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## Paradigm Shift of Net Neutrality in the United States

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# **Paradigm Shift of Net Neutrality in the United States**

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# Net Neutrality Paradigm Shift in the United States

## Abstract

### I. Introduction

Broadband Internet is highly developed and sophisticated in both its technological and commercial aspects, and the regulation of broadband service providers (BSPs) remains controversial. Regulating BSPs is challenging because there is no precedent, and the rapid progress of technology has rendered regulatory justification complex. Currently, the concept of net neutrality is used as a measure of BSP regulation. The basic concept of net neutrality is that BSPs should treat all data on the Internet equally, which means the information data passing through BSP on a first-come first-served basis.<sup>1</sup> Net neutrality was originally aimed at ensuring that the Internet remained a free zone of information flow.<sup>2</sup> Some commentators have associated the concept of net neutrality with the protection of freedom of speech<sup>3</sup> or even the use of eminent domain to confiscate the BSP's property right.<sup>4</sup> However, neither of these arguments has received serious attention from academics or practitioners. This article argues that the arrangement of information flow by BSPs for commercial reasons will never constitute a direct infringement of freedom of speech, and that the use of eminent domain applies only to the total use-deprivation of property that can be physically taken and not to the regulatory scheme of net neutrality which does not satisfy with either the total use-deprivation or the physical property requirement.<sup>5</sup>

In recent years, the policy disputes around net neutrality have been characterized by considerable tension between the free flow of information and the business arrangements of BSPs arising from commercialized applications of information technology. Achieving a balance between these interests involves difficult policy decisions because the constitutional hierarchy of free information flow has never been reviewed by the Supreme Court as a fundamental human right. Therefore, when

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<sup>1</sup> STUART MINOR BENJAMIN & DOUGLAS GARY LICHTMAN ET AL., TELECOMMUNICATIONS LAW AND POLICY 1012 (2nd ed., 2006).

<sup>2</sup> Fa-Chang Cheng, *The Review of Newly Developing Trend to Net Neutrality Dispute in the United States and Inspiration to Taiwan*, 198 FORMOSA TRANSNATIONAL L. REV. 89, 92 (2014).

<sup>3</sup> Marvin Ammori, *First Amendment Architecture*, 2012 WIS. L. REV. 1, 1-2 (2012).

<sup>4</sup> Daniel A. Lyons, *Virtual Takings: The Coming Fifth Amendment Challenge to Net Neutrality Regulation*, 86 NOTRE DAME L. REV. 65, 117-118 (2011).

<sup>5</sup> GEOFFREY R. STONE & LOUIS M. SEIDMAN ET AL., CONSTITUTIONAL LAW, 1661-1662 (3rd ed., 1996).

negotiating with business interests associated with cyber technology innovations, net neutrality advocates struggle to explain why the interests of free information flow should prevail. Therefore, the Federal Communications Commission (FCC) reframed the dispute into a discussion of unfair competition. Moreover, the dispute regarding the FCC's regulation of BSP behavior to promote net neutrality in the past has received the District of Columbia Circuit Court's three judicial rulings, which are *Comcast v. FCC* in 2010, *Verizon v. FCC* in 2014, and *USTA v. FCC&USA* in 2016.

The problems encountered by the FCC in justifying net neutrality regulations arise in two areas: one is the convincing legal authority and the other is the proper regulatory structure of telecommunication industry. Neither the convincing legal authority to support the regulations by supervising the BSPs' behavior nor whether the asserted regulatory substance is in agreement with the entire telecommunications regulatory infrastructure has been determined. In this article, two prior judicial decisions, *Comcast* and *Verizon*, regarding net neutrality are briefly reviewed to provide a foundation for examining the recent judicial decision in the 2016 *USTA* case handed down by the District of Columbia Circuit Court (hereinafter "Circuit Court"). The different interpretations between the parties in the *USTA* case regarding the FCC's jurisdiction and justifications of the *2015 Open Internet Order* are also explained in this article. The main goal of this article is to proffer the determination of crucial criteria in the net neutrality dispute. The different points of view between the advocates and opponents of net neutrality, especially the disagreement between the bipartisan FCC commissioners, are also observed. Through a review of the paradigm shift in the net neutrality, the advantages and disadvantages from the discussion of past regulation and court decisions are explored, and a thorough analysis is offered regarding the future of the U.S. policy on the net neutrality. The concept of net neutrality is embodied within the Open Internet policy (rules, orders)<sup>6</sup>. For the purpose of this article, these three terms (i.e., policy, rules, and orders) are used interchangeably. Furthermore, since the Telecommunications Act of 1996 overhauled the significant part of Communications Act of 1934, these two federal legislations are mentioned interchangeably in this article.

