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

NO. 15-1063
(AND CONSOLIDATED CASES)

UNITED STATES TELECOM ASSOCIATION, ET AL.,
PETITIONERS,
V.
FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

OPPOSITION OF RESPONDENTS TO PETITIONS FOR PANEL REHEARING AND REHEARING EN BANC

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In *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015) (JA3477) (*Order*), the Federal Communications Commission classified broadband internet access service as a common carrier telecommunications service under the Communications Act, and adopted rules designed to ensure that providers of such service do not engage in practices—such as blocking, throttling, and paid prioritization of data—that could undermine the openness that drives innovation and investment on the internet.

The panel, in an opinion written by Judges Tatel and Srinivasan (with Judge Williams dissenting in part), comprehensively examined petitioners' objections to the FCC's *Order* and rejected them in their entirety.

The panel's decision was entirely correct. It is fully consistent with the Supreme Court's analysis in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005) (*Brand X*), and the framework set forth by this Court in *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010), and *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014). Furthermore, the panel's decision does not conflict with any decision of the Supreme Court, this Court, or any other court of appeals. The decision turned on a careful and considered evaluation of the record and the FCC's predictive judgment regarding the effects of its *Order* on the internet marketplace.

The Communications Act authorizes the FCC to treat telecommunications

carriers as common carriers "to the extent that [they are] engaged in providing telecommunications services." 47 U.S.C. § 153(51). The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." *Id.* § 153(53). As the Supreme Court has held, "the term 'offer' is ambiguous"; thus, "[t]he statute fails unambiguously to classify" broadband service as either a telecommunications service or an information service, "leav[ing] federal telecommunications policy in this technical and complex area to be set by the Commission." *Brand X*, 545 U.S. at 991-992. Consistent with *Brand X*, the panel in this case—including Judge Williams, who dissented on other issues—agreed that "the Commission has statutory authority to classify broadband as a telecommunications service." Op. 29.

The panel also appropriately upheld the agency's decision to classify mobile broadband internet access as a commercial mobile service subject to common carrier treatment under the Act. 47 U.S.C. § 332(c)(1). A "commercial mobile service" is defined as "any mobile service … that is provided for profit and makes interconnected service available" to the public. *Id*. § 332(d)(1). "Interconnected service" means "service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission)." *Id.* § 332(d)(2). The panel held that it was reasonable for the FCC to define "public switched network"

to include "any common carrier switched network … that use[s] the North American Numbering Plan, *or public IP addresses*, in connection with the provision of switched services." Op. 60 (emphasis in original) (internal quotation marks omitted). The panel held that the Commission reasonably classified mobile broadband as an interconnected service because it gives subscribers the capability to communicate with all users of the public switched network, including telephone users as well as internet users. Op. 55-81.

In ruling on these and other questions, the panel reached the correct result after giving a full and fair hearing to petitioners' arguments to the contrary. In six rehearing petitions totaling 90 pages, petitioners have identified no reason for the panel or the en banc Court to rehear this case.

BACKGROUND

1. For many years, the FCC has grappled with how best to classify broadband internet access service under the Communications Act. In 1998, the agency classified a portion of broadband internet service furnished over telephone lines as a "telecommunications service" under 47 U.S.C. § 153(53). *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012 (1998). Four years later, the Commission classified cable broadband as an "information service" (*see* 47 U.S.C. § 153(24)) that included no separate offering of "telecommunications service." *Inquiry*

Concerning High-Speed Access to the Internet over Cable and Other Facilities, 17 FCC Rcd 4798 (2002) (*Cable Modem Order*).

In *Brand X*, 545 U.S. at 986-1000, the Supreme Court held that the Act did not unambiguously address how broadband should be classified, and that the FCC's classification of cable broadband as an information service was based on a reasonable—if "perhaps just barely," *see id.* at 1003 (Breyer, J., concurring)—construction of ambiguous statutory terms. The agency later classified wireline broadband and mobile broadband as information services. *See* Op. 14-15.

While this classification exempted broadband from common carrier regulation under Title II of the Act, the FCC observed that it retained authority to regulate broadband providers under Title I. *Cable Modem Order*, 17 FCC Rcd at 4841-42 ¶¶ 75-79. The Supreme Court agreed: "[T]he Commission remains free to impose special regulatory duties on facilities-based [internet service providers] under its Title I ancillary jurisdiction." *Brand X*, 545 U.S. at 996.

2. Shortly after *Brand X* was decided, the FCC in a policy statement adopted certain principles designed to "preserve and promote the open and interconnected nature of the public Internet." *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14986, 14988 ¶ 4 (2005). The agency declared that if it found "evidence that providers of telecommunications for Internet access or IP-enabled services are violating these

principles," it would "not hesitate to take action to address that conduct." *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14904 ¶ 96 (2005).

