FEDERAL COMMUNICATIONS BAR ASSOCIATION

AND

THE LAW AND TECHNOLOGY INSTITUTE
OF THE CATHOLIC UNIVERSITY OF AMERICA
COLUMBUS SCHOOL OF LAW

NATIONAL TELECOMMUNICATIONS
MOOT COURT COMPETITION
2017

COMPETITION PROBLEM
(Released December 13, 2016)

Contents:
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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
PicPerfectTV, Complainant,
and
AmericaLink, Defendant,
Protecting and Promoting the Open Internet

MEMORANDUM OPINION AND ORDER

Adopted: November 1, 2016
Released: November 5, 2016

By the Commission: Commissioner Wallace dissenting and issuing a statement.

I. INTRODUCTION

1. In this Memorandum Opinion and Order, the Commission considers the complaint filed by PicPerfectTV against AmericaLink for allegedly violating the Commission’s Open Internet Rules. The Commission adopted these rules to protect and promote the Internet as an open platform enabling freedom of expression, end-user control, and competition. We find that AmericaLink’s preferential treatment of PurityOnline unreasonably interferes with PicPerfectTV’s and other online video distributors’ ability to conduct business in the online video streaming marketplace.

2. Upon reviewing the facts and circumstances surrounding AmericaLink’s practices, the Commission orders AmericaLink to discontinue its zero-rating practices with respect to PurityOnline unless AmericaLink extends the opportunity to participate in the zero-rating to other online video distributors (“OVDs”) on the same basis as PurityOnline.

1 47 CFR §§ 8.3, 8.7, and 8.11.

2 Protecting and Promoting the Open Internet, 30 FCC Rcd 5601 (2015) (“Open Internet Order”), aff’d, United States Telecom Ass’n v. FCC, 825 F.3d 674 (D.C. Cir. 2016), pets. for reh’g pending.
II. BACKGROUND

3. PicPerfectTV is a new OVD that streams its video content to subscribers over the Internet. It offers a range of original and pre-distributed content, including TV, movies, and documentaries. PicPerfectTV has recently begun streaming video in 4K, or “ultra HD” resolution.

4. Some of PicPerfectTV’s subscribers receive their broadband Internet access service from an Internet service provider (“ISP”) called AmericaLink. AmericaLink is a for-profit common carrier offering wired voice and data services to the public. AmericaLink does not offer any wireless services. It has one controlling shareholder, Dr. Albert R. Dent.

5. 40% of AmericaLink subscribers are PicPerfectTV viewers. AmericaLink has a limit on the amount of data that its subscribers can use each month on their home network, but that limit has been reached by less than 10% of its subscribers. PicPerfectTV’s 4K video stream offerings, however, have significantly increased the data that PicPerfectTV subscribers use. At peak hours, almost 50% of all AmericaLink data is being used for PicPerfectTV videos.

6. Due to the high amount of PicPerfectTV traffic, AmericaLink has stopped making additional interconnection ports available to PicPerfectTV and transit providers that carry PicPerfectTV traffic. Although AmericaLink has sufficient last-mile capacity to carry PicPerfectTV, its refusal to interconnect has led to degraded PicPerfectTV video content for AmericaLink customers who subscribe to PicPerfectTV. This has resulted in upset PicPerfectTV subscribers, as the videos they request now frequently buffer and sometimes cannot load at all on their home networks.

7. AmericaLink maintains that despite the traffic increase caused by PicPerfectTV streamers, less than 10% of AmericaLink’s subscribers exceed their monthly data cap when on their home network. AmericaLink’s marketing materials urge consumers to buy its fastest (and most expensive) Internet plan to access high quality video content. However, AmericaLink concedes that even with its fastest Internet plan, PicPerfectTV streamers experience degraded video quality on their home network during peak viewing hours.

