

ORAL ARGUMENT SCHEDULED FOR DECEMBER 4, 2015

**No. 15-1063 (and consolidated cases)**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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UNITED STATES TELECOM ASSOCIATION, *et al.*

*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and  
UNITED STATES OF AMERICA,

*Respondents.*

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On Petition for Review of an Order of the Federal Communications Commission

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**BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF  
MANUFACTURERS, THE BUSINESS ROUNDTABLE, AND THE  
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA  
IN SUPPORT OF PETITIONERS**

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August 5, 2015

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, *amici curiae* the National Association of Manufacturers (“NAM”), the Business Roundtable (“BRT”), and the Chamber of Commerce of the United States of America (“Chamber”), submit the following corporate disclosure statements:

NAM is a nonprofit trade association representing small and large manufacturers in every industrial sector and in all 50 states. NAM has no parent corporation, and no publicly held company owns 10% or more of its stock.

BRT is an association of chief executive officers of leading U.S. companies. BRT has no parent corporation, and no publicly held company owns 10% or more of its stock.

The Chamber is a non-profit corporation representing the interest of more than three million businesses of all sizes, sectors, and regions. The Chamber has no parent corporation, and no publicly held company owns 10% or more of its stock.

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1), *amici curiae* certify that:

**(A) Parties and Amici**

Parties and *amici* are listed in the Joint Brief for Petitioners USTelecom, NCTA, CTIA, ACA, WISPA, AT&T, and CenturyLink.

In addition, the following entities have filed briefs *amici curiae*, or statements of intent to file such briefs, in this Court:

*Supporting Petitioners:*

- Richard Bennett
- Business Roundtable
- Center for Boundless Innovation in Technology
- Chamber of Commerce of the United States of America
- Competitive Enterprise Institute
- Harold Furchtgott-Roth
- Georgetown Center for Business and Public Policy
- International Center for Law and Economics and Affiliated Scholars
- William J. Kirsch
- Mobile Future
- Multicultural Media, Telecom and Internet Council
- National Association of Manufacturers

- Phoenix Center for Advanced Legal and Economic Public Policy Studies
- Telecommunications Industry Association
- Washington Legal Foundation
- Christopher Seung-gil Yoo

*Supporting Respondent:*

- None to date

*Supporting Neither Party:*

- None to date

**(B) Ruling under Review**

Reference to the ruling under review appears in the Joint Brief for Petitioners USTelecom, NCTA, CTIA, ACA, WISPA, AT&T, and CenturyLink.

**(C) Related Cases**

Counsel is aware of no related cases.

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**CERTIFICATE OF COUNSEL REGARDING  
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On August 4, 2015, this Court granted *amici curiae*'s Amended Motion for Leave to File Brief in Support of Petitioners, authorizing submission of a brief up to 4,000 words. Pursuant to Circuit Rule 29(d), counsel for *amici curiae* the National Association of Manufacturers, the Business Roundtable, and the Chamber of Commerce of the United States of America\* hereby certify that no other non-government *amicus* brief of which they are aware relates to the subjects addressed herein:

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\* Pursuant to Fed. R. App. P. 29(c), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

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## **STATUTES AND REGULATIONS**

Except for the regulations set forth in the addendum, all applicable statutes, etc., are contained in the Joint Brief for Petitioners USTelecom, NCTA, CTIA, ACA, WISPA, AT&T, and CenturyLink.

## **IDENTITY AND INTEREST OF *AMICI CURIAE***

The National Association of Manufacturers (“NAM”), the Business Roundtable (“BRT”), and the Chamber of Commerce of the United States of America (the “Chamber”) (collectively, “*amici*”) submit this brief in support of petitioners United States Telecom Association, National Cable & Telecommunications Association, CTIA – The Wireless Association<sup>®</sup>, AT&T Inc., American Cable Association, CenturyLink, Wireless Internet Service Providers Association, Alamo Broadband Inc., and Daniel Berninger.<sup>1</sup>

NAM is the nation’s largest industrial trade association, representing small and large manufacturers in every industrial sector and every state. NAM’s mission is to enhance manufacturers’ competitiveness by shaping a legislative and regulatory environment conducive to U.S. economic growth. BRT is an association of chief executive officers of leading U.S. companies that together have \$7.2 trillion in annual revenues and nearly 16 million employees. BRT’s member

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<sup>1</sup> *Amici curiae* do not support petitioners in Case No. 15-1151, Full Service Network, True Connect Mobile, Sage Telecommunications LLC, and Telescape Communications Inc.

companies comprise more than a quarter of the total value of the U.S. stock market, pay more than \$230 billion in dividends, and generate more than \$470 billion in sales for small and medium-sized businesses annually. The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. Because an important function of *amici* is to represent their members' interests before the courts, *amici* regularly file briefs in cases raising issues of concern to the nation's business community.

As three of the nation's preeminent business associations, *amici* have a significant interest in, and can offer a unique perspective on, the issues here. American businesses are the beneficiaries of a globally deployed broadband infrastructure, which has transformed the way they operate and provided numerous opportunities to create and market innovative products and services. *Amici* believe that their perspective will assist the Court in resolving this case. *See* Fed. R. App. 29(b).