## **II. Overall Jurisdictional Review and Two Prior Cases Overruling the FCC's Regulation on Open Internet**

Generally, reviewing the FCC's jurisdiction to supervise BSPs involves two types of jurisdictional authority: common carrier jurisdiction for telecommunications carriers (i.e., Title II jurisdiction) and ancillary jurisdiction for information-service

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<sup>6</sup> Federal Communications Commission, *Open Internet*, <https://www.fcc.gov/general/open-internet>.

providers (Title I jurisdiction)<sup>7</sup>. Different jurisdictional authorities have different levels of regulatory intensity. To propose a regulatory scheme for BSPs, the FCC must determine which jurisdictional authority applies in the first place. In doing so, it not only supports the legitimacy of the regulation but also prepares for possible review in the court. Therefore, laying the legal foundation of BSP regulation regarding net neutrality should be the priority consideration in drafting the administrative order by the FCC or conducting the review by the court.

In the *Comcast* case<sup>8</sup>, the Circuit Court denied the FCC's authority to bar Comcast from interfering with its customers' use of peer-to-peer networking applications<sup>9</sup>. In its discussion, the Circuit Court rejected the FCC's ancillary jurisdiction argument because the FCC had failed to tie its assertion of ancillary authority over Comcast's Internet service to any statutorily mandated responsibility.<sup>10</sup>

In the 2014 *Verizon* case,<sup>11</sup> the Circuit Court still overturned the FCC's *2010 Open Internet Order* with even clearer reasons. Three major regulatory requirements in the *2010 Open Internet Order* including transparency, antiblocking, and antidiscrimination measures were heavily challenged.<sup>12</sup> Under the regulatory scheme of the Telecommunications Act of 1996, telecommunications carrier shall be treated as a common carrier under stricter regulatory measures of Title II; however, the provider of information service is not subject to Title II regulation.. Traditionally, the FCC stringently regulated telecommunications carriers due to its quasi-public nature.<sup>13</sup> In this case, the FCC insisted that even BSPs should be categorized as information service providers, and BSPs still could be regulated under certain regulations to protect the value of open Internet. The *2010 Open Internet Order* was enacted to achieve the goal of net neutrality;<sup>14</sup> however, not all of the FCC commissioners agreed the entire net neutrality order.

The *2010 Open Internet Order* provides three major requirements:<sup>15</sup>

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<sup>7</sup> The common names of Title I and Title II originally are categorized under the Communications Act of 1934. See Christopher S. Yoo, *Wickard for the Internet? Network Neutrality After Verizon v. FCC*, 66 FED. COMM. L.J. 415, 419-424 (2014).

<sup>8</sup> *Comcast Corp. v. FCC*, 600 F.3d 642 (2010).

<sup>9</sup> Under FCC's Internet Policy Statement, consumers are entitled to access the lawful Internet content of their choice and to run applications and use services of their choice. *Id.* at 644.

<sup>10</sup> *Id.* at 644. Even FCC attempted to use section 706 in the Telecommunications Act of 1996 as the basis for ancillary jurisdiction in the case argument, the circuit Court found the 2008 Open Internet Order itself refused to recognize section 706 as an independent authority. Therefore the aforementioned argument also failed in dispute. *Id.* at 658-659.

<sup>11</sup> *Verizon v. FCC*, 740 F.3d 623 (2014).

<sup>12</sup> *Id.* at 661.

<sup>13</sup> *Id.* at 651.

<sup>14</sup> *Id.* at 631-633.

<sup>15</sup> *Id.* at 633.

“Transparency” refers to the public disclosure of information regarding the network management practices, performance, and commercial terms of broadband Internet access services; “Anti-blocking” prohibits BSPs from blocking lawful content, applications, and services subject to reasonable network management, and it also prohibits impairing or degrading particular content, applications, services, or nonharmful devices to render them effectively unusable; “Antidiscrimination” means that fixed BSPs shall not unreasonably discriminate in transmitting lawful network traffic, including paid-priority.

The Circuit Court found that Verizon was subject to both the antiblocking and antidiscrimination measures, which were similar to the no “unjust and unreasonable” discrimination standard for telecommunications carriers.<sup>16</sup> In particular, the Circuit Court recognized the *2010 Order* clearly shows the negative reaction of BSPs to the paid-priority business measure.<sup>17</sup> Besides, the antiblocking measure requires BSPs to set the edge provider minimum level of access. Moreover, because the *2010 Order* also prohibited BSPs from impairing and degrading certain content, applications, services, or nonharmful devices to render them effectively unusable, it seems to have left BSPs with no option for negotiation.<sup>18</sup> The Circuit Court concluded that the aforementioned measures exceeded the FCC’s alleged legal competence to regulate information service providers. Notably, Judge Silberman, who delivered the dissenting opinion, believed that the FCC could not substantiate that the *2010 Open Internet Order* could either promote competition or remove barriers to infrastructure investment. This is required by legal authorities in the regulation of information service providers because the FCC failed to conduct a market power analysis.<sup>19</sup>

To strengthen the legal foundation on net neutrality after the *Verizon* case, the FCC issued a notice of proposed rulemaking to seek the best approach to protecting and promoting Internet openness, and finally in February 2015 the FCC adopted the *2015 Open Internet Order* under the guise of net neutrality.<sup>20</sup> In the *2015 Open Internet Order*, the FCC adopted five significant measures, including reclassifying both fixed and mobile BSPs as telecommunications service providers; forbearing from applying certain Title II provisions to broadband service; promulgating the bright-line rules to ban blocking, throttling and no paid prioritization; prohibiting BSPs from unreasonable interference or unreasonable disadvantage to consumer or edge providers; and adopting enhanced transparency rule.