In 2008, after receiving complaints that Comcast was interfering with its customers' ability to access certain applications, the FCC—invoking its ancillary authority under Title I—ordered Comcast to submit information verifying that it had revised its network management practices to conform to the open internet principles. This Court vacated that order because the Commission failed to identify any grant of statutory authority to which the order was reasonably ancillary. *Comcast*, 600 F.3d 642.

The FCC subsequently sought comment on whether it should reclassify broadband as a telecommunications service. *Framework for Broadband Internet Service*, 25 FCC Rcd 7866, 7867 ¶ 2 (2010). But it elected not to reclassify broadband when it adopted rules in 2010 that (among other things) forbade broadband providers to block, or to discriminate unreasonably in, the transmission of internet traffic. *See Verizon*, 740 F.3d at 632-34. The agency based those rules primarily on section 706 of the Telecommunications Act of 1996, which directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," 47 U.S.C. § 1302(a), and to "take immediate action to accelerate deployment of such capability" if it

finds that such capability is not "being deployed to all Americans in a reasonable and timely fashion." *Id.* § 1302(b).

In *Verizon*, 740 F.3d at 635-42, this Court held that the Commission had authority under section 706 to adopt its 2010 open internet rules. It also held that the agency adequately explained that without such rules, broadband providers could act to threaten internet openness and thereby "inhibit the speed and extent of future broadband deployment." *Id.* at 645. Nonetheless, the Court vacated the anti-blocking and anti-discrimination rules, holding that they unlawfully subjected broadband providers to per se common carrier treatment. *Id.* at 655, 658-59. Noting that the FCC had classified broadband as an information service, the Court explained that the Communications Act bars the Commission from regulating information service providers as common carriers. *Id.* at 649-59. The Court remanded the case to the agency for further proceedings. *Id.* at 659.

3. In May 2014, the FCC sought comment on how it should respond to the *Verizon* remand. *Protecting and Promoting the Open Internet*, 29 FCC Rcd 5561 (2014) (JA53) (*NPRM*). After receiving nearly four million comments, the Commission promulgated the *Order* at issue here (JA3477).

In the *Order*, the Commission examined the facts surrounding the current provision of broadband and determined that it was reasonable to reclassify broadband as a telecommunications service. *Order* ¶¶ 328-387 (JA3618-53). The

agency found substantial evidence that broadband is used by consumers today "primarily as a conduit for reaching modular content, applications, and services that are provided by unaffiliated third parties." *Id.* ¶ 350 (JA3631). This evidence led the Commission to conclude that consumers perceive broadband "as a standalone offering" of telecommunications. Op. 24 (citing *Order* ¶ 365 (JA3641)).

In addition, after finding evidence that mobile broadband now provides subscribers with ubiquitous access to both telephone users and internet users, the Commission concluded that it made little sense to continue classifying mobile broadband as a "private mobile service" exempt from common carrier regulation under 47 U.S.C. § 332(c)(2). Accordingly, the FCC reclassified mobile broadband as a "commercial mobile service," or its "functional equivalent," subject to common carrier regulation under 47 U.S.C. § 332(c)(1). This reclassification was designed to protect users of mobile broadband and to promote regulatory parity between fixed and mobile broadband services. *Order* ¶¶ 388-408 (JA3654-66).

Having reclassified broadband as a telecommunications service, the FCC adopted a set of rules designed to preserve internet openness by banning blocking, throttling, paid prioritization, and other practices that were shown to harm the open internet. *Order* ¶¶ 104-224 (JA3521-80). The agency also exercised its authority under 47 U.S.C. § 160 to forbear from applying most of Title II's provisions to broadband providers. *Id.* ¶¶ 493-542 (JA3714-43).

4. Multiple petitioners challenged the *Order* on various grounds. In a comprehensive 115-page opinion, the panel rejected all of petitioners' claims and denied the petitions for review. Judges Tatel and Srinivasan wrote the opinion. Senior Judge Williams dissented in part.

ARGUMENT

The panel thoroughly analyzed and properly rejected every one of petitioners' challenges to the FCC's *Order* adopting open internet rules. The panel found that: (1) the Commission had authority to reclassify fixed and mobile broadband internet access as common carrier telecommunications services (Op. 31-41, 55-78); (2) such reclassification was reasonable (Op. 41-49); (3) the agency provided parties with notice that it might reclassify broadband as a telecommunications service (Op. 29-31), and that its rules might reach interconnection disputes (Op. 52-54); (4) the Commission's rules do not violate the First Amendment (Op. 108-15); and (5) section 706 of the 1996 Act gives the Commission authority to adopt its open internet rules to promote broadband deployment (Op. 94-97). Petitioners have provided no reason to reconsider these rulings.