### **ARGUMENT**

Title II of the Communications Act of 1934 is a poor fit for regulating the most technologically advanced and dynamic information system in history: It is Depression-era legislation adopted to regulate the telephone monopoly, and was



itself cribbed from a 19th Century railroad statute.<sup>2</sup> The Federal Communications Commission (“FCC” or “Commission”) recognized that very point soon after enactment of the Telecommunications Act of 1996, stating: “[C]lassifying Internet access services [under Title II] could have significant consequences for the global development of the Internet. We recognize the unique qualities of the Internet, and do not presume that legacy regulatory frameworks are appropriately applied to it.”<sup>3</sup>

Unlike old Ma Bell, the market for broadband Internet access is characterized by fierce competition, rapid expansion, and nimble adaptation, all of which help the broadband market to meet increasing consumer demand for innovative, bandwidth-hungry technologies. *Amici* view broadband as a vital tool for stimulating job growth and improving the delivery of a broad range of services from education to healthcare. *Amici* oppose reclassifying broadband service providers, which—even with the Commission’s purported forbearance—will discourage investment and stifle innovation. Again, the Commission itself recognized as much before its recent about-face: The FCC told the Supreme Court that the “heightened regulatory obligations” of Title II coverage would “discourage

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<sup>2</sup> See Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 3 (Max D. Paglin ed., 1989); ROBERT LITAN, BROOKINGS INST., REGULATING INTERNET ACCESS AS A PUBLIC UTILITY: A BOOMERANG ON TECH IF IT HAPPENS 2 (2014), available at <http://goo.gl/8Smo4m>.

<sup>3</sup> *In re Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 11501 ¶ 82 (1998), available at <http://goo.gl/4inO5d>.

investment in facilities” and cause providers to “raise their prices.” Br. for Federal Petitioners, *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, No. 04-277, at 31 (Jan. 2005) (“FCC *Brand X* Brief”), available at <http://goo.gl/7WptXB>.

The Commission’s longstanding position is the correct one: Broadband providers should not be regulated as common carriers.

## **I. New Broadband Regulation Is Unnecessary**

### **A. The Broadband Market Is Highly Competitive**

Many service providers offer broadband throughout the United States. Cable television providers make broadband available to roughly 88 percent of the population; landline telephone companies, 89 percent of the population; and mobile wireless companies, 99 percent of the population. DAVID N. BEEDE, U.S. DEP’T OF COMMERCE, *COMPETITION AMONG U.S. BROADBAND SERVICE PROVIDERS* 3 (Dec. 2014), available at <http://goo.gl/7I3w9N> (“Commerce Report”). Consumers thus have many options in choosing broadband service. The government’s own figures indicate that, for consumers seeking basic broadband service providing download speeds of three megabits per second, 98 percent of the population can choose from two or more mobile providers, *id.* at 1, while 82.1 percent can select from four providers.<sup>4</sup> Eighty-eight percent can select from two

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<sup>4</sup> *In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market*

or more fixed providers. Even at speeds of 10 megabits per second, a typical consumer can select from two fixed and three mobile providers. Commerce Report 1. Consumers in virtually all of the United States have access to at least two broadband providers. Litan, *supra*, at 2.<sup>5</sup> U.S. pricing is quite low compared to other industrialized countries, up to speeds of 20 megabits per second, and profit margins are slimmer, reflecting robust competition.<sup>6</sup> Thus, the broadband market is far removed from the concerns of monopoly that led Congress to enact Title II.

Vigorous competition exists even for the next frontier of broadband service—gigabit broadband, with speeds of *one billion* bits per second, 50 to 200 times faster than traditional broadband. While currently only three percent of the population can choose gigabit service, Commerce Report 2, multiple companies—

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*Conditions With Respect to Mobile Wireless, Seventeenth Report*, WT Docket No. 13-135, 29 FCC Rcd. 15311 ¶51, Chart III.A.2 (2014).

<sup>5</sup> In Full Service Network’s opening brief, it claims that that “only 12 percent of American households had a choice of three or more providers [and] 27 percent have two options.” ECF No. 1565545, 17-18. That claim is misleading, referring only to connections that are 25 megabit per second and ignoring all other options (a caveat that Full Service Network omits). Their own source supports the fact that two-thirds of Americans have access to three or more broadband options. *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 14-126, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment*, 30 FCC Rcd. 1375 ¶ 83 (2015).

<sup>6</sup> RICHARD BENNETT ET AL., INFO. TECH. & INNOVATION FOUND., *THE WHOLE PICTURE: WHERE AMERICA’S BROADBAND NETWORKS REALLY STAND* 46-52 (Feb. 2013), available at <http://goo.gl/ULIf1m>.

including Comcast, Google, and AT&T—are building gigabit infrastructure.<sup>7</sup> Time Warner Cable will make gigabit-speed service available as consumer demand increases.<sup>8</sup> When Google announced plans to bring gigabit speeds to consumers, AT&T matched it for the same price. Popper, *supra*. Comcast responded by offering *two*-gigabit speeds.<sup>9</sup> Time Warner countered by tripling its speeds without raising prices. Popper, *supra*. The gigabit Internet thus is poised to enjoy the robust competition that consumers have come to expect in broadband.