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<sup>16</sup> Under the Circuit Court’s opinion, the common carrier’s allowance did not include “commercially reasonable” standard. *Id.* at 657.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 658.

<sup>19</sup> *Id.* at 662, 665.

<sup>20</sup> See Protecting and Promoting the Open Internet, 80 Fed. Reg. 19738-01, 19740-19741 (April 13, 2015).

### III. *USTA* Case and Subsequent Paradigm Shift

Unsurprisingly, the 2015 *Open Internet Order* was challenged in the Circuit Court once again, and this ensued in the 2016 *USTA* case,<sup>21</sup> which was handed down by the Circuit Court with the same majority as the 2014 *Verizon* case. However, in contrast to the *Verizon* case, the FCC pushed the regulation forward to the brink of interpretation, and the Circuit Court fully bolstered the FCC's argument. This has been interpreted as a complete victory for the FCC. Net neutrality does not appear to have become less controversial, but instead, this issue awaits further policy decisions.<sup>22</sup> This article reviews the *USTA* case thoroughly and narrows it to certain essential disputes in net neutrality policy making. Understanding the discrepancy between the conflicting parties' opinions is necessary to grasp the observations of this article.

In this third attempt for the Open Internet policy, the FCC reclassified BSPs as telecommunications services providers<sup>23</sup> and included the "interconnection arrangements" between BSPs and other networks within the meaning of "telecommunications services."<sup>24</sup> Under the FCC's mindset, the Communications Act empowered the FCC to refrain from asserting other regulatory schemes for telecommunications services providers besides the restrictions stipulated in the Open Internet policy because the FCC determined that other regulatory schemes were unnecessary to ensure just and reasonable service or protect consumers. Moreover, the forbearance was consistent with the public interest.<sup>25</sup> This indicates the FCC's ambition to regulate BSPs. At the beginning of the case statement, the Circuit Court established the *Chevron* Doctrine as the reviewing standard, meaning that the Circuit Court would fundamentally respect the FCC's fact-finding and policy decisions unless these were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.<sup>26</sup> The Circuit Court claimed these criteria were met, but based on the reviewing standard, the Circuit Court should inquire as to whether the FCC's reclassification and the regulatory substance were truly in accordance with the law.

In the 2016 *USTA* case, the Circuit Court mainly divided the reviewing opinion into four parts: the adequacy of procedural notification, the ambiguity of the statute,

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<sup>21</sup> United States Telecom Ass'n v. FCC, 825 F.3d 674 (2016).

<sup>22</sup> Jenna Ebersole, *Telecom Cases to Watch in 2017*, MORGANLEWIS (Jan. 2, 2017), <https://www.morganlewis.com/~media/files/news/2017/law360-telecom-cases-to-watch-in-2017-02jan17.ashx?la=en>

<sup>23</sup> United States Telecom Ass'n v. FCC, 825 F.3d 674, 695 (2016).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 695-696.

<sup>26</sup> *Id.* at 697.

the permissible construction of the reclassification, and an examination of the reclassified real substance. In the *2010 Open Internet Order*, the FCC used the ancillary jurisdiction rationale as a foundation for interpreting the statutory ambiguity, and to incorporate changed circumstances and legitimate reasons to achieve reclassification.<sup>27</sup> The FCC asserted that not only is the procedural notification adequate, but also that the statutory ambiguity enabled the reclassification of BSPs as telecommunications carriers on the basis of the changed circumstances and legitimate reasons. Furthermore, in this reclassification of broadband services,<sup>28</sup> the changed circumstances also hinged on consumer perspectives and pervasive evidence supporting the dispute.<sup>29</sup> To define BSPs as telecommunications carriers under the permissible construction requirement, the FCC explained that despite some incidents of BSPs' using information services to transmit content to end users (e.g. Domain Name System and caching), these services do not turn broadband Internet access into a functionally integrated information service because they are simply used to facilitate the transmission of information so that users can access other services. In reviewing the dispute in the court decision, the FCC also attempted to provide an explanation for fortifying the permissible construction requirement and each rule of the reclassification. The FCC's arguments have been recognized by the majority of the Circuit Court, but have also been heavily criticized by the opponents of net neutrality and Williams, the Senior Circuit Judge who filed the dissenting opinion in this case.

In the 2016 *USTA* case, the opponents first argued from a procedural point of view that the FCC failed to assert its alleged authority to regulate telecommunications services providers based on the Administrative Procedure Act, because they only mentioned the ancillary jurisdiction, which is contained within Section 706 of the 1996 Telecommunications Act.<sup>30</sup> In response, the advocates claimed that, by seeking comments about whether BSPs should be reclassified as telecommunications services providers, the FCC had already satisfied its obligation in the Notice of Proposed Rulemaking.<sup>31</sup>

After the procedural dispute challenge, the opponents inquired the reasons for

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<sup>27</sup> Rob Frieden, *Déjà vu All Over Again: Questions and a Few Suggestions on How the FCC Can Lawfully Regulate Internet Access*, 67(3) FED. COMM. L.J. 325, 358, 361 (2015).