I. THE PANEL CORRECTLY UPHELD THE FCC'S DECISION TO RECLASSIFY BROADBAND INTERNET ACCESS SERVICE.

The Commission found substantial record evidence that consumers today

perceive broadband internet access service "primarily as a conduit for reaching modular content, applications, and services that are provided by unaffiliated third parties" such as Netflix, Google, and Amazon. *Order* ¶ 350 (JA3631). The evidence also showed that broadband "is marketed today primarily as a conduit for the transmission of data across the Internet." *Id.* ¶ 354 (JA3633). On the basis of this record, the Commission found that broadband includes a separate "offering of telecommunications" that fits the Act's definition of "telecommunications service." *Id.* ¶¶ 306-387 (JA3609-53). The panel correctly held that this determination was reasonable. Op. 31-50.

A. The Panel Correctly Held That The Commission Has Authority To Classify Broadband Internet Access Service As A Common Carrier Telecommunications Service.

The panel's holding that the FCC has statutory authority to classify broadband internet access service as a telecommunications service (Op. 32-41)—a ruling joined by all three judges (Op. 29)—rests on an unassailable foundation: the Supreme Court's *Brand X* decision. In *Brand X*, the Court ruled that the Communications Act did not clearly resolve the question of how broadband should be classified, and that "the proper classification of broadband turns 'on the factual particulars of how Internet technology works and how it is provided, questions *Chevron* leaves to the Commission to resolve in the first instance.'" Op. 33 (quoting *Brand X*, 545 U.S. at 991). *Brand X* forecloses petitioners' claim

(USTelecom Pet. 8-15; AT&T Pet. 10-12) that the Act precludes the FCC from classifying broadband as a telecommunications service.

Petitioners maintain that *Brand X* "is irrelevant" because that case (unlike this one) concerned only the "last mile" facilities "connecting a consumer to the broadband provider's network." USTelecom Pet. 13. The panel disagreed. It explained that, "even if the *Brand X* decision was only about the last mile," the Supreme Court "focused on the nature of the functions broadband providers offered to end users, not the length of the transmission pathway, in holding that the 'offering' was ambiguous." Op. 33. This case involves the same ambiguous term "offering."

The question here—just as in *Brand X*—is whether the transmission component of broadband internet access service is inextricably intertwined with, or "functionally separate" from, information-processing features. *Brand X*, 545 U.S. at 991. In holding that "the statute fails unambiguously to classify the telecommunications component of cable [broadband] as a distinct offering," the Court in *Brand X* concluded that Congress left "federal telecommunications policy in this technical and complex area to be set by the Commission." *Id.* at 992. The panel here properly reached the same conclusion.

Petitioners claim that in view of the FCC's past treatment of analogous services, the Telecommunications Act of 1996 mandates that broadband be

classified as an information service. USTelecom Pet. 9-10; AT&T Pet. 10-11. But the panel pointed out that "nothing in the Telecommunications Act suggests that Congress intended to freeze in place the Commission's existing classifications of various services." Op. 35. Such a reading of the statute "would conflict with the Supreme Court's holding in *Brand X*" that the statute was ambiguous as to how broadband should be classified. *Id.*; *see also Brand X*, 545 U.S. at 996 (the Court found it "improbable" that the 1996 Act "unambiguously freezes in time the [pre-existing] treatment of facilities-based information-service providers"). Moreover, shortly after the 1996 Act was passed, the FCC "classified a portion of DSL service—broadband internet service furnished over telephone lines—as a telecommunications service." Op. 13.

Similarly, there is no merit in petitioners' assertion (USTelecom Pet. 10-11) that 47 U.S.C. § 230—a provision focused on the blocking and screening of offensive material—clearly demonstrates Congress's intent to classify broadband as an information service. Petitioners point to section 230(f)(2), which defines the term "interactive computer services" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet." 47 U.S.C. § 230(f)(2). But that definition applies only to "this section"—*i.e.*, section 230. *Id.* § 230(f). And section 230 does not address internet

regulation generally; it merely provides protection from liability for those who block access to offensive online material. *Id.* § 230 (heading); 230(c), (d). In any event, the panel considered and rejected this argument, explaining that it was "unlikely that Congress would attempt to settle the regulatory status of broadband Internet access services in such an oblique and indirect manner" by burying the issue in a definitional section of a provision concerning the treatment of offensive material. Op. 34-35 (quoting *Order* ¶ 386 (JA3653)).

Petitioners make much of the FCC's statement in a 1998 report to Congress that if a service allows subscribers to "interact[] with stored data, the service is an information service." AT&T Pet. 12 (quoting *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11530 ¶ 59 (1998) (*Stevens Report*)); *see also* USTelecom Pet. 9. But in the same report, the agency also observed that it "may not always be straightforward whether, on the one hand, an entity is providing a single information service with communications and computing components, or, on the other hand, is providing two distinct services, one of which is a telecommunications service." *Stevens Report* ¶ 60. In the *Order*, the FCC recognized that broadband providers offer information services such as email; it simply concluded that "broadband Internet access service is today sufficiently independent of these information services that it is a separate offering." *Order* ¶ 356 (JA3634). The panel properly affirmed that reasonable conclusion. Op. 38.