Overall, Internet capacity continues to grow at roughly fifty percent per year,<sup>10</sup> because broadband providers invest tens of billions of dollars every year to upgrade networks for higher speeds and greater capacity—more than a trillion dollars of private-sector investments since 1996.<sup>11</sup> But even at that phenomenal

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<sup>7</sup> Marcien Jenckes, *Imagine Where 2 Gigabit Speeds Will Take You*, COMCASTVOICES (Apr. 2, 2015), <http://goo.gl/frnChE>; Craig Lloyd, *What Is Google Fiber and Why Is It So Awesome?*, DIGITAL TRENDS (Aug. 16, 2013), <http://goo.gl/iW6IVt>; Ben Popper, *AT&T Announces It Will Match Google Fiber's Price and Speed in Kansas City*, THE VERGE (Feb. 17, 2015), <http://goo.gl/fE2Xn8>.

<sup>8</sup> Karl Bode, *Time Warner Cable CEO Hints at Gigabit Speeds by 2017*, DSLREPORTS (May 19, 2015), <http://goo.gl/AqRFB9>.

<sup>9</sup> Vlad Savov, *Comcast Leapfrogs Google Fiber With New 2Gbps Internet Service*, THE VERGE (Apr. 2, 2015), <http://goo.gl/B1x5sq>.

<sup>10</sup> MAUREEN K. OHLHAUSEN, COMM'R, FED. TRADE COMM'N, REMARKS TO THE U.S. CHAMBER OF COMMERCE 10 (Oct. 18, 2013), *available at* <https://goo.gl/DHXSXo>.

<sup>11</sup> *See, e.g.*, EVERETT EHRlich, PROGRESSIVE POL'Y INST., THE STATE OF U.S. BROADBAND: IS IT COMPETITIVE? ARE WE FALLING BEHIND (2014), *available at* <http://goo.gl/CZ3NmF>.

pace, growth in capacity only “roughly match[es] demand.” Ohlhausen, *supra*, at 10. As explained below, it is inevitable that regulating broadband under legislation developed for monopoly telephone service will reduce infrastructure investment just as new technologies demand even greater Internet capacity.

### **B. New Technologies Require Continuing Unrestricted Broadband Growth**

Even with all the remarkable applications and services available today, we are in the early stages of the broadband economy. Between 2014 and 2019, domestic Internet traffic is expected to triple, with an increase per capita from 31 Gigabytes to 96 Gigabytes.<sup>12</sup> Video traffic will triple, mobile data traffic will increase seven-fold, and the total number of networked devices will increase from 2.0 billion to 3.9 billion. *Id.* And according to the Pew Research Center, a host of futuristic technologies and applications will become available whose promise can be realized only if Internet speed and capacity continue to grow at its historic pace.<sup>13</sup>

Devices increasingly will be connected “to the Internet, without the active role of a live person, so that they can collect and communicate information on their

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<sup>12</sup> VNI Forecast Highlights, CISCO (June 10, 2014), <http://goo.gl/xlFkTG>.

<sup>13</sup> PEW RESEARCH CENTER, KILLER APPS IN THE GIGABIT AGE 8 (Sept. 2014) (“Pew Report”), available at <http://goo.gl/aW2D1G>; Christian de Looper, *Gigabit Ethernet Will Bring Big Speed, Smooth Streaming and Dynamite Apps*, TECH TIMES (Oct. 9, 2014), <http://goo.gl/AW0mmZ>.

own and, in many instances, take action based on the information they send and receive”—a phenomenon called “The Internet of Things.” Ohlhausen, *supra*, at 1. Networked personal sensors will improve healthcare by permitting “continuous health monitoring.” Pew Report, *supra*, at 13. Networked sensors in traffic infrastructure will improve traffic control as signals adjust vehicle flow in real time, based on factors such as congestion and weather. Jake Brewer, *What Good Is a Gigabit?*, HUFFPOST.COM (May 27, 2013), <http://goo.gl/PyUdb4>. The Internet of Things represents an approximately \$19 trillion business opportunity,<sup>14</sup> consistent with forecasts that 26 billion devices will be connected to the Internet by 2020.<sup>15</sup> Fast broadband connections are the “lynchpin” of this new technology. Pew Report, *supra*, at 2.

Faster broadband speeds are also essential to high-tech applications known as “virtual reality” and “augmented reality.” *Id.* at 8; de Looper, *supra*. Virtual reality uses a special headset to create the illusion of being in another place: The headset covers the wearer’s eyes, and the image displayed on the headset screen changes in response to the viewer’s movements, making the viewer “feel

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<sup>14</sup> Olga Khariff, *Cisco CEO Pegs Internet of Things as \$19 Trillion Market*, BLOOMBERG (Jan. 7, 2014), <http://goo.gl/xKoWx9>.

