 739, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996) (plurality opinion) (noting that the "speech interests" in leased channels are "relatively weak because [the companies] act less like editors, such as newspapers or television broadcasters, than like common carriers, such as telephone companies"); *FCC v. League of Women Voters of California*, 468 U.S. 364, 378, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984) ("Unlike common carriers, broadcasters are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public duties." (alteration and internal quotation marks omitted)); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 106, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973) (noting that the Senate decided in passing the Communications Act "to eliminate the common carrier obligation" for broadcasters because "it seemed unwise to put the broadcaster under the hampering control of being a common carrier and compelled to accept anything and everything that was offered him so long as the price was paid" (quoting 67 Cong. Rec. 12,502 (1926))). The Supreme Court has explained that the First Amendment comes "into play" only where "particular conduct possesses sufficient communicative elements," *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989), that is, when an "intent to convey a particularized message [is] present, and in the surrounding circumstances the likelihood [is] great that the message would be understood by those who viewed it," *Spence v. Washington*, 418 U.S. 405, 410–11, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974). The absence of any First Amendment concern in the context of common carriers rests on the understanding that such entities, insofar as they are subject to equal access mandates, merely facilitate the transmission of the speech of others rather than engage in speech in their own right.

As the Commission found, that understanding fully applies to broadband providers. In the Order, the Commission concluded that broadband providers "exercise little control over the content which users access on the Internet" and "allow Internet end users to access all or substantially all content on the Internet, without alteration, blocking, or editorial intervention," thus "display[ing] no such intent to convey a message in their provision of broadband Internet access services." 2015 Open Internet Order, 30 FCC Rcd. at 5869 ¶ 549. In turn, the Commission found, end users "expect that they can obtain access to all content available on the Internet, without the editorial intervention of their broadband provider." *Id*. Because "the accessed speech is not edited or controlled by the broadband provider but is directed by the end user," *id*. at 5869–70 ¶ 549, the Commission concluded that broadband providers act as "mere conduits for the messages of others, not as agents exercising editorial discretion subject to First Amendment protections," *id*. at 5870 ¶ 549. Petitioners provide us with no reason to question those findings.

[75]Because the rules impose on broadband providers the kind of nondiscrimination and equal access obligations that courts have never considered to raise a First Amendment concern—i.e., the rules require broadband providers to allow "all members of the public who choose to employ such facilities [to] communicate or transmit intelligence of their own design and choosing," *Midwest Video*, 440 U.S. at 701, 99 S.Ct. 1435 (internal quotation marks omitted)—they are permissible. Of course, insofar as a broadband provider might offer its own *content*—such as a news or weather site—separate from its internet access service, the provider would receive the same protection under the First Amendment as other producers of ***742** internet content. But the challenged rules apply only to the provision of internet access as common carriage, as to which equal access and nondiscrimination mandates present no First Amendment problem.

Petitioners and their amici offer various grounds for distinguishing broadband service from other kinds of common carriage, none of which we find persuasive. For instance, the rules do not automatically raise First Amendment concerns on the ground that the material transmitted through broadband happens to be speech instead of physical goods. Telegraph and telephone networks similarly involve the transmission of speech. Yet the communicative intent of the individual speakers who use such transmission networks does not transform the networks themselves into speakers. *See id.* at 700–01, 99 S.Ct. 1435.

[76]Likewise, the fact that internet speech has the capacity to reach a broader audience does not meaningfully differentiate broadband from telephone networks for purposes of the First Amendment claim presented here. Regardless of the scale of potential dissemination, both kinds of providers serve as neutral platforms for speech transmission. And while the extent of First Amendment protection can vary based on the content of the communications—speech on "matters of public concern," such as political speech, lies at the core of the First Amendment, *Snyder v. Phelps*, 562 U.S. 443, 451, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011) (internal quotation marks omitted)—both telephones and the internet can serve as a medium of transmission for all manner of speech, including speech addressing both public and private concerns. The constitutionality of common carriage regulation of a particular transmission

medium thus does not vary based on the potential audience size.