8. Through a deal pushed by Dr. Dent, a devoutly religious man, AmericaLink has a joint marketing agreement with an unaffiliated OVD that is a competitor of PicPerfectTV called PurityOnline. PurityOnline offers “wholesome content” across a range of genres (including sports, entertainment, national and international news) from third party content providers, and excludes any content that PurityOnline deems contrary to “wholesome family values.” Currently, 10% of AmericaLink’s subscribers stream PurityOnline content. Under the joint marketing agreement, AmericaLink has adopted a “zero-rating” policy for PurityOnline’s content, meaning that AmericaLink’s subscribers can stream PurityOnline without the data usage being counted against their home network data cap. In return for having its content zero-rated, PurityOnline has agreed to promote
AmericaLink on its OVD platform. AmericaLink and PurityOnline exchange no other consideration.

9. PicPerfectTV filed a complaint under the Commission’s Open Internet rules, alleging that AmericaLink’s refusal to expand interconnection capacity and preferential treatment of PurityOnline violates the FCC’s Open Internet rules, including those on unreasonable interference or disadvantage with making content available to end users.

10. In its response to PicPerfectTV’s complaint, AmericaLink stated that: (1) its practices are simply reasonable network management or are otherwise permissible under the Open Internet rules, and (2) the First Amendment protects its relationship with PurityOnline from Commission regulation. We reject both arguments.

III. DISCUSSION

11. Zero-rating plans (also referred to as “sponsored data”) enable broadband providers to exclude edge provider content from end users’ usage allowances. Under the standard we adopted in the Open Internet Order, a broadband ISP is barred from “unreasonably interfere[ing] with or unreasonably disadvantag[ing] 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 edge providers’ ability to make lawful content, applications, services, or devices available to end users.” The only exception to this ban is if the broadband ISP’s practices are “reasonable network management.”

12. Our concern is not with zero-rating per se. To the contrary, the Commission has acknowledged that zero-rating-based business models sometimes benefit consumers and competition.

13. But this is not such a case. As detailed below, AmericaLink’s preferential treatment of PurityOnline content under their joint marketing arrangement unreasonably interferes with and disadvantages PicPerfectTV’s ability to make its content available to end users.

A. Unreasonable Interference

14. Review of zero-rating practices under the no-unreasonable interference standard is tailored to catch practices by ISPs that undermine the intent of the three bright-

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4 47 CFR §§ 8.7, 8.11.

5 47 CFR § 8.11

6 Open Internet Order at ¶151.
line rules of the Open Internet Order.\textsuperscript{7} Several factors guide the application of our catch-all rule here: the extent of end-user control, competitive effects, the effect on innovation, investment, or broadband deployment, the promotion of free expression, and whether the practice is use-agnostic.\textsuperscript{8}

15. Each of those factors confirms that AmericaLink’s practices are unlawful. Its refusal to open additional interconnection ports for PicPerfectTV (despite capacity being available) coupled with its zero-rating arrangement for PurityOnline content amounts to more than mere “reasonable network management.” AmericaLink’s practices have clear anti-competitive and anti-consumer effects in the online video marketplace that unreasonably interfere with and unreasonably disadvantage PicPerfectTV’s and consumers’ ability to use broadband Internet access service to reach one another.

16. As AmericaLink admits, its “practices interfere with end-users’” ability to engage with the Internet as they see fit. The Commission has long recognized that enabling consumer choice is the best path toward ensuring competitive markets, economic growth, and technical innovation. It is critical that consumers’ decisions, rather than those of service providers, drive the Internet’s development.\textsuperscript{9} While we recognize, too, that many practices fall somewhere on a spectrum from more end-user-controlled to more broadband provider-controlled, we do not believe AmericaLink’s practice of zero-rating one OVD while refusing to facilitate the proper transmission of another OVD’s content reflects end users’ choices.