<sup>15</sup> Press Release, Gartner, Inc., Gartner Says the Internet of Things Installed Base Will Grow to 26 Billion Units By 2020 (Dec. 12, 2013), *available at* <http://goo.gl/Vi5iv7>.

transported to someone else's reality."<sup>16</sup> Augmented reality "puts virtual things into users' real worlds,"<sup>17</sup> by using a headset to superimpose digital features over real ones. For example, a user could "pin" to a wall a television that does not exist, but functions as if it were real.<sup>18</sup> By 2016, a half-dozen manufacturers will have released virtual- or augmented-reality devices.<sup>19</sup> Analysts estimate that this market will top \$150 billion by 2020,<sup>20</sup> and eventually will involve hundreds of millions of users. Digi-Capital Report, *supra*.

Such devices have obvious applications for movies and sporting events.<sup>21</sup> But such devices also will improve remote medical diagnosis and treatment (possibly enabling telesurgery), Pew Report, *supra*, at 9, will permit interactive remote learning virtual classrooms, de Looper, *supra*; Brewer, *supra*, and enable new social experiences as people will be able to "have virtual Thanksgiving dinner with the other side of the family." Pew Report, *supra*, at 9. But to ensure the

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<sup>16</sup> Rachel Metz, *A Film Studio for the Age of Virtual Reality*, MIT TECH. REV. (Feb. 13, 2015), <http://goo.gl/losz0F>.

<sup>17</sup> *Augmented/Virtual Reality to Hit \$150 Billion Disrupting Mobile by 2020*, DIGI-CAPITAL (Apr. 2015) ("Digi-Capital Report"), <http://goo.gl/Tf30aY>.

<sup>18</sup> Scott Stein, *HoloLens Takes Halo and Minecraft Worlds to Another Level*, C|NET (June 17, 2015), <http://goo.gl/GgPwVm>.

<sup>19</sup> *Id.*; Chris Smith, *Microsoft's HoloLens Will Be Amazing, but It Won't Be Cheap*, BGR (May 1, 2015), <http://goo.gl/YWq7oe>.

<sup>20</sup> *Why Virtual Reality Could Generate \$150 Billion*, FORTUNE (Apr. 10, 2015), <http://goo.gl/sy2kUs>.

<sup>21</sup> Metz, *supra*; John Gaudiosi, *This Company Streams Live Sports Events to Virtual Reality*, FORTUNE (May 1, 2015), <http://goo.gl/G5V2ki>.

headset image synchs with the viewer's movements will require high-capacity broadband infrastructure that can *instantly* transmit massive amounts of high-definition video and audio data.<sup>22</sup>

## **II. New Regulation Will Stifle Investment Critical for Developing the Next Generation of Broadband Technology**

In light of the vibrant and competitive market for broadband services, the Commission's action can only be understood as an effort "to solve a problem that doesn't exist." Pai Dissent 321. Regulating broadband Internet connectivity under common-carrier provisions subjects one of the most dynamic markets in human history to the clumsy regulatory tools of a bygone era. It will impose dramatically higher costs on providers and, worse, uncertainty that will make it impossible for companies to predict how they may do business. Such an environment will hurt not only the broadband companies that must decide how to invest their resources, but also the businesses that rely on a rapidly responding Internet infrastructure—and their customers.

### **A. Proposed Regulations Will Increase Costs and Discourage Investment**

It is well documented that treating broadband as a "telecommunications service" will subject providers to a host of new costs and fees for access to poles,

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<sup>22</sup> Bo Begole, *Omnipresence and the Coming Age of "Remote Reality,"* VB.COM (July 13, 2015), <http://goo.gl/jikK78>; Alan Carlton, *When Virtual Reality Really Hits, It Won't Look Like Google Cardboard,* VB.COM (June 3, 2015), <http://goo.gl/PRc2UN>.



conduits, rights of way<sup>23</sup>; state and local taxes and fees<sup>24</sup>; and related fees estimated at \$11 billion per year.<sup>25</sup> Greater costs discourage investment by decreasing returns and by diverting resources that could be invested in infrastructure. But the main drag on investment is the cost and uncertainty of regulatory compliance. Uncertainty imposes additional costs on broadband providers by requiring that funds be spent on legal services to reduce uncertainty—through regulatory counseling, pursuing advisory opinions, and litigation—rather than on infrastructure investment. And because uncertainty increases the likelihood of unprofitable outcomes, it will cause broadband providers to hold back investment.

Under the FCC’s Order, thousands of broadband providers will find their “rates” and “practices” subject to the broad but ambiguous standards applicable under Sections 201 and 202. Add to that the FCC’s sweeping but undefined “Internet conduct standard” adopted under Title II, which prohibits service

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<sup>23</sup> See, e.g., Letter from Steven F. Morris, Vice President and Associate General Counsel, Nat’l Cable & Telecomms. Ass’n, to Marlene H. Dortch, Secretary, Fed. Commc’ns Comm’n 2 (Jan. 22, 2015), available at <http://go.usa.gov/3cppB>.

