ORAL ARGUMENT HELD ON DECEMBER 4, 2015
DECISION ISSUED JUNE 14, 2016

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

JOINT RESPONSE TO PETITIONS FOR REHEARING AND REHEARING EN BANC FOR INTERVENORS COGENT COMMUNICATIONS, INC., COMPTEL, DISH NETWORK CORPORATION, FREE PRESS, NETFLIX, INC., OPEN TECHNOLOGY INSTITUTE | NEW AMERICA, PUBLIC KNOWLEDGE, *ET AL.*, IN SUPPORT OF THE FCC

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to FED. R. APP. P. 26.1 and D.C. Cir. R. 26.1, Intervenors in support of Respondents the FCC and the United States submit the following corporate disclosure statements:

Ad Hoc Telecommunications Users Committee: The Ad Hoc Telecommunications Users Committee ("Ad Hoc") is an unincorporated, non-profit association of large business users of communications services. Ad Hoc represents the interests of its members in proceedings before the Federal Communications Commission (the "FCC") and the federal courts on issues related to the regulation of interstate telecommunications. Ad Hoc is a "trade association" as defined in Circuit Rule 26.1(b).

Center for Democracy & Technology: The Center for Democracy & Technology ("CDT") is a non-profit, non-stock corporation organized under the laws of the District of Columbia. CDT has no parent corporation, nor is there any publicly held corporation that owns stock or other interest in CDT.

Cogent: Cogent Communications, Inc. ("Cogent") is a subsidiary of Cogent Communications Holdings, Inc. There are no publicly held companies, other than Cogent Communications Holdings, Inc., that have an ownership interest of 10% or more in Cogent. With respect to Cogent Communications Holdings, Inc., only

FMR LLC (also known as Fidelity Investments) holds an ownership interest of greater than 10%.

The "general nature and purpose, insofar as relevant to litigation," Circuit Rule 26.1(b), of Cogent is twofold. First, Cogent is an Internet transit provider, meaning that Cogent facilitates the transmission of data between content providers and Internet service providers as well as between other transit providers. Second, Cogent is an Internet service provider through its sale of Internet access to mostly small- and medium-sized businesses.

ColorOfChange: ColorOfChange.org is a national, nonpartisan, nonprofit organization. ColorOfChange.org has no parent corporations, and no publicly held company has a 10% or greater ownership in ColorOfChange.org.

Credo Mobile: Working Assets, Inc., is the parent company of Credo Mobile, Inc. No publicly held corporation owns stock or any other interest in either Credo Mobile, Inc. or Working Assets, Inc.

Demand Progress: Demand Progress is a non-profit corporation. It has no parent corporation. No publicly held company has any ownership interest in Demand Progress.

DISH: DISH Network Corporation, which has publicly-traded equity (NASDAQ:DISH), has no parent corporation. Based solely on a review of Form 13D and Form 13G filings with the Securities and Exchange Commission, no

entity owns more than 10% of DISH Network Corporation's stock other than Putnam Investments, LLC and JPMorgan Chase & Co. DISH Network L.L.C. is a wholly owned subsidiary of DISH DBS Corporation, a corporation with publicly traded debt. DISH DBS Corporation is a wholly owned subsidiary of DISH Orbital Corporation. DISH Orbital Corporation is a wholly owned subsidiary of DISH Network Corporation. As of June 30, 2016, DISH Network L.L.C. had 13.593 million TV customers.

Fight for the Future: Working Assets, Inc., is the parent company of Fight for the Future, Inc. No publicly held corporation owns stock or any other interest in either Fight for the Future, Inc. or Working Assets, Inc.

Free Press: Free Press is a national, nonpartisan, nonprofit organization. Free Press has no parent corporations nor is there any publicly held corporation that owns stock or other interest in Free Press.

Kickstarter: Kickstarter, PBC is a privately held company that has no parent company, and no publicly held company owns 10% or more of its stock. Based in New York, it is a global platform for bringing creative projects to life.

INCOMPAS: COMPTEL d/b/a INCOMPAS is the leading national trade association representing competitive communications service providers and their supplier partners. INCOMPAS is a not-for-profit corporation and has not issued shares or debt securities to the public. INCOMPAS does not have any parent

companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Level 3: Insofar as relevant to the litigation, Level 3 Communications, LLC ("Level 3") is an Internet Service Provider, providing Internet services, including content-delivery and transit services, to customers in the United States and globally. Level 3 is a wholly owned subsidiary of Level 3 Financing, Inc., which is a wholly owned subsidiary of Level 3 Communications, Inc., a publicly traded company incorporated in the State of Delaware. No publicly traded company owns 10% or more of Level 3 Communications, Inc.

Meetup: Meetup, Inc. is a privately held company that has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Based in New York, Meetup is an online network of local community groups, enabling people across the world to find an existing group or start a new group.

National Association of Regulatory Utility Commissioners: The National Association of Regulatory Utility Commissioners ("NARUC") is a quasigovernmental nonprofit organization founded in 1889 and incorporated in the District of Columbia. NARUC is a "trade association" as that term is defined in Local Circuit Rule 26.1(b). NARUC has no parent company. No publicly held company has any ownership interest in NARUC. NARUC represents those government officials in the fifty States, the District of Columbia, Puerto Rico, and

the Virgin Islands, charged with the duty of regulating, *inter alia*, the regulated telecommunications and electric utilities within their respective borders.