17. AmericaLink’s practices interfere with OVD competition and innovation. PicPerfectTV is a new OVD attempting to move the market forward by streaming content in ultra HD resolution. But AmericaLink has exercised its position as gatekeeper between PicPerfectTV and a large portion of its streaming subscribers to cripple PicPerfectTV’s ability to compete in the online video streaming marketplace. That practice necessarily stifles “innovation.”

18. AmericaLink’s practices also raise freedom of expression concerns by promoting content from one OVD over all others. As Congress has recognized, the Internet “offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural

\textsuperscript{7} The Commission and all parties to the proceeding agree that the port capacity dispute is relevant to whether AmericaLink violated the no-unreasonable interference standard; therefore we do not separately consider it under sections 201 and 202 of the Act. As the Commission has previously said, zero-rating practices will be reviewed on a case-by-case basis under the no-unreasonable interference or unreasonable disadvantage standard, not the paid prioritization standard. \textit{Id.} at ¶¶135-37.

\textsuperscript{8} \textit{Id.} at ¶¶135-37.

\textsuperscript{9} \textit{Id.} at ¶77.
development, and myriad avenues for intellectual activity.”¹⁰ AmericaLink’s preferential treatment of PurityOnline unreasonably interferes with and disadvantages consumers’ and edge providers’ ability to use broadband Internet to communicate with each other, thus causing harm to the ability of the Internet to be a platform for free expression.

19. For much the same reasons, AmericaLink’s practices regarding PicPerfectTV and PurityOnline exceed the realm of reasonable network management. They effectively give preferential treatment to certain content the ISP believes is worthy of viewership. That practice conflicts with the application-agnostic approach, which—as we have said—does not “interfere with end users’ choices about which content, applications, or services . . . to use,” nor “distort competition and unreasonably disadvantages certain edge-providers.”¹¹

B. First Amendment

20. We reject AmericaLink’s argument that the Open Internet rules violate its First Amendment rights. AmericaLink is a common carrier that is not engaging in speech; rather it is serving as a conduit for the speech of others.¹²

21. The First Amendment exists to protect the speech of a speaker. Without speech, the First Amendment does not apply. The Supreme Court has held that the First Amendment only applies to speech that is inherently expressive.¹³ To determine whether an actor’s conduct possesses “sufficient communicative elements to bring the First Amendment into play,” the Supreme Court has asked whether “[a]n intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who viewed it.”¹⁴

22. Broadband providers do not engage in this type of conduct. Because AmericaLink is a broadband provider, it does not perform inherently expressive activity such as filtering or promoting content. Instead, it merely provides a platform for users to access various kinds of content. This is not the “inherently expressive” type of conduct that

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¹⁰ 47 USC § 230(a)(3).

¹¹ Open Internet Order at ¶144.


¹³ Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 66 (2006); see also United States v. O’Brien, 391 U.S. 367, 376 (1968) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”).

the First Amendment aims to protect. Even with the zero-rating deal in place, AmericaLink exercises no control over what its users choose to see. AmericaLink fails to promote any message merely by striking a deal with an OVD that emphasizes wholesome content. In providing these services, AmericaLink serves as a mere conduit for the messages of others, not as an agent exercising editorial discretion subject to First Amendment protections. As we have stated previously, “our rules merely affect what broadband providers must do . . . not what they may or may not say.”

23. The dissent claims that “any reasonably discerning consumer will have no trouble interpreting those messages,” but fails to provide any support for this position. Instead, the dissent gives a reasonable interpretation of why AmericaLink may have chosen to make the agreement with PurityOnline, but this is by no means the only reasonable interpretation. Instead, AmericaLink may have made the agreement for the valuable cross-promotion opportunity. It stretches the reality of the situation to claim, as the dissent does, that “AmericaLink’s zero-rating agreement and AmericaLink’s associated conduct necessarily signaled to consumers that AmericaLink was “exercising editorial discretion” to “communicate messages” to them.”