<sup>24</sup> See, e.g., Letter from James Assey, Executive Vice President, Nat’l Cable & Telecomms. Ass’n, to Jonathan Sallet, General Counsel, Fed. Commc’ns Comm’n 2-3 (Dec. 2, 2014), available at <http://goo.gl/19u2nR>.

<sup>25</sup> Hal Singer & Robert Litan, *No Guarantees When It Comes to Telecom Fees*, PROGRESSIVE POLICY INSTITUTE BLOG n.5 (Dec. 16, 2014), <http://goo.gl/TSrs29> (estimating annual taxes and fees of \$11 billion assuming the Internet Tax Freedom Act is made permanent); see also FCC *Brand X* Brief at 31.

providers from “unreasonably interfer[ing] or unreasonably disadvantag[ing]” users’ access to content or content providers’ dissemination of content. Order 285. Although the FCC has outlined “seven vaguely worded factors that it will consider when applying the Internet conduct standard,” Pai Dissent 323, they provide little in the way of guidance on which broadband providers can base investment decisions. How the FCC will apply those factors is “anything but clear” to outside observers, so broadband providers will be “hard-pressed to predict” their application.<sup>26</sup> Even the FCC Chairman concedes that, outside of the most basic questions, “we don’t know where things go next” in implementing the Internet conduct standard.<sup>27</sup>

Recognizing the uncertainties its action creates, the FCC says that it “will operate on a case-by-case basis” to address issues that arise, Order ¶108; *accord id.* ¶¶135, 138, 218, “considering the totality of the circumstances,” *id.* ¶¶138, 246. But the Commission’s multifactor “totality-of-the-circumstances” test is inherently indeterminate and its results hard to predict, “giv[ing] little guidance to future litigants and as a corollary impos[ing] limited restraint on [the] agenc[y].” *USAir*,

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<sup>26</sup> Corynne McSherry, *Dear FCC: Rethink the Vague “General Conduct” Rule*, ELECTRONIC FRONTIER FOUNDATION (Feb. 24, 2015), <https://goo.gl/wMmmKD>.

<sup>27</sup> Tom Wheeler, Chairman, Fed. Commc’ns Comm’n, February 2015 Open Meeting Press Conference (Feb. 26, 2015) (165:30-166:52), *available at* <https://goo.gl/9hVmbm>.

*Inc. v. Dep't of Transp.*, 969 F.2d 1256, 1263 (D.C. Cir. 1992); accord *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 553 (1995) (Thomas, J., concurring).

The new Rules are so unclear that the FCC cannot give a straight answer about the lawfulness of the most basic industry practice: usage-based billing, which allows consumers to select the most economical plan satisfying their needs by providing graduated rates for different usage levels.<sup>28</sup> The Commission says only that it “will address concerns” at some unspecified future time.<sup>29</sup> Until then, broadband providers are left to wonder. That is only the most glaring example: No business activity is per se reasonable under the Internet conduct standard. Only “[r]easonable network management” is protected, Order 285, the scope of which can be determined only by a process of trial and error—or, more accurately, “trial and lawsuit.”

To predict the FCC’s likely assessment of industry practices, broadband providers must hire lawyers to analyze proposed plans against the Agency’s past statements and actions. While the FCC has adopted an “advisory opinion” process,

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<sup>28</sup> The four largest mobile providers all employ usage-based billing. See *Cell Phone Plan Comparison*, CONSUMER REPORTS (July 15, 2015), <http://goo.gl/ky9gsZ>. One-size-fits-all plans force low-usage customers to subsidize high-usage ones.

<sup>29</sup> See Order ¶153 (“[W]e decline to make blanket findings about these practices and will address concerns under the no-unreasonable interference/disadvantage on a case-by-case basis.”).

it refuses “to establish any firm deadlines to rule on” requests, Order ¶234, and may choose simply not to respond. *Id.* ¶231. Sophisticated legal advice is necessary even to *seek* an advisory opinion, in order to provide the FCC sufficient detail to persuade it to respond and to ensure the opinion binds the Agency, without needlessly exposing other matters to regulators.<sup>30</sup> Such advisory opinions are presumptively public. *See* 47 C.F.R. § 8.18(d). But even if the request is made confidentially, *see* 47 C.F.R. § 0.459, Enforcement Bureau inquiries to competitors, business partners, and consumers may prematurely disclose business plans. Seiver & Drogula, *supra*.

If a provider proceeds without an advisory opinion (or its request is declined), “case-by-case” assessment means *litigation*—and more delay, more lawyers, and more expense. Enforcement actions are not restricted to clearly abusive practices. As the FCC Enforcement Chief observed, because regulated companies “generally don’t do [things]” “when it’s clear that something is impermissible, . . . . when you’re in enforcement, you’re almost always working in a gray area.”<sup>31</sup> In practice, given the Agency’s vague standard, “the FCC will have almost unfettered discretion to decide what businesses clear the bureaucratic bar.”

