



Federal Communications Commission  
Washington, D.C. 20554

May 30, 2013

Mark J. Langer, Clerk  
United States Court of Appeals  
for the District of Columbia Circuit  
333 Constitution Avenue, N.W. Room 5523  
Washington, D.C. 20001

Re: *Verizon v. FCC*, No. 11-1355

Dear Mr. Langer,

In its letter of May 22, 2013, Verizon incorrectly claims that the decision in *National Ass'n of Manufacturers v. NLRB*, No. 12-5068 (May 7, 2013), “forecloses” the FCC’s argument that the Open Internet rules are consistent with the First Amendment.

The Court in *NLRB* struck down a requirement that employers post a notification of collective bargaining rights. The notice was written by the government, with a list of required statements in a specified format. Slip op. 2, 4. Thus, “the government selected the message and ordered its citizens to convey that message.” *Id.* 17-18. Because employers “object[ed] to the message the government has ordered them to publish,” *id.* 19, the Court found the notification tantamount to compelled speech, like a compulsory flag salute or the mandatory display of a license-plate motto.

The Open Internet rules do not resemble that regulation. Broadband providers need not convey any specific message, let alone a government-designated one. Providers must only refrain from blocking access to web sites of their customers’ choice. Indeed, because Internet access service serves principally as a conduit for Internet content, broadband providers are not speakers at all. Verizon has defended itself against subpoenas on that very ground. FCC Br. 69. The Open Internet rules thus affect only the *conduct* of Internet service providers, not their *speech*. FCC Br. 69-71. *NLRB* does not address such a situation. This case is far closer to *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), which upheld an

Mark J. Langer  
May 30, 2013  
Page 2

analogous requirement of access by military recruiters to school facilities. *See* FCC Br. 70.

The *NLRB* panel recognized that, in the absence of compulsory government-devised messages, a “compelled speech violation” could occur only when “the complaining speaker’s own message was affected by the speech it was forced to accommodate.” Slip op. 20, quoting *FAIR*, 547 U.S. at 63. The Open Internet rules do not implicate that principle because Verizon remains free to convey any content of its choice on its facilities, to host its own website, or to provide edited services reflecting Verizon’s choice of content. FCC Br. 71.

Respectfully submitted,

/s/ Joel Marcus

Joel Marcus  
Counsel

cc: all counsel per attached service list

**CERTIFICATE OF SERVICE**

I, Joel Marcus hereby certify that on May 30, 2013, I electronically filed the foregoing Letter with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Others, marked with an asterisk, will receive service by mail unless another attorney for the same party is receiving service through CM/ECF.

Helgi C. Walker  
Eve K. Reed  
William S. Consovoy  
Brett A. Shumate  
Wiley Rein LLP  
1776 K Street, N.W.  
Washington, D.C. 20006  
*Counsel for: Verizon*

Michael E. Glover  
Edward Shakin  
William H. Johnson  
Verizon  
1320 North Courthouse Road  
9<sup>th</sup> Floor  
Arlington, VA 22201  
*Counsel for: Verizon*

John T. Scott, III  
William D. Wallace  
Verizon Wireless  
1300 I Street, N.W.  
Suite 400 West  
Washington, D.C. 20005  
*Counsel for: Verizon*

Walter E. Dellinger  
O'Melveny & Myers LLP  
1625 Eye Street, N.W.  
Washington, D.C. 20006  
*Counsel for: Verizon*

Henry Goldberg  
Goldberg, Godles, Wiener & Wright  
1229 Nineteenth Street, N.W.  
Washington, D.C. 20036  
*Counsel for: Open Internet  
Coalition*

Harold J. Feld  
Public knowledge  
1818 N Street, N.W.  
Suite 410  
Washington, D.C. 20036  
*Counsel for: Intervenor Public  
Knowledge*

David Bergman  
Law Office of David C. Bergmann  
3293 Noreen Drive  
Columbus, OH 43221  
*Counsel for: NASUCA*

Jeffrey J. Binder  
Law Office of Jeffrey Binder  
2510 Virginia Avenue, NW  
Suite 1107  
Washington, DC 20037  
*Counsel for: Vonage Holdings  
Corporation*