24. Even if the speech is expressive, the Commission’s rules do not run afoul of the First Amendment because they are content-neutral. In determining whether a regulation is content-based or content-neutral, the “principal inquiry . . . is whether the government adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.” A content-neutral regulation will survive intermediate scrutiny if “it furthers an important or substantial government interest . . . unrelated to the suppression of free expression,” and if “the means chosen” to achieve that interest “do not burden substantially more speech than is necessary.”

25. The Open Internet Order outlined in great detail why the rules were necessary to promote the “virtuous cycle” and ensure that Internet users had access to a wide range of sources. They are narrowly tailored, as they only impact the provision of Internet access, and not the protected speech activities of AmericaLink. AmericaLink remains free to tell its subscribers why it would prefer that they only view wholesome

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15 Open Internet Order at ¶ 550 (quoting Rumsfeld v. Forum for Academic & Institutional Rights, Inc. 547 U.S. 47, 64 (2006)).

16 Dissent, ¶ 17.

17 Dissent, ¶ 16 (quoting City of Los Angeles v. Preferred Comm’ns, Inc., 476 U.S. 488, 494 (1986)).


19 Id. at 662 (internal quotation marks omitted).
content. It simply cannot throttle other legitimate traffic or zero-rate traffic from PurityOnline alone.

26. The dissent is wrong to argue that there is no important government interest which would justify applying the rules to AmericaLink because it fails to mention the “virtuous cycle” which drove the Open Internet proceedings. By throttling some parts of the Internet and driving its subscribers to preferred content through zero-rating, AmericaLink threatens to create walled gardens that isolate subscribers from the Internet. Such activity threatens the Internet as we know it.

27. The dissent would have us wait until we see tangible harms to customers. Yet, the tangible harms already exist. Consumers who want to access PicPerfectTV cannot because AmericaLink is attempting to drive them to PurityOnline. Should we stand back and allow AmericaLink to continue this behavior, it could encourage other ISPs to do the same. By the point we could have the empirical studies demanded by the dissent, it would be too late and the open Internet would be destroyed.

IV. CONCLUSION

28. For these reasons, we find AmericaLink in violation of the Open Internet Order. In consideration of the above, we therefore impose as a remedy that AmericaLink discontinue its zero-rating practices with PurityOnline unless it offers its zero-rating arrangement to other OVDs on the same basis.
DISSENT OF COMMISSIONER WALLACE

I. INTRODUCTION

1. The bargain at the heart of this case is simple. AmericaLink, in partnership with PurityOnline, curates content that is, in its view, wholesome, and gives its subscribers that content for free to encourage them to consume more of it. This model has deep roots in communications: Broadcast television and terrestrial radio are free because programming is subsidized by advertising, and more viewers mean more advertising revenue for the broadcaster. So, too, with toll-free calling, and the vast majority of Internet websites. In each case, use of a network is offered for free to expand subscriptions.

2. My colleagues are wrong to condemn that bargain as a violation of the Open Internet Order and to exclude the speech that arrangement enables from the First Amendment’s protections. The Commission ought to instead find that non-exclusive zero-rating programs are in the public interest and that AmericaLink’s arrangement with PurityOnline, which encourages consumption of wholesome content, is protected speech under the First Amendment. I dissent.

II. BACKGROUND

3. AmericaLink’s objective, though an unorthodox one in the Wild West of the Internet, is noble: AmericaLink seeks to encourage its subscribers to watch unobjectionable online content. To that end, AmericaLink has agreed not to count content it deems to be wholesome against subscribers’ data limits. No one pays AmericaLink for its toll-free provision of PurityOnline’s content. PurityOnline instead features AmericaLink in its marketing materials, and the controlling shareholders, who believe strongly in the virtue of the content they peddle, act within their conscience.

4. AmericaLink’s venture into “wholesome” broadcasting allows interested subscribers unlimited access to favored content on the network. By allowing subscribers to consume that content for “free,” AmericaLink directly targets a core concern of a certain segment of the Internet-accessing population.