<sup>28</sup> To define between the telecommunications service and the information service, FCC stated that the former is the Internet access service and the latter is the add-on applications, content and services. *See United States Telecom Ass'n v. FCC*, 825 F.3d 674, 698 (2016).

<sup>29</sup> FCC proffered record evidence to demonstrate that consumers use broadband primarily to access third-party content, which would make BSPs' service providing a "stand-along" telecommunications service. *Id.* at 697-698.

<sup>30</sup> The Administrative Procedure Act section 553 requires a Notice of Proposed Rulemaking to include either the terms or substance of the proposed rule or a description of the subjects and issues involved. *Id.* at 700.

<sup>31</sup> *Id.*



reclassification of BSPs. According to the FCC, the ambiguous interpretation of legal authorities combined with some legitimate reasons gave rise to the need for the reclassification, which fulfilled the requirements of the aforementioned *Chevron* Doctrine. Therefore, the following court decision examines the *2015 Open Internet Order* reclassification in terms of the two criteria stipulated in the *Chevron* case to examine the FCC’s legal theory: the ambiguity of the statute and the permissible construction of the reclassification.<sup>32</sup>

The advocates claimed that the *Open Internet Order* is ambiguous because the definition of “offering” was open to interpretation.<sup>33</sup> According to the interpretation in the *Brand X* case,<sup>34</sup> to serve as a telecommunications carrier, a provider must offer telecommunications services that are functionally separate from information services. Additionally, to serve as an information service provider, a provider must offer telecommunications services that are functionally integrated with information services. Therefore, whether BSPs are telecommunications carriers or information-service providers depends on the interpretation of the FCC’s fact-finding in resolving the ambiguity. This ambiguity satisfied the first requirement of the *Chevron* Doctrine and substantiated the telecommunications carriers’ reclassification of BSPs.

Conversely, the opponents summarized three reasons for maintaining broadband services as unambiguous information services.<sup>35</sup> The first argument was that broadband services enable generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making information available via telecommunication, meaning that BSPs cannot be included in the mutually exclusive category of telecommunications services. In response, the advocates indicated that BSP services can offer standalone telecommunications services despite these information service functions.

The second argument was that Congress’s intention to incorporate BSPs under the definition of “interactive computer services” was demonstrated in the 1996 Communications Decency Act, where the legislation defines an “interactive computer service” as follows:

Any information service, system, or access software provider that provides

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<sup>32</sup> *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984).

<sup>33</sup> According to 47 USC § 153 (53), the definition of “telecommunications service” means 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. *See United States Telecom Ass’n v. FCC*, 825 F.3d 674, 701 (2016).

<sup>34</sup> *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 991 (2005).

<sup>35</sup> *United States Telecom Ass’n v. FCC*, 825 F.3d 674, 702-703 (2016).

or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

In response, the advocates argued that Congress would not attempt to settle the regulatory status of BSPs to provide services in an indirect manner in the 1996 Telecommunications Act.

The third argument was that the statutory context and history confirmed FCC's classification of the enhanced services in *Computer II* regime and classification of the information service in 1996 Telecommunications Act. In response, the advocates and the majority claimed that Congress never delegated to the FCC authority to regulate broadband service as a telecommunications service and insisted that demonstrating a congressional construction of the statutory meaning and congressional action or inaction is often entitled to no weight in answering whether an agency has statutory authority to promulgate regulations. In addition, the advocates saw no sign of precluding the FCC from regulatory power over BSPs, which would otherwise directly contradict the Supreme Court opinion in the *Brand X* case because the Supreme Court recognized that Congress, by leaving a statutory ambiguity, delegated the power to regulate BSPs to the FCC.<sup>36</sup>

Regarding the permissibility of the reclassification, referred to as the “*Chevron* step two” requirement, the primary disputes centered on whether BSPs offered stand along telecommunications services and whether there was evidence to support the reclassification on the basis of the changed circumstances. The opponents’ first argument against this was that DNS and caching are not simply used to facilitate the transmission of information, but instead present many core information-service functions associated with BSPs.<sup>37</sup> In response, the advocates recognized that the broadband service features were adjunct-to-basic services, but this did not alter the fundamental character of the telecommunications service to BSPs and thus the service features were excluded from the definition of information services unless provided by a third party.<sup>38</sup> The opponents then challenged the idea of adequate changed circumstances to support the reclassification, arguing that the FCC did not give sufficient explanation.<sup>39</sup> Moreover, in the dissenting opinion, Judge Williams did not concur that there were changes in consumer broadband use to access third party content, applications, services, and fast advertising speeds compared with a decade

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<sup>36</sup> *Id.* at 704.

<sup>37</sup> *Id.* at 705.

<sup>38</sup> *Id.* at 705-706.