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<sup>30</sup> John D. Seiver & Elizabeth Drogula, *Open Internet Advisory Opinions: Do You Feel Lucky?*, DAVIS WRIGHT TREMAINE (July 8, 2015), <http://goo.gl/8mu3Hy>.

<sup>31</sup> Brendan Sasso, *The FCC’s \$365 Million Man*, NAT’L J. (Apr. 26, 2015), <http://goo.gl/8QuT6h> (quoting Enforcement Bureau Chief Travis LeBlanc).

Pai Dissent 323; McSherry, *supra* (concluding that the “test gives the FCC an awful lot of discretion”).

Moreover, the FCC is not even the last word in how the Order will be interpreted. “Any person claiming to be damaged by any” broadband provider “may bring suit for the recovery of damages” in federal district court, 47 U.S.C. § 207. Thus, a competitor, an interest group, or a plaintiff’s lawyer can hale any broadband provider into court—meaning *more* delays, *more* lawyers, *more* expense, and *even greater* uncertainty. “As a practical matter, it is likely that only companies that can afford years of litigation to answer these questions” about the lawfulness of practices will be able to operate under FCC regulations. McSherry, *supra*. Smaller providers in particular will be harmed, because they “don’t have the means or the margins to withstand a regulatory onslaught.” Pai Dissent 330. Those not “squeezed . . . out of business altogether,” *id.*, will be forced to divert money better spent on infrastructure to compliance costs and legal bills. Thus, as

experience in other countries confirms,<sup>32</sup> providers “are likely to invest significantly less than they would absent Title II regulation.”<sup>33</sup>

Even the FCC concedes that “unclear regulatory requirements could stymie rather than encourage innovation.” Order ¶138. While the FCC speculates that uncertainty “will dissipate over time as the marketplace internalizes our Title II approach,” Order ¶410, that statement fails to grasp the inherent uncertainty in the FCC’s approach, whose application can be expected to change with every change in leadership and personnel. *See* pp.12-13, *supra*.

### **B. Purported “Forbearance” Aggravates Uncertainty**

These uncertainties exist regardless of the Commission’s decision to forbear—for the moment—enforcing some Title II provisions. The Commission acknowledges that the *entire sweep* of Title II may be imposed in the future.<sup>34</sup> To take just one example, the FCC temporarily forbore collecting the Universal

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<sup>32</sup> *See* CHRISTOPHER S. YOO, PENN LAW CTR. FOR TECH., INNOVATION AND COMPETITION, U.S. VS. EUROPEAN BROADBAND DEPLOYMENT: WHAT DO THE DATA SAY? 4-5, 13, 23 (June 2014), *available at* <http://goo.gl/WXPuUK>; MARTIN H. THELLE & BRUNO BASALISCO, COPENHAGEN ECONOMICS, HOW EUROPE CAN CATCH UP WITH THE US: A CONTRAST OF TWO CONTRARY BROADBAND MODELS, (June 2013), *available at* <http://goo.gl/TQq9GG>.

<sup>33</sup> Kevin A. Hassett & Robert J. Shapiro, *The Impact of Title II Regulation of Internet Providers on Their Capital Investment* 1 (2014), *available at* <http://goo.gl/gh4Sjl>. That study likely *underrepresents* effects of this regulation, since it predates (and thus does not analyze) the vague Internet conduct standard.

<sup>34</sup> *See* Order ¶495 (stating FCC will proceed “incrementally” in considering Title II’s requirements); *id.* ¶495 n.1487 (suggesting FCC may “whittle away” at forbore sections).

Service Fund fee, but made clear that the issue is on its agenda for reconsideration.<sup>35</sup> Worse yet, the Commission asserts it can use provisions it did not forbear (§§ 201 and 202) to address issues covered in the forbore sections. *See, e.g.*, Order ¶¶508-09. Thus forbearance leaves providers in limbo, with no clear idea of what the regulatory landscape will be in the near future. The “overhang of more rules to come . . . should make any rational businesses hold back on investment.” Pai Dissent 328.

### C. Regulation Will Reduce Choice and Quality

Finally, regulation will decrease the variety and quality of Internet services. The risk that litigation will determine new products to be unlawful foreseeably reduces providers’ flexibility to create a variety of plans to suit a range of consumers. *See* Robert E. Litan & Hal J. Singer, *Unintended Consequences of Net Neutrality*, 5 J. ON TELECOMM & HIGH TECH. L. 533, 558-66 (2007). Rather than developing infrastructure to serve cutting-edge bandwidth-intensive content and applications, providers have every incentive to reduce their risk by eliminating options, structuring infrastructure and pricing toward the “typical” user. *Id.* at 566-67. Thus, the price of “solv[ing] a problem that doesn’t exist,” Pai Dissent 321, will be slowing innovation in a field that requires rapid evolution. “Mediocrity in

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<sup>35</sup> Order ¶489 (“We therefore conclude that forbearance is warranted at the present time in order to allow the Commission to consider the issues presented based on a full record in that docket.”).

broadband service is hardly an objective that policymakers in the United States should be trying to achieve.” Litan & Singer, *supra*, at 533.