The panel also rightly rejected petitioners' contention (USTelecom Pet. 15) that certain information-processing functions associated with broadband service necessarily rendered that service an information service exempt from common carrier treatment. The Act provides that an "information service" does not include functions used "for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(24). The Commission reasonably determined that functions such as domain name service (which expedites routing of data) and caching (which enables speedier retrieval of data) "facilitate use of the network without altering the fundamental character of the telecommunications service," and therefore fall within the telecommunications management exception. Op. 39-40.[1]

B. The Panel Correctly Held That Reclassification Was Reasonable.

Contrary to petitioners' assertion (NCTA Pet. 9-13), the FCC's decision to

[1] The panel also correctly concluded that intervenors' argument that *Chevron* deference should not apply because the *Order* involved questions of "deep economic and political significance," TechFreedom Pet. 5-9 (quoting *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015)), was foreclosed by *Brand X*, where "the Supreme Court expressly recognized that Congress, by leaving a statutory ambiguity, had delegated to the Commission the power to regulate broadband service." Op. 38. In addition, the panel rightly rejected intervenors' attempt (TechFreedom Pet. 10-13) to compare the FCC's statutory interpretation in this case to the EPA's unlawful statutory construction in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014). *See* Op. 41.

reclassify broadband was not only statutorily authorized but also reasonable. As the panel observed, "the Commission cited ample record evidence supporting its current view that consumers perceive a standalone offering of transmission." Op. 47; *see id.* at 25-27. In particular, the FCC explained that consumers' demand for third-party internet services has sparked "the explosive growth of online content and applications providers." *Order* ¶ 347 (JA3629). Between 2003 and 2015, "the number of websites increased from 'approximately 36 million' to 'an estimated 900 million.'" Op. 25 (quoting *Order* ¶ 347 (JA3629)). Although petitioners contend that there is "nothing new" about consumers using broadband to access third-party content (NCTA Pet. 10), the amount of such content and consumer demand for it have grown to unprecedented levels in the last decade. In addition, the Commission found record evidence that consumers today "use broadband principally to access third-party content, not [broadband-provider-supplied] email and other add-on applications." Op. 25; *see Order* ¶¶ 347-348 (JA3629-30). In light of this evidence, it was reasonable for the FCC to conclude that consumers now regard broadband as a standalone transmission service that they use to access third-party services and applications.

In any event, as the panel noted (Op. 47), the Commission found that the reclassification of broadband was warranted "even assuming, *arguendo*, that the facts regarding how [broadband] is offered had not changed." *Order* n.993

(JA3637). The agency set forth the policy considerations that justified reclassification even apart from any change in circumstances. It had reason to believe that unless it adopted rules to protect internet openness, broadband providers "could act in ways" that "inhibit the speed and extent of future broadband deployment." *Verizon*, 740 F.3d at 645; *see also* 47 U.S.C. § 1302. The Commission determined that the best way to protect internet openness was to adopt a set of measures, including "anti-blocking, anti-throttling, and anti-paid prioritization rules," which the *Verizon* Court had held "impose per se common carrier obligations by requiring broadband providers to offer indiscriminate service to edge providers." Op. 43 (citing *Order* ¶ 14 (JA3483)). After *Verizon*, the agency could not adopt those rules unless it reclassified broadband as a telecommunications service. *See Verizon*, 740 F.3d at 649-59. The panel properly held that these considerations provided "a perfectly 'good reason' for the Commission's change in position." Op. 43.

Notwithstanding petitioners' claims to the contrary (NCTA Pet. 11), there is nothing unprecedented—or even unusual—about an agency modifying its interpretation of an ambiguous statute to accommodate a shift in policy. An agency "'must consider varying interpretations and the wisdom of its policy on a continuing basis' … in response to changed factual circumstances, or a change in administrations." *Brand X*, 545 U.S. at 981 (quoting *Chevron USA, Inc. v. Natural*

Res. Def. Council, 467 U.S. 837, 863-64 (1984)). Indeed, "in *Chevron* itself, [the Supreme] Court deferred to an agency interpretation that was a recent reversal of agency policy," even though the reversal was not based on any change in facts. *Id.* at 982 (citing *Chevron*, 467 U.S. at 857-58).