<sup>39</sup> *Id.* at 707, 778.

ago. Nor did he see a connection between the alleged changed circumstances and the reclassification of BSPs as telecommunications carriers.<sup>40</sup> The opponents also argued whether ancillary jurisdiction would be sufficient to authorize the *2015 Open Internet Order*.<sup>41</sup> The advocates countered by explaining that the *2015 Open Internet Order* could be categorized only as telecommunications service regulations because BSPs were common carriers *per se*,<sup>42</sup> and they ignored Judge Williams' criticism of no-factual-findings.<sup>43</sup>

The opponents also asserted that the reclassification would undermine investment in broadband infrastructure,<sup>44</sup> indicating that the swift switch in policy attitude was hurting potential investment in BSPs because of the costs of regulatory compliance and policy uncertainty,<sup>45</sup> which contradict the fair reliance of BSPs.<sup>46</sup> The advocates responded that the reclassification's negative impact on broadband investment was indirect, given that the increased demand for broadband and the increased competition to supply broadband were more significant drivers of investment.<sup>47</sup>

The dissenting Judge Williams suggested that the FCC should conduct a specific type of market power analysis to bolster the BSPs' reclassification as a telecommunications carrier.<sup>48</sup> In his opinion, the FCC had made the prospect of competition the basis for refusing to apply telecommunications carrier regulations for nearly four decades. He claimed that many of the FCC's policy arguments assert what sound like claims of market power, but without going through any of the fact gathering or analysis required to support such claims.<sup>49</sup> Moreover, he observed that, by erecting this unfounded criterion, the FCC created the illusion of a lack of choice in access to broadband services so that the public would infer a need for tighter

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<sup>40</sup> *Id.* at 748.

<sup>41</sup> *Id.* at 707.

<sup>42</sup> *Id.*

<sup>43</sup> In responding dissent Judge Williams's no-factual-findings argument, the Circuit Court just said that we need not decide whether there is really anything new because FCC concluded that changed factual circumstances were not crucial to its classification decision. *Id.* at 709.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 747, 754-755.

<sup>46</sup> *Id.* at 746.

<sup>47</sup> Given this shifting regulatory treatment, it was not unreasonable for the Commission to conclude that broadband's particular classification was less important to inventors than increased demand. *Id.* at 710. There seems to have conflicting evidence regarding whether broadband investment has been hurt by the net neutrality rules. See also Grant Gross, *New FCC Chairman: Net Neutrality Rules Were a 'mistake'*, PCWORLD (Feb 28, 2017), <http://www.pcworld.com/article/3175769/internet/new-fcc-chairman-net-neutrality-rules-were-a-mistake.html>.

<sup>48</sup> While the 1996 Act by no means conditions classification under Title II on a finding of market power, *Brand X* shows that the Court recognized the relevance of market power to the Commission's classification decision. *Id.* at 749.

<sup>49</sup> *Id.* at 750.

regulation.<sup>50</sup>

Finally, the opponents argued that the reclassification and the forbearance were intertwined and therefore should stand or fall together.<sup>51</sup> They claimed that, to initiate the forbearance power, the FCC would traditionally conduct a market power analysis. Because the FCC did not do so in the *2015 Open Internet Order*, the reclassification should fall with the forbearance as arbitrary and capricious.<sup>52</sup> In response, the advocates simply stated that persuasive evidence of competition is unnecessary as a predicate to forbearance.<sup>53</sup>

After reviewing the required criteria for reclassifying BSPs as telecommunications carriers, which the FCC had based upon, both the advocates and opponents reviewed the substance of the *2015 Open Internet Order* to see whether it could satisfy as the telecommunications carrier regulation. The content provision involved five rules—three bright-line rules (no blocking, no throttling, and no paid prioritization) and two general rules (no unreasonable interference or unreasonable disadvantage to consumers or edge providers, and enhanced transparency).<sup>54</sup> The opponents challenged the “no paid prioritization” and “no unreasonable interference or unreasonable disadvantage to consumers or edge providers” (hereinafter “general conduct rule”) rules in the Federal Circuit.<sup>55</sup>

The opponents argued that the regulation against paid prioritization did not fit any traditional regulation of telecommunications carriers and that the ancillary jurisdiction still required verification to support the claim.<sup>56</sup> Surprisingly, the advocates did not argue for incorporating the anti-paid-prioritization regulation into the traditional carrier’s regulation. Instead, they claimed that even though BSPs were categorized as telecommunications carriers, the ancillary jurisdiction could still be

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<sup>50</sup> FCC set up 25 Mbps access standard and indicated just few people could acquire such access to show the lack of competition in broadband service. But the standard was far exceeding the needs of ordinary customers. *Id.* at 751.

<sup>51</sup> *Id.* at 775.

<sup>52</sup> *Id.* at 778.

<sup>53</sup> *Id.* at 776.

<sup>54</sup> The anti-blocking and anti-throttling rules prohibit broadband providers from blocking lawful content, applications, services, or non-harmful devices or throttling access to the same. The anti-paid-prioritization rule bars broadband providers from favoring some traffic over other traffic either in exchange for consideration from a third party or to benefit an affiliated entity. The General Conduct Rule prohibit broadband providers from unreasonably disadvantaging (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. The enhanced transparency rule is built on the promulgation in 2010 Open Internet Order sustained in the Verizon case. *Id.* at 696.

<sup>55</sup> *Id.* at 733.