### CONCLUSION

The Commission’s Order should be vacated.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 5th day of August, 2015, a true and correct copy of the foregoing Brief of *Amici Curiae* the National Association of Manufacturers, the Business Roundtable, and the Chamber of Commerce of the United States of America in Support of Petitioners was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ John P. Elwood  
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# **ADDENDUM**

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**47 C.F.R. § 0.459 (2015)**

**§ 0.459 Requests that materials or information submitted to the Commission be withheld from public inspection.**

**(a)**

**(1)** Procedures applicable to filings in non-electronic proceedings. Any person submitting information or materials to the Commission may submit therewith a request that such information not be made routinely available for public inspection. (If the materials are specifically listed in §0.457, such a request is unnecessary.) A copy of the request shall be attached to and shall cover all of the materials to which it applies and all copies of those materials. If feasible, the materials to which the request applies shall be physically separated from any materials to which the request does not apply; if this is not feasible, the portion of the materials to which the request applies shall be identified. In the latter circumstance, where confidential treatment is sought only for a portion of a document, the person submitting the document shall submit a redacted version for the public file.

**(2)** Procedures applicable to filings in electronic proceedings. In proceedings to which the electronic filing requirements set forth in §1.49(f) of this chapter apply, a party seeking confidential treatment of a portion of a filing must submit in electronic format either a redacted version of the document or an affidavit that it is impossible to submit a redacted document consistent with the filing requirements of this section. Where a party demonstrates that even the fact of a filing must remain confidential, and that this is consistent with the requirements of this section, this affidavit may be filed in paper format under seal.

**(3)** Comments and other materials may not be submitted by means of the Commission's Electronic Comment Filing System (ECFS) with a request for confidential treatment under this section.

**(4)** The Commission may use abbreviated means for indicating that the submitter of a record seeks confidential treatment, such as a checkbox enabling the submitter to indicate that the record is confidential. However, upon receipt of a request for inspection of such records pursuant to §0.461, the submitter will be notified of such request pursuant to §0.461(d)(3) and will be requested to justify the confidential treatment of the record, as set forth in paragraph (b) of this section.

**(b)** Except as provided in §0.459(a)(3), each such request shall contain a statement of the reasons for withholding the materials from inspection (see §0.457) and of the facts upon which those records are based, including:

**(1)** Identification of the specific information for which confidential treatment is sought;

**(2)** Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission;

(3) Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged;

(4) Explanation of the degree to which the information concerns a service that is subject to competition;

(5) Explanation of how disclosure of the information could result in substantial competitive harm;

(6) Identification of any measures taken by the submitting party to prevent unauthorized disclosure;

(7) Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties;

(8) Justification of the period during which the submitting party asserts that material should not be available for public disclosure; and

(9) Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.

(c) Casual requests (including simply stamping pages “confidential”) which do not comply with the requirements of paragraphs (a) and (b) of this section will not be considered.

(d)

(1) If a response in opposition to a confidentiality request is filed, the party requesting confidentiality may file a reply within ten business days. All responses or replies filed under this paragraph must be served on all parties.

(2) Requests which comply with the requirements of paragraphs (a) and (b) of this section will be acted upon by the appropriate custodian of records (see §0.461(d)(1)), who is directed to grant the request if it demonstrates by a preponderance of the evidence that non-disclosure is consistent with the provisions of the Freedom of Information Act, 5 U.S.C. 552. If the request for confidentiality is granted, the ruling will be placed in the public file in lieu of the materials withheld from public inspection.

(3) The Commission may defer acting on requests that materials or information submitted to the Commission be withheld from public inspection until a request for inspection has been made pursuant to §0.460 or §0.461. The information will be accorded confidential treatment, as provided for in §0.459(g) and §0.461, until the Commission acts on the confidentiality request and all subsequent appeal and stay proceedings have been exhausted.

(e) If the materials are submitted voluntarily (i.e., absent any requirement by statute, regulation, or the Commission), the person submitting them may request the Commission to return the materials without consideration if the request for confidentiality should be denied. In that event, the materials will ordinarily be returned (e.g., an application will be returned if it cannot be considered on a confidential basis). Only in the unusual instance where the public

interest so requires will the materials be made available for public inspection. However, no materials submitted with a request for confidentiality will be returned if a request for inspection has been filed under §0.461. If submission of the materials is required by the Commission and the request for confidentiality is denied, the materials will be made available for public inspection once the period for review of the denial has passed.

(f) If no request for confidentiality is submitted, the Commission assumes no obligation to consider the need for non-disclosure but, in the unusual instance, may determine on its own motion that the materials should be withheld from public inspection. See §0.457(d).

(g) If a request for confidentiality is denied, the person who submitted the request may, within ten business days, file an application for review by the Commission. If the application for review is denied, the person who submitted the request will be afforded ten business days in which to seek a judicial stay of the ruling. If these periods expire without action by the person who submitted the request, the materials will be returned to the person who submitted them or will be placed in a public file. Notice of denial and of the time for seeking review or a judicial stay will be given by telephone, with follow-up notice in writing. The first day to be counted in computing the time periods established in this paragraph is the day after the date of oral notice. Materials will be accorded confidential treatment, as provided in §0.459(g) and §0.461, until the Commission acts on any timely applications for review of an order denying a request for confidentiality, and until a court acts on any timely motion for stay of such an order denying confidential treatment.