5. PicPerfectTV challenges AmericaLink’s venture as a violation of the Open Internet Order’s prohibitions against throttling, prioritization, and unreasonable interference with making content available to end users. In that Order, we left open the question whether zero-rating plans were allowed. We acknowledged “the concerns . . . that sponsored data plans have the potential to distort competition by allowing service providers to pick and choose among content and application providers to feature on

different service plans.”\textsuperscript{21} But we also said that sponsored data proposals “could benefit consumers and competition.”\textsuperscript{22} Accordingly, we stated that we would “look at and assess such practices under the no-unreasonable interference/disadvantage standard, based on the facts of each individual case, and take action as necessary.”\textsuperscript{23}

6. The Commission today finds that AmericaLink’s zero-rating plan is not in the public interest and also holds that it is not protected speech under the First Amendment. It is wrong to do so.

III. DISCUSSION

A. AmericaLink’s zero-rating plan for wholesome content is in the public interest.

7. Broadband providers have the ability to act as gatekeepers between content providers and consumers. We have stated that “[a]s gatekeepers, [broadband providers] can block access altogether; they can target competitors, including competitors to their own video services; and they can extract unfair tolls.”\textsuperscript{24} To prevent malicious gate-keeping, the Open Internet Order established bright-line bans on “blocking, throttling, and paid prioritization.”\textsuperscript{25} We also enacted a catch-all rule that ISPs “shall not unreasonably interfere with or unreasonably disadvantage end users’ ability to select, access, and use broadband Internet access services or the lawful Internet content, applications, services, or devices of their choice.”\textsuperscript{26} The Report and Order erroneously finds that AmericaLink’s zero-rating plan violates its gate-keeping responsibilities.

8. AmericaLink’s zero-rating plan achieves net neutrality’s objectives. At the heart of the Open Internet Order is the important idea that consumers are better served by a legal regime in which all of the Internet reaches all Internet users.\textsuperscript{27} The proliferation of Internet-connected devices means consumers have multiple ways of interacting with the Internet. Today’s user does not necessarily need every device to access every Internet

\textsuperscript{21} Id.

\textsuperscript{22} Id.

\textsuperscript{23} Id.

\textsuperscript{24} Open Internet Order at 8.

\textsuperscript{25} Id. at 9.

\textsuperscript{26} Id.

endpoint at all times. Some users only want or need specialized or limited access. For example, parents who provide their children with Internet-connected devices may want these devices to limit the content the children can access. In a similar way, a religiously observant Internet user may not want full connectivity so as to be consistent with the edicts of his faith. This new Internet reality requires us to consider the benefits of allowing broadband providers to tailor offerings to customers’ particular preferences. In this case, by not charging for wholesome content, AmericaLink effectively provides a lower-cost broadband plan for users who do not need or want the “full” Internet. Tailored plans such as these are more efficient than forcing limited-use users into one-size-fits-all plans that are ill-suited to their needs. Thus, AmericaLink’s new broadband model enhances consumer welfare in an increasingly diverse Internet ecosystem.

9. AmericaLink’s wholesome-content program is not anti-competitive. The program does not involve payments by the providers of the zero-rated content. In the absence of payments to the broadcaster, zero-rating cannot plausibly be characterized as anti-competitive foreclosure by content providers. Rather, to the extent AmericaLink has elected to exclude certain content from its zero-rating plan, the decision reflects AmericaLink’s unilateral determination that doing so improves the value of its platform. AmericaLink’s venture is not exclusive. No one’s views are muzzled or limited. To the extent AmericaLink performs any gate-keeping function, it holds the gate open for content it favors.