<sup>56</sup> Judge Williams said in the dissenting opinion that the opponent parties argued that even if Title II (for telecommunications carrier regulation) could properly be applied to broadband service, that title gave FCC no authority to prohibit reasonable rate distinction. *Id.* at 733-734.

used to interpret the legal authority for regulation. FCC's ancillary jurisdiction had been authenticated in the *Verizon* case, in which the court recognized that the FCC had authority to enact measures to encourage the deployment of broadband infrastructure and that the FCC's rules would promote the virtuous circle of innovation that had driven the rapid growth of the Internet.<sup>57</sup> The FCC was also challenged over tying telecommunications carriers' status to ancillary jurisdiction, because the opponents considered the purpose of regulations based upon telecommunications carriers' status to be incompatible with ancillary jurisdiction.<sup>58</sup> Judge Williams further explained that, by appealing previous decisions, the FCC had recognized the permissibility of reasonable rate differences;<sup>59</sup> only unjust or unreasonable discrimination was disallowed under the regulation of telecommunications carriers,<sup>60</sup> and he considered uprooting the permissibility of reasonable rate differences extraordinary.<sup>61</sup> He also expressed bewilderment at the exemption of caching services and content delivery networks,<sup>62</sup> and questioned the causation between paid prioritization and the virtuous innovation cycle<sup>63</sup> without evaluating the market power of Internet service providers (ISPs).<sup>64</sup> Not only did Judge Williams question the alleged benefits of the regulation against paid prioritization, but he also doubted that paid prioritization would result in the efficient allocation of network resources and benefit broadband development.<sup>65</sup> Moreover, he argued that even if the advocates' claims were correct, the minimum quality standards of ISPs would be an alternative solution to the alleged drawbacks of paid

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<sup>57</sup> *Id.* at 757.

<sup>58</sup> The disfavored parties believed to initiate the telecommunications carrier regulatory scheme is to strengthen the force but the ancillary jurisdiction is to facilitate a shift from regulated monopoly to competition. *See Id.* at 769-771. *See also* Christopher S. Yoo, *Wickard for the Internet? Network Neutrality After Verizon v. FCC*, 66 FED. COMM. L.J. 415, 430-431 (2014).

<sup>59</sup> *Id.* at 758.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 760.

<sup>62</sup> Judge Williams said although the Commission acknowledged that caching agreement raised many of the same issues as other types of paid prioritization, it expressly declined to adopt regulations governing them. And he could not see why the paid access to broadband providers' caching did not violate the paid prioritization ban. And the aforementioned situation was also the same in Content Delivery Networks. *See id.* at 767-768.

<sup>63</sup> The virtuous cycle means innovations at the edges of the network enhance consumer demand, leading to expanded investments in broadband infrastructure that spark new innovations at the edge. And Judge Williams reviewed FCC's proffered evidence and found no relevance to prove the paid-prioritization posing a serious risk to broadband development. *See id.* at 760-762.

<sup>64</sup> FCC used the gatekeeper theory to present a kind of "market-power-lite" in ISPs. Under this theory, ISPs has the power to impede customers' switching in order to achieve the purposes inconsistent with efficient use of the net. The economic theory also called "lock in effect". But FCC gave not substantial evidence to support this theory. *See id.* at 766.

<sup>65</sup> *Id.* at 762-764. Especially, Judge Williams said in his dissenting opinion: Thus paid prioritization would yield finely tuned incentives for innovation exactly where it is needed to relieve network congestion. These innovations could improve the experience for users, driving demand and therefore investment.

prioritization.<sup>66</sup>

Regarding the general conduct rule, the opponents argued that it was sufficiently vague to go against the due process clause in the U.S. Constitution.<sup>67</sup> The Circuit Court indicated that the vagueness doctrine consists of two concerns: that the regulated parties should know what is required of them, and that precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory manner.<sup>68</sup> The advocates rejected the adequate notice aspect of the argument, arguing that the prospective application of the general conduct rule would offer sufficient specificity such that a reasonably prudent BSP would have a fair warning of what the regulations required. They also claimed that the precision and guidance requirement had been satisfied because the FCC had set forth seven factors, each with an explanation of how it should be interpreted and applied.<sup>69</sup>

#### **IV. Serious Disputes around the Decision Making of Net Neutrality Policy**

The entire decision of 2016 *USTA* case to deploy legal theory for the reclassification of BSPs generally impinged on the competitive market concept. Even though freedom of speech might be a potential dispute, this subject did not garner serious attention, similar to the 2016 *USTA* case. The opponents argued that the *Open Internet Order* violate the First Amendment by forcing broadband providers to transmit speech with which they might disagree,<sup>70</sup> although this argument was determinately rebutted by the majority opinion. First, the Circuit Court said that common carriers have long been subject to nondiscrimination and equal access obligations without raising any First Amendment questions; moreover. The FCC concluded that BSPs act as mere conduits for the messages of others, not as agents exercising editorial discretion subject to First Amendment protections.<sup>71</sup> Nor did Judge Williams' dissenting opinion concur with the opponents' disputes.