\*Kurt M. Rogers  
Brendan D. Kasper  
Vonage Holdings Corp.  
23 Main Street  
Homdel, NJ 07333  
*Counsel for: Vonage Holdings Corporation*

Earle D. Getchell, Jr. Esq.  
\*Wesley G. Russell, Jr.  
Office of the Attorney General,  
Commonwealth of Virginia  
900 East Main Street  
Richmond, VA 23219  
*Counsel for: Commonwealth of Virginia*

James B. Ramsay  
General Counsel  
National Association of Regulatory  
Utility Commissioners  
1101 Vermont Avenue, NW  
Suite 200  
Washington, D.C. 20005  
*Counsel for: NARUC*

Genevieve Morelli  
ITTA  
1101 Vermont Avenue, N.W.  
Suite 501  
Washington, D.C. 20005  
*Counsel for: ITTA*

Ilya Shapiro, Esq.  
The Cato Institute  
1000 Massachusetts Avenue, NW  
Washington, D.C. 20001  
*Counsel for: Cato Institute*

Samir C. Jain  
Wilmer Cutler Pickering, et al.  
1875 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006  
*Counsel for: Verizon*

John P. Elwood  
Vinson & Elkins LLP  
2200 Pennsylvania Avenue, NW  
Suite 500 West  
Washington, D.C. 20037  
*Counsel for: Cato Institute,  
Competitive Enterprise Institute,  
Free State Foundation,  
TechFreedom*

Quentin Riegel  
Deputy General Counsel  
National Association of  
Manufacturers  
1331 Pennsylvania Avenue, NW  
North Tower – Suite 1500  
Washington, D.C. 20004  
*Counsel for: NAM*

Russell P. Hanser  
\*Bryan N. Tramont  
Wilkinson Barker Knauer, LLP  
2300 N Street, NW  
Suite 700  
Washington, D.C. 20037  
*Counsel for: NAM*

\*Randolph J. May  
The Progress & Freedom Foundation  
1444 Eye Street, NW  
Suite 500  
Washington, DC 20005  
*Counsel for: Free State Foundation*

\*Sam Kazman  
Competitive Enterprise Institute  
1899 L Street, NW  
12<sup>th</sup> Floor  
Washington, D.C. 20036  
*Counsel for: Competitive Enterprise  
Institute*

Andrew J. Schwartzman  
Media Access Project  
1625 K Street, NW  
Suite 1000  
Washington, D.C. 20006  
*Counsel for: Tim Wu*

Kevin S. Bankston  
Emma J. Llanos  
Center for Democracy and  
Technology  
1634 I Street, NW  
Suite 1100  
Washington, D.C. 20006  
*Counsel for: Center for Democracy  
and Technology, Marvin Ammori,  
Jack M. Balkin, Michael J. Burstein  
et al.*

John F. Blevins  
Loyola University New Orleans  
College of Law  
7214 St. Charles Avenue  
Box 901  
New Orleans, LA 70118  
*Counsel for: Paul Vixie, Leonard  
Kleinrock, Scott Bradner, et al.*

E.J. Rosenkranz  
Orrick, Herrington & Sutcliffe LLP  
51 West 52<sup>nd</sup> Street  
New York, NY 10019  
*Counsel for: Stewart Alsop, Brian  
Ascher, Brad Burnham, et al.*

Sean H. Donahue  
Law Office of Sean H. Donahue  
2000 L Street, NW  
Suite 808  
Washington, D.C. 20036  
*Counsel for: National Association of  
Telecommunications Officers and  
Advisors, et al.*

R.C. Lawrence  
U.S. Attorney's Office  
Civil Division  
555 4th Street, NW  
Washington, D.C. 20530  
*Counsel for: U.S.A.*

Nickolai G. Levin  
Catherine G. O'Sullivan  
Robert J. Wiggers  
U.S. Department of Justice  
Appellate Section  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530  
*Counsel for: U.S.A.*

/s/ Joel Marcus

Joel Marcus