The panel also rightly rejected petitioners' argument that the FCC reclassified broadband without accounting for reliance interests engendered by its prior policy. Op. 47-49. Petitioners mistakenly claim that the Commission "denied that any reliance interests *exist*." NCTA Pet. 12. The Commission did no such thing. It simply determined that broadband providers' reliance on the classification of broadband as an information service was not nearly as substantial as petitioners alleged. The Commission "found that 'the regulatory status of broadband Internet access service appears to have, at most, an indirect effect (along with many other factors) on investment.'" Op. 48 (quoting *Order* ¶ 360 (JA3636)). "The Commission explained that 'the key drivers of investment are demand and competition,' not the form of regulation." *Id.* (quoting *Order* ¶ 412 (JA3668)).

Substantial evidence supported the FCC's finding that the classification of broadband as a telecommunications service would not significantly deter investment. Executives of several broadband providers stated that reclassification would not alter their investment plans. *Order* n.986 (JA3636). In addition, the Commission found that "the highest levels of wireline broadband infrastructure

investment to date" occurred between the late 1990s and 2005—a period when the broadband service offered by incumbent local phone companies was regulated as a telecommunications service under Title II. *Id.* ¶ 414 (JA3669-70).

Furthermore, the Commission reasonably determined that "the unsettled regulatory treatment of broadband" over the past two decades "likely diminished the extent of investors' reliance on the prior classification." Op. 49; *see Order* ¶ 360 (JA3636-37). In 1998, the agency classified wireline broadband as a telecommunications service. *See* Op. 49. Four years later, it classified cable broadband as an information service; but that classification was "not definitively settled until 2005 when the Supreme Court decided *Brand X*." *Id.* Just five years after *Brand X*, "the Commission sought public comment on whether it should reverse course and classify broadband as a telecommunications service." *Id.* Given the fluctuating regulatory treatment of broadband, there was no reason to believe that broadband providers had developed significant reliance on any particular classification.

In any event, as even Judge Williams in dissent agreed, "[n]o one supposes that firms' past investment in reliance on a set of rules should give them immunity to regulatory change." Dissenting Op. 8. *See also Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006); *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997). To justify such a change, an agency need only show that any "serious

reliance interests" engendered by its prior policy were "taken into account" when adopting the new policy; the agency acts arbitrarily only when it "ignores such matters." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). The FCC did not ignore the reliance interests of broadband providers; it properly took them into account when, in conjunction with its decision to reclassify broadband, it decided to forbear "from applying all but a few core provisions of Title II" to broadband. *Order* ¶ 409 (JA3667); *see id.* ¶¶ 434-542 (JA3680-3743). The panel correctly held that the FCC satisfied its burden of justification here. Op. 47-49.

II. THE PANEL CORRECTLY UPHELD THE COMMISSION'S DECISION TO CLASSIFY MOBILE BROADBAND SERVICE AS COMMERCIAL MOBILE SERVICE.

The panel also correctly upheld the Commission's determination that mobile broadband should no longer be treated as a "private" mobile service exempt from common-carriage obligations, *see* 47 U.S.C. § 332(c)(2), but instead should be treated as a "commercial mobile service" subject to common carrier obligations, *see id.* § 332(c)(1). As the Commission explained, mobile broadband—which is now used by "hundreds of millions of subscribers"—is no longer "akin to" the type of mobile service that would have been categorized as "private" when section 332 was adopted—*e.g.*, a "taxi dispatch service" that "offered users access to a discrete and limited set of endpoints." *Order* ¶ 404 (JA3664-65). Instead, unlike such

"private" mobile services, mobile broadband "gives subscribers the capability to communicate to or receive communication from other users on the public switched network." 47 C.F.R. § 20.3 (defining "interconnected service").

1. To qualify as a "commercial mobile service" under section 332, a mobile service must make "interconnected service available … to the public." *See* 47 U.S.C. § 332(d)(1). The statute defines "interconnected service" as "service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission)." *Id.* § 332(d)(2). The panel found that the FCC reasonably exercised its delegated authority under section 332(d)(2) when it revised its definition of "public switched network" to include "any common carrier switched network … that use[s] the North American Numbering plan, *or public IP addresses*, in connection with the provision of switched services." Op. 60 (quoting *Order* ¶ 391 (JA3655)).

On the basis of this new definition, "the Commission found that mobile broadband qualifies as an 'interconnected service'" under section 332(d)(2). Op. 61. The agency therefore reclassified mobile broadband as a commercial mobile service. *Order* ¶¶ 388-408 (JA3654-66). The panel held that this reclassification was "reasonable and supported by record evidence" documenting "the explosive growth of mobile broadband service and its near universal use by the public." Op. 61 (citing *Order* ¶¶ 88-92, 391, 398-99 (JA3511-14, 3655-56, 3661-62)).

The panel also found that "the need to avoid a statutory contradiction in the treatment of mobile broadband provides further support for its reclassification as a commercial mobile service." Op. 76. By reclassifying mobile broadband, the Commission "avoid[ed] the contradictory result of classifying mobile broadband providers as common carriers under Title II while rendering them immune from common carrier treatment under Title III." *Id.* The FCC's decision to maintain regulatory parity between fixed and mobile broadband made perfect sense because, as the panel explained, a consumer's mobile device can shift from a fixed Wi-Fi internet connection to a mobile broadband connection "from one minute to the next, potentially even without [the consumer's] awareness," and it would make little sense to have "different regulatory rules depending on how [a mobile device] happens to be connected to the internet at any particular moment." Op. 77.