This article argues that the 2015 *Open Internet Order* did not aim to regulate BSPs' speech content and therefore had, at most, only an indirect effect on potentially constraining freedom of speech. Furthermore, the effort to equate the free flow of

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<sup>66</sup> The ISP minimum quality standard offers an alternative that resolves a problem at which the Order is aimed relieving content providers of the fear that poor service due to the paid prioritization might stifle advantageous interactions with other sites. *See id.* at 764-765.

<sup>67</sup> *Id.* at 734.

<sup>68</sup> *Id.* at 736.

<sup>69</sup> *Id.* at 736-737.

<sup>70</sup> *Id.* at 740.

<sup>71</sup> *Id.* at 740-741.

information and content-based free speech failed without support from academic and dissenting opinions.<sup>72</sup> Because the potential regulatory scheme for BSPs hinges on the economic aspects, which were also the primary focus in the 2016 *USTA* case, the following review observed the main disputes to net neutrality between the advocates and opponents.

Several controversies demonstrate the considerable recognition gap between the advocates and opponents and thus the 2016 *USTA* case has caused the paradigm shift. First, the 2016 *USTA* case recognized the legitimacy of categorizing BSPs as telecommunications carriers, whereas the advocates shifted from taking the BSPs' stance and sought to overcome the *Chevron* Doctrine hurdle. The ambiguity of the statute argument seems more plausible than the permissible construction argument, especially because the Supreme Court recognized that Congress, by leaving a statutory ambiguity, delegated the power to regulate BSPs to the FCC in the *Brand X* case. However, in the permissible construction argument, beside the advocates' criticism of the changed circumstances justification, the advocates encountered the challenges in categorizing BSPs as telecommunications carriers that they could not overcome and failed to explain.

When a shift from previous policy thinking to an incompatible new theory is attempted, the evidence should be solid and substantial. However, when reviewing the permissible construction requirement which applied to provisions in the 2015 *Open Internet Order*, the FCC did not offer substantial evidence to support the reclassification of BSPs, nor did it explain through a market power analysis the forbearing assertion of traditional telecommunications carriers' obligation, which had been done for decades. This also occurred in the FCC's ruling against paid prioritization: no clear indication of the connection between the paid prioritization and the virtuous innovation cycle had been shown in either the *Order* or the case argument. In addition to this failure to present solid and substantial evidence, the FCC was unable to explain why ancillary jurisdiction should be substituted as the legal authority for this more stringent regulation, rather than telecommunications carrier regulation. According to Judge Williams' observation, only unjust or unreasonable discrimination is disallowed under the telecommunications carrier regulation, and it is extraordinary to uproot the permissibility of reasonable rate differences. The advocates appeared determined to push for net neutrality in BSPs, even with such

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<sup>72</sup> Even in the dissenting opinion Judge Williams said that if a broadband provider nonetheless was 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; this article would also like to argue to prohibit the broadband provider aforementioned behavior does not attain to content-based free speech constrain because, in the business industry, it is highly unlikely that BSPs will operate based on the content-based motivation. *Id.* at 743.

deficiencies in reasoning. The prima facie observation from this paradigm shift leads this research to conclude that if the FCC desires *ex ante* regulation in the new technology industry, especially in the online environment, the policy concerns must be more thoroughly accompanied with credible evidence to support the legal theory.

This article further analyzes that the FCC actually attempted to use the so-called theory of enhancing competition to disguise concerns about the free flow of information. The underlying motivation is that the government has no obligation to actively promote the free flow of information, but instead has the duty to encourage the deployment of advanced telecommunications capability to all Americans on a reasonable and timely basis.<sup>73</sup> Therefore, protecting free information flow through current telecommunications law is a preferable strategy for a government agency. Whether a completely competitive market would indirectly guarantee free information flow is debatable. Nevertheless, the FCC's persistence in pushing the value of free information flow through traditional telecommunications regulatory channels is an exercise in futility, causing considerable confusion, deviating from traditional regulatory types to telecommunications carriers and cannot pass through legal theory scrutiny.

A comment after the release of the 2016 *USTA* case shows that the body of evidence proffered by the FCC is controversial and insufficient to support the legal basis for BSP regulation.<sup>74</sup> One critical comment pointed out that the unfair competition regulatory agency, the Federal Trade Commission (FTC), should be the ultimate solution to the drawbacks that the Open Internet policy was aimed at remedying, even if the market failed to mitigate those problems. Moreover, the 2015 *Open Internet Order* actually deprived consumers of free choice.<sup>75</sup> This article also argues that some advocates still support the 2015 *Open Internet Order*, especially the current FCC Chairman, Ajit Pai's clear intention to abolish such rules, although no advocate has offered sufficient evidence to vindicate the theory of net neutrality.<sup>76</sup>

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<sup>73</sup> Section 706 of the Telecommunications Act is codified as 47 USC § 1302 (1996).

<sup>74</sup> After searching the Westlaw data base, the result indicated only one article is really relevant to the dispute here. See Hon. Maureen K. Ohlhausen, *Antitrust over Net Neutrality: Why We should Take Competition in Broadband Seriously*, 15 COLO. TECH. L.J. 119, 119 (2016).