10. AmericaLink’s venture is also not exclusive in the context of competition. Opportunities to participate in zero-rating plans are held out for other content providers and ISPs. Without exclusivity—the inclusion of some participants and the exclusion of others—there is no foreclosure, and hence no anticompetitive concern. That some broadcasters choose not to participate in a zero-rating scheme does not mean that they are “foreclosed.” Exclusivity raises competition concerns only under limited conditions, including that the exclusive arrangement must be sufficiently widespread so as to foreclose entry or expansion by an otherwise equally efficient competitor (i.e., by preventing such a competitor from achieving minimum efficient scale). Exclusivity in the context of zero-rating is efficiency-enhancing, not entry-foreclosing. Each network is not a distinct market, but rather all networks in a given geographic area compete in the same relevant product market. There is a vigorously competitive broadband market in the United States, and

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30 Id. at 1166 (“A consensus has emerged that a necessary condition for anticompetitive harm arising from allegedly exclusionary agreements is that the contracts foreclose rivals from a share of distribution sufficient to achieve [MES].”)
widespread consumer desire for open access to the web means exclusive deals will likely be narrowly tailored to specific consumer demographics. Beyond exclusivity, the particular design and pricing of broadband packages involves complex trade-offs and long-term strategy: The nuances of these programs are undoubtedly questions best left for the market.

11. While allowing those who want limited Internet to enjoy a lower-cost alternative, AmericaLink is not engaging in a race to the bottom. Experience has shown that zero-rating programs will not trigger more narrow and specialized offerings in which users will only choose to partake in an à la carte Internet. Instead, users of zero-rated offerings ultimately end up engaging more with the Internet. For example, when T-Mobile offered its Binge On program, which allows users to reduce T-Mobile’s data charges by limiting streaming to a lower resolution, most customers who were introduced to a stripped-down version of applications soon migrated to the full Internet. Furthermore, AmericaLink’s plan does not eliminate access to “unwholesome” parts of the Internet. If anything, the data saved by accessing wholesome content would be available to explore other services outside the zero-rated content.

12. AmericaLink’s venture will expand the Internet into communities that are not currently connected. The digital divide, which has existed from the beginning of broadband development, persists today. Internet connectivity correlates with age, income, and educational attainment. Although the specific reasons for non-adoptions vary from community to community, two primary and related impediments to greater connectivity are now widely accepted: many do not see broadband as relevant to their everyday lives, and there is a perception that Internet connectivity is too expensive. Free data helps to address these barriers by enhancing the value proposition for non-adopters. The ability to stream as much wholesome media content as possible could become an enticing on-ramp for non-users: if they come to wireless broadband for unlimited streaming of family-friendly TV, they may very well stay online and use their connections for additional, more meaningful uses. For those who perceive broadband of any kind – wired or wireless – to be too expensive, the promise of free data could allow them to purchase more basic plans with lower data caps, which would deliver significant monthly cost-savings.


13. The Commission’s concerns about the public interest impacts of AmericaLink’s zero-rating plan are misplaced. AmericaLink’s delivery of low-cost wholesome content will expand the reach of online content and generate the economic and social benefits we sought to achieve with the Open Internet Order. Far from foreclosing competition or limiting free expression, zero-rating plans provide niche access to the Internet and encourage broader engagement.

B. AmericaLink’s zero-rating plan is protected speech under the First Amendment

14. Even assuming that AmericaLink’s zero-rating agreement runs afoul of the Open Internet Order, the First Amendment proscribes the enforcement action that the Commission imposes today. The zero-rating agreement is not merely a commercial arrangement between two companies. It is also an act of expression on the part of AmericaLink that is entitled to First Amendment protection. The Order issued in this errs in concluding otherwise.