2. Petitioners argue that the panel's "preference for symmetry cannot trump an asymmetrical statute." CTIA Pet. 14 (quoting *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015)). But the panel explained that the Commission's decision to adopt the same classification for both mobile broadband and mobile voice "was in keeping with Congress's objective … to creat[e] regulatory symmetry among similar mobile services." Op. 60 (internal quotation marks omitted). By its terms, section 332 exempts only *private* mobile services from common carrier regulation. *See* 47 U.S.C. § 332(c)(2). The FCC reasonably found that "private" mobile

services are "services that offered users access to a discrete and limited set of endpoints," such as dispatch services used by taxi companies or police departments. *See* Op. 59-60; *Order* ¶ 404 (JA3665). Unlike these closed private networks, mobile broadband today provides "the same sort of ubiquitous access" provided by mobile voice service, which has always been classified as a commercial mobile service. Op. 59.

3. Petitioners contend that mobile broadband cannot be an "interconnected service" under section 332(d)(2) because it does not "allow users 'to communicate to or receive communication from all other users'" of the redefined public switched network, including users of telephone numbers. CTIA Pet. 10-11 (quoting Op. 66); *see also* AT&T Pet. 8 (arguing that networks using telephone numbers and IP addresses are "mutually incompatible"). To the contrary, the Commission explained—and the panel agreed—that "mobile broadband Internet access service today, through the use of VoIP [Voice over Internet Protocol], messaging, and similar applications, effectively gives subscribers the capability to communicate with all [telephone users] as well as with all users of the Internet." *Order* ¶ 401 (JA3663); *see* Op. 66-71.[2]

[2] Petitioners assert that the FCC's lawyers "abandoned" the VoIP rationale on appeal. AT&T Pet. 2; *see also* CTIA Pet. 7. But it was the FCC's *Order*—not its brief—that was on review. And petitioners do not dispute that in the *Order*, the Commission espoused the VoIP rationale that the panel upheld.

Petitioners argue that because mobile broadband subscribers can place telephone calls only by obtaining a VoIP application, mobile broadband itself does not give users the capability to communicate with telephone users. CTIA Pet. 11; AT&T Pet. 9. As the panel explained, however, "[n]othing in the statute … compels the Commission to draw a talismanic (and elusive) distinction between (i) mobile broadband alone enabling a connection, and (ii) mobile broadband enabling a connection through use of an adjunct application such as VoIP." Op. 70. The panel observed that, "even for communications from one mobile broadband user to another, mobile broadband generally works in conjunction with a native or third-party application … to facilitate transmission of users' messages. The conjunction of mobile broadband and VoIP to enable IP-to-telephone communications is no different." Op. 71.

Moreover, the Commission found substantial evidence that since 2007 (when the agency classified mobile broadband as a private mobile service), a "convergence between mobile voice and data networks" had "blurred the distinction between services using [telephone] numbers and services using public IP addresses." *Order* ¶ 401 (JA3663); *see* Op. 68-70 (discussing record evidence of changes in the marketplace, including bundled offerings of VoIP applications with smartphones). The record showed that consumers now "communicate indiscriminately between [telephone numbers] and IP endpoints on the public

switched network" using mobile VoIP. Op. 70 (quoting *Order* ¶ 401 (JA3663)). "In light of those developments," the panel was fully justified in concluding that "the Commission reasonably determined that mobile broadband today is interconnected with the newly defined public switched network." *Id.*

Petitioners assert that, as a result of the FCC's new definition of "public switched network," mobile voice service cannot qualify as a commercial mobile service because it "is no longer interconnected with the newly defined public switched network." CTIA Pet. 13. The panel rightly rejected that argument. As the panel explained, the new definition of public switched network does not prevent the FCC from continuing to classify mobile voice as a commercial mobile service. Mobile voice users "can 'receive communication from' mobile broadband users through VoIP …. That capability would suffice to render mobile voice an 'interconnected service' under the Commission's regulatory definition of that term." Op. 72 (quoting 47 C.F.R. § 20.3).