<sup>75</sup> *Id.* at 120.

<sup>76</sup> Nicholas Economides, *Don't Gut Net Neutrality. It's Good for People and Business*, WIRED (Jan. 5, 2017), <https://www.wired.com/2017/01/dont-gut-net-neutrality-good-people-business/>; Lint Finley, *If Trump Fans Love Freedom, They Should Love Net Neutrality*, WIRED (Mar. 11, 2017), <https://www.wired.com/2017/03/trump-fans-love-freedom-love-net-neutrality/>. See also Jeremy Gillula & Kerry Sheehan, *NY State AG's Lawsuit Against ISP Shows Why We Need Net Neutrality Protections—And Proves What Time Warner Cable Can Do Worse*, ELECTRONICFRONTIERFOUNDATION (Mar. 6, 2017), <https://www.eff.org/deeplinks/2017/03/ny-state-ags-lawsuit-against-isp-shows-why-we-need-strong-net-neutrality>; Kerry Sheehan, *Trump and His Advisors on Net Neutrality*, ELECTRONICFRONTIERFOUNDATION (Dec. 19, 2016),



The current situation does not reveal further strong support for the necessity of net neutrality beside the arguments in the 2016 *USTA* case.

This understanding prompts more thinking about the possible future of regulatory schemes on net neutrality issue. The first possible scenario is that the FCC proclaims that the U.S. government has an active legal duty to promote freedom of speech, and that the net neutrality is inherent in this constitutionally fundamental human right. The second scenario is that the FCC proffers convincing evidence to prove that BSPs require stringent countermeasures to remedy seriously unfair competitive practices. The third scenario is that the FCC places most net neutrality regulations on hold, gathers more information about BSP operations, and relegates possible unfair competition remediation to the FTC.

The first scenario seems unlikely, because the FCC would have to overcome a double hurdle, not only to equate freedom of speech with freedom of information flow but also to determine the legitimate legal grounds for promoting freedom of speech on the Internet. The second scenario could succeed, pending more evidence gathered from the FCC to vindicate the necessity of regulating telecommunications carriers. However, the third scenario is the most promising solution. Not recognizing BSPs as telecommunications carriers would confer the benefit of them being supervised by the FTC.<sup>77</sup> In the third scenario, the FCC would have a cooling-off period to conduct additional studies of the infrastructure of BSP operations through the rule of transparency. Concurrently, the FTC would serve as a case-by-case *ex post* remedy until such time (e.g., if an inextricable anti-competition violation due to the market failure occurs) when the FCC must attempt to resolve the dispute once again.<sup>78</sup>

## V. Conclusion

Net neutrality regulation could be interpreted as either promoting the free flow of information or promoting the broadband services. From observing the 2016 *USTA* case, this article concludes that the FCC elected to respond to the BSP competition dispute under the guise of being concerned about free information flow. This approach actually created substantial controversy, and the paradigm shift of the BSP regulatory

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<https://www.eff.org/deeplinks/2016/12/trump-and-his-advisers-net-neutrality> (last visited Apr. 14, 2017).

<sup>77</sup> According to 15 U.S.C. § 45(a)(2), common carrier is exempted from FTC's regulation. And the exemption is status-based rather than activity-based. *See* *FTC v. AT&T Mobility LLC*, 835 F.3d 993, 995, 997 (2016).

<sup>78</sup> Some commentators even believed that the rule of transparency is better than other rules of net neutrality. *See* Christos Pappas & Katerina Argyraki ET AL., *Transparency Instead of Neutrality*, Proceedings of the 14th ACM Workshop on Hot Topics in Networks, Art. No.22 (Philadelphia, PA, Nov. 16 - 17, 2015).

scheme from speculative to concrete seems to have ended abruptly. The new FCC chairman recently delivered a speech pointing out that the net neutrality regulation deviated from the longstanding light-touch regulatory approach to Internet and that such regulation has injected great uncertainty, which is the enemy of growth, into the broadband service industry.<sup>79</sup> Reading between the lines, it appears that the FCC presently considers that net neutrality does not contribute to the development of broadband networks. These contradicting opinions also seem to indicate that the supporting evidence in the 2016 *USTA* case is insufficient to bolster the telecommunications carrier theory. And, in May 18, 2017, FCC initiated a new Notice of Proposed Rulemaking to reverse the FCC's 2015 decision and return to the longstanding, successful light-touch framework under Title I of the Communications Act<sup>80</sup>. How the underlying thoughts on net neutrality will diminish, be revived, or be modified remains to be seen. However, in this transitional time, the ideal option for the FCC is to put most net neutrality regulations on hold, gather more BSP operation information, and relegate possibly unfair competition remediation to the FTC.

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<sup>79</sup> Remarks of Federal Communications Commission Chairman Ajit Pai at the Mobil World Congress, [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0228/DOC-343646A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0228/DOC-343646A1.pdf).

<sup>80</sup> FCC Proposes Ending Utility-Style Regulation of the Internet—first step toward resorting Internet freedom, promoting investment, innovation & choice, [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0518/DOC-344948A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0518/DOC-344948A1.pdf)