15. AmericaLink’s zero-rating arrangement plainly “possesses sufficient communicative elements to bring the First Amendment into play” because it evinces “an intent to convey a particular message . . . [and] the likelihood was great that the message would be understood by those who viewed it.”\(^{34}\) AmericaLink has made no secret about the fact that its decision to zero-rate PurityOnline’s content is more than an ordinary business decision. When the zero-rating agreement was first announced, AmericaLink disseminated a press release stating that “our partnership with PurityOnline will help cement AmericaLink’s position not only as a premier service provider, but as a company dedicated to the promotion of decency and morality in an online environment so often characterized by crass, demeaning and objectionable content.”\(^{35}\) Moreover, AmericaLink’s controlling shareholder, Dr. Albert R. Dent, is devoutly religious who has long advocated for the promotion of wholesome content on the Internet. Particularly in that light, AmericaLink’s zero-rating agreement and AmericaLink’s associated conduct necessarily signaled to consumers that AmericaLink was “exercising editorial discretion” to “communicate messages” to them.\(^ {36}\)

16. And any reasonably discerning consumer will have no trouble interpreting those messages. The agreement conveys to consumers the desirability of PurityOnline’s content, which consumers know has been carefully curated to ensure the absence of the sort of material that they, like many Americans, find obnoxious and offensive. The agreement embodies the notion that morally wholesome content is more desirable than


\(^{35}\) Press Release, AmericaLink, Inc., AmericaLink Partners with PurityOnline (Sept. 28, 2016).

other forms of online content. It ratifies the deeply held beliefs of Dr. Dent, and does so very conspicuously, creating a high probability that consumers will understand the communication being conveyed.\textsuperscript{37}

17. As a content-neutral regulation on an exercise of “editorial discretion” over speech “created by others,” today’s Order cannot survive First Amendment scrutiny unless “it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”\textsuperscript{38} Today’s Order does not even come close to meeting this exacting standard. No important government interest is protected by forcing AmericaLink to charge its customers for the data they use when accessing PurityOnline’s content. There is simply no evidence that consumers would be better off in the absence of the AmericaLink zero-rating agreement than with it. Consumers of AmericaLink’s service are every bit as free to access the content they desire today as they were the day before the agreement was entered into. Indeed, there are ample reasons to think that the AmericaLink zero-rating agreement will actually benefit consumers.\textsuperscript{39} And as I noted above, PurityOnline’s competitors are at liberty to seek out their own zero-rating agreements – agreements that reward content curated in different ways to cater to different customers. In short, the Order does more to undermine than to advance important government interests.

18. Additionally, the zero-rating agreement “burden[s] substantially more speech than necessary to further” the government’s interest in promoting non-discrimination.\textsuperscript{40} The facts before us do not justify placing \textit{any} burden on AmericaLink’s speech, because no harm has been proven. This Commission has many options at its disposal for safeguarding consumers that do not involve eviscerating AmericaLink’s First Amendment rights. It could have waited to see whether the agreement produced a tangible negative effect on consumers (e.g., through an empirically observable impact on edge provider innovation) before issuing a wholesale proscription. It could have investigated whether the agreement is even correlated to reduced web traffic for content other than PurityOnline’s.\textsuperscript{41} But no. Even granting that the government’s interest in promoting ISP

\textsuperscript{37} It would be an imaginative consumer indeed who would adopt the majority’s effort to conjure a purpose for AmericaLink’s practices that conflicts with its own explanation of that purpose and its controlling shareholder’s advocacy of wholesome Internet content.

\textsuperscript{38} \textit{BellSouth Corp. v. F.C.C.}, 144 F.3d 58, 70-71 (D.C. Cir. 1998) (quotation omitted).

\textsuperscript{39} \textit{See supra} ¶¶ 12-14.

\textsuperscript{40} \textit{BellSouth}, 144 F.3d at 71.

\textsuperscript{41} For all anyone knows, the zero-rating agreement could have no effect on such traffic. Perhaps it will simply lead to consumers spending more time viewing PurityOnline videos with no appreciable negative effect on other edge providers.
nondiscrimination between online content providers is “important in the abstract,” there has been no adequate showing “that the recited harms are real, not merely conjectural.”