In a related argument, petitioners contend that mobile broadband cannot be an interconnected service because "mobile voice [phones] cannot receive calls from *any* VoIP-incompatible mobile broadband device, including e-readers, motor vehicles, and mobile hotspots." CTIA Pet. 13. But the FCC's new definition of "public switched network" does not depend on whether users of VoIP-incompatible broadband devices can place calls to mobile voice users. Instead, the

question is whether mobile broadband "'gives subscribers the *capability* to communicate to' telephone users." Op. 71 (quoting 47 C.F.R. § 20.3) (emphasis added). Because a mobile broadband subscriber can use a mobile broadband *connection* to communicate with mobile voice users by means of VoIP-compatible devices, it is irrelevant whether other devices that are incapable of employing a VoIP application can also be connected to the network. In the same way, the FCC's prior definition of the network did not depend on whether a voice user could receive a fax communication by picking up the phone. In each instance, the FCC was defining the network itself; the network does not change based on whether a particular node of the network is connected to a VoIP-capable device or instead to a device without that capability. For that reason, the FCC could reasonably conclude (as the panel suggested) that mobile voice continues to be an "interconnected service"—and a commercial mobile service—under the new definition of "public switched network," which encompasses both IP addresses and telephone numbers. Op. 72-73.

4. Petitioners also contend that the panel's decision to uphold the reclassification of mobile broadband on the basis of third-party VoIP applications is inconsistent with its holding that broadband is "a standalone offering" of telecommunications, independent of "add-on applications." CTIA Pet. 12 (quoting Op. 24-25); *see also* AT&T Pet. 12-15. This argument ignores the fact that these

two different but related holdings were based on the panel's analysis of two different definitions.

In assessing whether broadband could reasonably be characterized as an offering of telecommunications subject to Title II, the panel focused on the Act's definition of "telecommunications service": "the offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153(53). That definition turns on what is "offered." *Brand X*, 545 U.S. at 989; *see* Op. 32. By contrast, the FCC's definition of "interconnected service" turns on the "*capability* to communicate," Op. 71 (quoting 47 C.F.R. § 20.3) (emphasis added), and not on whether that capability is or is not separately offered. It is reasonable to interpret "offering" more narrowly than "capability"; the term "offering" can reasonably be read to include only what is actually offered, while a "capability" may also include features facilitated by other applications. The panel's holdings regarding these two separate issues rested on a reasonable reading of the relevant definitions.

III. THE PANEL CORRECTLY FOUND THAT THE COMMISSION PROVIDED SUFFICIENT NOTICE OF ITS DECISIONS TO RECLASSIFY BROADBAND AND TO REVIEW INTERCONNECTION DISPUTES.

Petitioners also claim (NCTA Pet. 13-15) that the FCC failed to provide adequate notice of its decisions to reclassify broadband as a Title II telecommunications service and to review disputes about interconnection agreements. The panel rightly rejected these contentions. Op. 29-31 (notice of

broadband reclassification); Op. 52-54 (interconnection).

As to reclassification, the Commission specifically sought comment on whether it "should revisit" the "classification of broadband Internet access service as an information service." *NPRM* ¶ 148 (JA104) (*NPRM*); *see* Op. 30. Of the eighteen paragraphs in the *NPRM* seeking comment on the FCC's legal authority, eight paragraphs featured proposals and questions concerning Title II reclassification. *See NPRM* ¶¶ 148-155 (JA104-08). Likewise, the Commission expressly requested comment on whether it "should expand the scope of the open Internet rules to cover issues related to traffic exchange"—*i.e.*, interconnection. *Id.* ¶ 59 (JA74); *see* Op. 52-54.[3]

Even if the parties had not received express notice on these issues, it is well settled that an agency's final rule need only be a "logical outgrowth" of the notice

[3] Petitioners maintain that the *NPRM* and the Commission's Chairman had made clear that the topic of interconnection "was off the table." NCTA Pet. 14. To the contrary, although the FCC "tentatively conclude[d]" that it should not apply its rules to network traffic exchange, the *NPRM* expressly sought comment on whether the agency should change that conclusion. *See* Op. 52-53. In a separate statement accompanying the *NPRM*, the FCC's Chairman stated that "the question of interconnection" was "better addressed separately." *NPRM*, Statement of Chairman Wheeler at 2 (JA139). This statement could hardly be read as a "clear" indication that interconnection was "off the table." NCTA Pet. 14. Even if it could, the Chairman's separate statement concerning interconnection could not override the plain terms of the *NPRM*, which was adopted by a majority of the five-member Commission. *See Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007) (the FCC "acts by majority vote").

to satisfy the APA's notice requirement. Op. 29 (quoting *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006)). A notice "satisfies the logical outgrowth test if it 'expressly ask[s] for comments on a particular issue or otherwise ma[kes] clear that the agency [is] contemplating a particular change.'" Op. 29-30 (quoting *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009)). The panel properly concluded that, at a minimum, Title II reclassification and regulation of interconnection were logical outgrowths of the *NPRM*. Op. 29-30, 52-54. Indeed, consistent with the panel's conclusion, many parties—including petitioners themselves—submitted extensive comments on these issues. *See* FCC Br. 110-12, 123-24 (citing submissions made by AT&T, CTIA, Century Link, and NCTA).