To be sure, in certain situations, entities that serve as conduits for speech produced by others receive First Amendment protection. In those circumstances, however, the entities are not engaged in indiscriminate, neutral transmission of any and all users' speech, as is characteristic of common carriage. For instance, both newspapers and "cable television companies use a portion of their available space to reprint (or retransmit) the communications of others, while at the same time providing some original content." *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986) (internal quotation marks omitted). Through both types of actions—creating "original programming" and choosing "which stations or programs to include in [their] repertoire"—newspapers and cable companies "seek[ ] to communicate messages on a wide variety of topics and in a wide variety of formats." *Id.*

In selecting which speech to transmit, newspapers and cable companies engage in editorial discretion. Newspapers have a finite amount of space on their pages and cannot "proceed to infinite expansion of ... column space." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974). Accordingly, they pick which articles and editorials to print, both with respect to original content and material produced by others. Those decisions "constitute the exercise of editorial control and judgment." *Id.* at 258, 94 S.Ct. 2831. Similarly, cable operators necessarily make decisions about which programming to make available to subscribers on a system's channel space. As with newspapers, the "editorial discretion" a cable operator exercises in choosing "which stations or programs to include in its repertoire" means that operators "engage in and transmit speech." ***743** *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (internal quotation marks omitted). The Supreme Court therefore applied intermediate First Amendment scrutiny to (but ultimately upheld) must-carry rules constraining the discretion of a cable company concerning which programming to carry on its channel menu. *See id.* at 661–62, 114 S.Ct. 2445.

In contrast to newspapers and cable companies, the exercise of editorial discretion is entirely absent with respect to broadband providers subject to the Order. Unlike with the printed page and cable technology, broadband providers face no such constraints limiting the range of potential content they can make available to subscribers. Broadband providers thus are not required to make, nor have they traditionally made, editorial decisions about which speech to transmit. *See* 2015 Open Internet Order, 30 FCC Rcd. at 5753 ¶ 347, 5756 ¶ 352, 5869–70 ¶ 549. In that regard, the role of broadband providers is analogous to that of telephone companies: they act as neutral, indiscriminate platforms for transmission of speech of any and all users.

Of course, broadband providers, like telephone companies, can face capacity constraints from time to time. Not *every* telephone call will be able to get through instantaneously at every moment, just as service to websites might be slowed at times because of significant network demand. But those kinds of temporary capacity constraints do not resemble the structural limitations confronting newspapers and cable companies. The latter naturally occasion the exercise of editorial discretion; the former do not.

If a broadband provider nonetheless were to *choose* to exercise editorial discretion—for instance, by picking a limited set of websites to carry and offering that service as a curated internet experience—it might then qualify as a First Amendment speaker. But the Order itself excludes such providers from the rules. The Order defines broadband internet access service as a "mass-market retail service"—i.e., a service that is "marketed and sold on a standardized basis"—that "provides the capability to transmit data to and receive data from all or substantially all Internet endpoints." 2015 Open Internet Order, 30 FCC Rcd. at 5745–46 ¶ 336 & n. 879. That definition, by its terms, includes only those broadband providers that hold themselves out as neutral, indiscriminate conduits. Providers that may opt to exercise editorial discretion—for instance, by offering access only to a limited segment of websites specifically catered to certain content—would not offer a standardized service that can reach "substantially all" endpoints. The rules therefore would not apply to such providers, as the FCC has affirmed. *See* FCC Br. 81, 146 n.53.

With standard broadband internet access, by contrast, there is no editorial limitation on users' access to lawful internet content. As a result, when a subscriber uses her broadband service to access internet content of her own choosing, she does not understand the accessed content to reflect her broadband provider's editorial judgment or viewpoint. If it were otherwise—if the accessed content were somehow imputed to the broadband provider—the provider would have First Amendment interests more centrally at stake. *See Forum for Academic & Institutional Rights*, 547 U.S. at 63–65, 126 S.Ct. 1297; *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 86–88, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980). But nothing about affording indiscriminate access to internet content suggests that the broadband provider *agrees* with the content an end user happens to access. Because a broadband provider does not—and is not understood by users to—"speak" when providing neutral access to internet content as common carriage, the ***744** First Amendment poses no bar to the open internet rules.