19. The majority cites *United States Telecom Ass’n, et al. v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) for the proposition that ISPs like AmericaLink, as common carriers, do not have a general right under the First Amendment to disregard nondiscrimination regulations. But *U.S. Telecom* did no more than reject a facial First Amendment challenge to the Open Internet Order. AmericaLink presents a much narrower as-applied challenge of precisely the sort that *U.S. Telecom* explicitly left the door open to. *U.S. Telecom* holds that “[i]f a broadband provider nonetheless were to choose to exercise editorial discretion . . . it might then qualify as a First Amendment speaker.” AmericaLink has made just such a choice here. Its decision to zero-rate PurityOnline content amounts to protected speech under the First Amendment. Today’s Order is content to trample on this speech with nary a second thought. But the First Amendment does not permit federal agencies to run roughshod over the right of legal persons to freely express their viewpoints.

20. Today, the Commission shows itself willing to sacrifice a fundamental liberty—freedom of speech—on the altar of “net neutrality.” The Commission also disregards plain evidence that AmericaLink’s joint venture with PerfectPicTV is nothing more than reasonable network management designed to ensure its customers enjoy a well-functioning Internet connection. I cannot endorse the Commission’s actions and neither, I fear, will a reviewing court.

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42 *Turner Broadcasting*, 512 U.S. at 664.

43 *See United States Telecom Ass’n*, 825 F.3d at 743 (emphasis in original).
AMERICANLINK, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.

Case No. 16-AAA

PETITION FOR REVIEW

AmericaLink petitions this Court for review of the Order of the Federal Communications Commission (“Commission” or “FCC”) in the matter captioned *In the Matter of PicPerfecTV, Complainant, and AmericaLink, Defendant, Protecting and Promoting the Open Internet Order*, Memorandum Opinion and Order, GN Docket No. 16-XYZ (adopted November 1, 2016, and released November 5, 2016) (“Order”). A copy of the Order is attached.

JURISDICTION AND VENUE

This Petition for Review is filed pursuant to Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 151 et seq. (“the Act”), 47 U.S.C. § 402(a). The Court has jurisdiction over the matters in this case under 28 U.S.C. §§ 2342(1) & 2344. The Order became final and subject to review upon its publication in the Federal Register on November 1, 2012, and this Petition is therefore timely under 47 C.F.R. § 1.4(b)(1). This Court is a proper venue under
28 U.S.C. § 2343. Finally, AmericaLink is the named defendant in the proceedings below and is thus a “party aggrieved by the final order” under review. 28 U.S.C. § 2344.

STANDING

AmericaLink is the named defendant in the proceeding, and the subject of the Commission’s Order. Accordingly, AmericaLink meets the requirement for standing.

NATURE OF THE CLAIMS

PicPerfecTV filed a complaint under the Commission’s Open Internet Rules, 47 C.F.R. §§ 8.3, 8.7, and 8.11, alleging that AmericaLink’s agreement with PurityOnline violated the rules. In its response, AmericaLink stated that (1) its practices are simply reasonable network management or are otherwise permissible under the Open Internet Rules, and (2) the First Amendment protects its relationship with PurityOnline from Commission regulation.

On November 1, 2016, the FCC adopted an order finding AmericaLink in violation of the Open Internet rules and ordering AmericaLink to discontinue its zero rating practices with PurityOnline unless it offers its zero rating arrangement to other OVDs on the same basis. The Commission rejected both of AmericaLink’s arguments.

The FCC erred in making each of these legal conclusions.

First, AmericaLink’s zero-rating agreement with PurityOnline is reasonable, serves the public interest, and does not violate the Commission’s rules.

Second, even assuming the zero-rating agreement violates the Open Internet Order, which it does not, the First Amendment proscribes the Commission’s enforcement action. The zero-rating agreement is an expression by AmericaLink is entitled to First Amendment protection.
For these reasons, we respectfully submit that the Order errs in interpretation of the Open Internet Rules and is unconstitutional. Accordingly, AmericaLink asks that this Court hold unlawful, set aside, enjoin, annul, and vacate the FCC’s Order.

Respectfully submitted,

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Dated: December 1, 2016