IV. THE PANEL CORRECTLY REJECTED ALAMO'S FIRST AMENDMENT CHALLENGE.

Alamo contends (Alamo Pet. 4-12) that the Commission's open internet rules violate the First Amendment. The panel correctly rejected that claim. Op. 108-15. As it explained, the FCC's rules "impose on broadband providers the kind of nondiscrimination and equal access obligations that courts have never considered to raise a First Amendment concern." Op. 111. The absence of any such concern, the panel pointed out, "rests on the understanding" that common carriers "merely facilitate the transmission of the speech of others rather than engage in speech in their own right." Op. 110.

Alamo argues that the panel "erred by concluding that broadband providers do not exercise editorial discretion." Alamo Pet. 5. Not so. Unlike providers of cable television service, broadband providers "are not required to make, nor have they traditionally made, editorial decisions about which speech to transmit." Op. 114; *see also Order* ¶ 549 (JA3745-46). In that regard, broadband providers acting in that capacity are analogous to telephone companies; "they act as neutral, indiscriminate platforms for transmission of speech of any and all users." Op. 114.[4]

Of course, as the panel acknowledged, a broadband provider could "*choose* to exercise editorial discretion—for instance, by picking a limited set of websites to carry and offering that service as a curated internet experience," and "it might then qualify as a First Amendment speaker." Op. 114. Any such provider, however, would be exempt from the open internet rules. Those rules apply only to "broadband Internet access service," which the FCC defines as a service "that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints." *Order* ¶ 336 (JA3622). "That definition, by its terms, includes only those broadband providers that hold themselves out as neutral,

[4] Alamo notes that the panel "did not address whether the open internet rules violate the First Amendment's Press Clause." Alamo Pet. 10. For the same reason that broadband providers are not speakers, they are not members of the press. Unlike newspaper publishers, broadband providers do not exercise editorial discretion; they merely serve as indiscriminate conduits for the speech of others. *See* Op. 113-14.

indiscriminate conduits." Op. 114-15.

V. THE PANEL RIGHTLY REAFFIRMED THE COMMISSION'S AUTHORITY UNDER SECTION 706.

Consistent with this Court's ruling in *Verizon*, 740 F.3d at 635-49, the panel held that section 706 of the 1996 Act authorizes the FCC to adopt the open internet rules in order to promote broadband deployment. Op. 94-97. The panel "fully adopt[ed]" the *Verizon* Court's "findings and analysis" regarding "the existence and permissible scope of the Commission's section 706 authority." Op. 97. Alamo has offered no good reason to disturb those findings. *See* Alamo Pet. 12-15.

Alamo contends that the FCC's reading of section 706 gives the agency virtually unlimited regulatory authority. Alamo Pet. 13-15. The Court in *Verizon* rightly rejected that argument, noting that there are "at least two limiting principles inherent" in section 706. *Verizon*, 740 F.3d at 640. First, the FCC's subject matter jurisdiction is confined to "interstate and foreign communication by wire or radio." 47 U.S.C. § 152(a). Second, any regulation adopted under section 706 must "be tailored to the specific statutory goal of accelerating broadband deployment." *Verizon*, 740 F.3d at 641.

Alamo argues that the FCC's reading of section 706 conflicts with the deregulatory purpose of the 1996 Act. Alamo Pet. 13-14. As the panel explained, however, "it is unsurprising that the grant of rulemaking authority" under section 706 "might occasion the promulgation of additional regulation." Op. 97. Any such

regulation "is entirely consistent with the Act's objectives" if, "as is true here (and was true in *Verizon*), the new regulation is geared to promoting the effective deployment of new telecommunications technologies such as broadband." *Id.*

Alamo also asserts that the Commission did not properly exercise its authority under section 706 because it made no "finding that broadband providers possess market power." Alamo Pet. 14. But the Court in *Verizon* concluded that "the Commission's failure to find market power" was "not 'fatal' to its theory" for adopting open internet rules under section 706. *Verizon*, 740 F.3d at 648. In the FCC's judgment, such rules were necessary to prevent broadband providers from discriminating among providers of internet content. The Commission found—and the Court agreed—that broadband providers' ability to engage in such discrimination "simply depends on end users not being fully responsive to the imposition of such restrictions" because of early termination fees and other switching costs that impede end users from switching broadband providers—not on whether broadband providers have "market power." *Id.*

CONCLUSION

The petitions for panel rehearing and rehearing en banc should be denied.

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UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES TELECOM ASSOCIATION, ET AL. Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION, AND UNITED STATES OF AMERICA, Respondents.	No. 15-1063 (and Consolidated cases)

CERTIFICATE OF SERVICE

I, James M. Carr, hereby certify that on October 3, 2016, I electronically filed the foregoing Opposition of Respondents to Petition for Panel Rehearing and Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the District of Columbia 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.

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