(h) If the request for confidentiality is granted, the status of the materials is the same as that of materials listed in §0.457. Any person wishing to inspect them may submit a request for inspection under §0.461.

(i) Third party owners of materials submitted to the Commission by another party may participate in the proceeding resolving the confidentiality of the materials.

#### **47 C.F.R. § 8.18 (2015)**

### **§ 8.18 Advisory opinions.**

#### **(a) Procedures.**

(1) Any entity that is subject to the Commission's jurisdiction may request an advisory opinion from the Enforcement Bureau regarding its own proposed conduct that may implicate the open Internet rules or any rules or policies related to the open Internet that may be adopted in the future. Requests for advisory opinions may be filed via the Commission's Web site or with the Office of the Secretary and must be copied to the Chief of the Enforcement Bureau and the Chief of the Investigations and Hearings Division of the Enforcement Bureau.

(2) The Enforcement Bureau may, in its discretion, refuse to consider a request for an advisory opinion. If the Bureau declines to respond to a request, it will inform the requesting party in writing.

(3) Requests for advisory opinions must relate to prospective or proposed conduct that the requesting party intends to pursue. The Enforcement Bureau will not respond to requests for opinions that relate to ongoing or prior conduct, and the Bureau may initiate an enforcement investigation to determine whether such conduct violates the open Internet rules. Additionally, the Bureau will not respond to requests if the same or substantially the same conduct is the subject of a current government investigation or proceeding, including any ongoing litigation or open rulemaking at the Commission.

(4) Requests for advisory opinions must be accompanied by all material information sufficient for Enforcement Bureau staff to make a determination on the proposed conduct for which review is requested. Requesters must certify that factual representations made to the Bureau are truthful and accurate, and that they have not intentionally omitted any information from the request. A request for an advisory opinion that is submitted by a business entity or an organization must be executed by an individual who is authorized to act on behalf of that entity or organization.

(5) Enforcement Bureau staff will have discretion to ask parties requesting opinions, as well as other parties that may have information relevant to the request or that may be impacted by the proposed conduct, for additional information that the staff deems necessary to respond to the request. Such additional information, if furnished orally or during an in-person conference with Bureau staff, shall be promptly confirmed in writing. Parties are not obligated to respond to staff inquiries related to advisory opinions. If a requesting party fails to respond to a staff inquiry, then the Bureau may dismiss that party's request for an advisory opinion. If a party voluntarily responds to a staff inquiry for additional information, then it must do so by a deadline to be specified by Bureau staff. Advisory opinions will expressly state that they rely on the representations made by the requesting party, and that they are premised on the specific facts and representations in the request and any supplemental submissions.

**(b) After review of a request submitted hereunder, the Enforcement Bureau will:**

(1) Issue an advisory opinion that will state the Bureau's present enforcement intention with respect to the proposed open Internet practices;

(2) Issue a written statement declining to respond to the request; or;

(3) Take such other position or action as it considers appropriate. An advisory opinion states only the enforcement intention of the Enforcement Bureau as of the date of the opinion, and it is not binding on any party. Advisory opinions will be issued without prejudice to the Enforcement Bureau or the Commission to reconsider the questions involved, or to rescind or revoke the opinion. Advisory opinions will not be subject to appeal or further review.

(c) The Enforcement Bureau will have discretion to indicate the Bureau's lack of enforcement intent in an advisory opinion based on the facts, representations, and warranties made by the requesting party. The requesting party may rely on the opinion only to the extent that the request fully and accurately contains all the material facts and representations necessary to issuance of the opinion and the situation conforms to the situation described in the request for



opinion. The Bureau will not bring an enforcement action against a requesting party with respect to any action taken in good faith reliance upon an advisory opinion if all of the relevant facts were fully, completely, and accurately presented to the Bureau, and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's or Bureau's approval.

**(d)** Public disclosure. The Enforcement Bureau will make advisory opinions available to the public on the Commission's Web site. The Bureau will also publish the initial request for guidance and any associated materials. Parties soliciting advisory opinions may request confidential treatment of information submitted in connection with a request for an advisory opinion pursuant to §0.459 of this chapter.

**(e)** Withdrawal of request. Any requesting party may withdraw a request for review at any time prior to receipt of notice that the Enforcement Bureau intends to issue an adverse opinion, or the issuance of an opinion. The Enforcement Bureau remains free, however, to submit comments to such requesting party as it deems appropriate. Failure to take action after receipt of documents or information, whether submitted pursuant to this procedure or otherwise, does not in any way limit or stop the Bureau from taking such action at such time thereafter as it deems appropriate. The Bureau reserves the right to retain documents submitted to it under this procedure or otherwise and to use them for all governmental purposes.