National Association of State Utility Consumer Advocates: The National Association of State Utility Consumer Advocates ("NASUCA") is a voluntary association of 44 consumer advocate offices in 41 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates for utility residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority. Some NASUCA member offices advocate in states whose respective state commissions do not have jurisdiction over certain telecommunications issues.

Netflix: Netflix is a publicly held corporation with its headquarters in Los Gatos, California. Netflix is an Internet subscription service providing consumers access to movies and television shows. Netflix has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

New America's Open Technology Institute: New America is a non-profit organization incorporated in the District of Columbia. New America has no parent corporation, nor is there any publicly held corporation that owns stock or other interest in New America.

Public Knowledge: Public Knowledge is a non-profit organization incorporated in the District of Columbia. Public Knowledge has no parent corporation, nor is there any publicly held corporation that owns stock or other interest in Public Knowledge.

Vimeo: Vimeo, Inc. is a wholly owned subsidiary of IAC/InterActiveCorp, a publicly-traded company with no parent company; no publicly-traded company owns 10% or more of IAC/InterActiveCorp. Based in New York, Vimeo provides Internet-based video sharing and hosting services to consumers.

Vonage: Vonage Holdings Corp., through its wholly owned subsidiary Vonage America, Inc., provides low-cost communications services connecting individuals through broadband devices worldwide. Vonage Holdings Corp. is a publicly held corporation, traded on the New York Stock exchange under the symbol VG. No publicly held corporation holds a 10% or greater interest in Vonage Holdings Corp., directly or indirectly.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENTS i

TABLE OF AUTHORITIES viii

GLOSSARY x

INTRODUCTION 1

ARGUMENT 3

I. THIS CASE IS NOT IN CONFLICT WITH PRECEDENT 3

II. THIS CASE DOES NOT PRESENT ISSUES OF EXCEPTIONAL LEGAL IMPORTANCE 6

III. THE PANEL DECISION IS CORRECT 9

IV. PETITIONER ALAMO'S FIRST AMENDMENT CLAIMS ARE UNFOUNDED 14

CONLUSION 15

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page(s)

CASES

Blue Ridge Envtl. Def. League v. Nuclear Regulatory Comm'n, 716 F.3d 183 (D.C. Cir. 2013) 7

Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc, 467 U.S. 837 (1984) 6-7

Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010) 3

**NCTA v. Brand X Internet Servs.*, 545 U.S. 967 (2005) 1, 4, 5, 6

Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014) 3

USTA v. FCC, 825 F.3d 674 (D.C. Cir. 2016) 3

STATUTES, REGULATIONS AND RULES

47 U.S.C. § 332 ..... 2, 10, 13

47 C.F.R. § 1.1206 10

47 C.F.R. § 64.702 9

FED. R. APP. P. 35 6

AGENCY PROCEEDINGS

Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798 (2002) 4

Protecting and Promoting the Open Internet, Report and Order on Remand, Notice of Proposed Rulemaking, 29 FCC Rcd. 5561 (2015) 9-10

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GLOSSARY

APA	Administrative Procedure Act, 5 U.S.C. §§ 701-706
Brand X	*NCTA v. Brand X Internet Servs.*, 545 U.S. 967 (2005)
Cable Modem Order	*Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd. 4798 (2002)
Cingular Comments	Comments of Cingular Wireless, LLC, *Wireless Broadband Access Task Force Seeks Public Comment on Issues Related to Commission's Wireless Broadband Policies*, GN Docket No. 04-163 (June 3, 2004)
Cogent Br.	Joint Brief for Intervenors Cogent Communications Inc., COMPTEL, DISH Network Corporation, Free Press, Netflix, Inc., Open Technology Institute | New America, Public Knowledge, *et al.* (Oct. 13, 2015)
Communications Act or Act	Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq*.
DSL	Digital Subscriber Line; an early broadband technology utilizing copper telephone lines to transmit data, which is limited by the physical constraints of the material resulting in a decrease in data rate as distance from the telephone company hub increases.
Edge providers	Third parties providing ISPs' users content, applications, and services over the Internet.
FCC or Commission	Federal Communications Commission
FCC Br.	Opening Brief of Federal Communications Commission and United States of America (Oct. 13, 2015)
ISP	Internet Service Provider

NPRM	*Protecting and Promoting the Open Internet*, *Notice of Proposed Rulemaking*, 29 FCC Rcd. 5561 (2014) (JA53)
Order	*Protecting and Promoting the Open Internet*, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601 (2015) (JA3477)
Petitioners	Petitioners USTelecom, NCTA, CTIA, ACA, WISPA, AT&T, CenturyLink, Alamo Broadband, and Daniel Berninger
Section 332	47 U.S.C. § 332
Title II	Title II of the Communications Act, codified as amended at 47 U.S.C. §§ 201–276
USTA Br.	Joint Opening Brief for Petitioners USTelecom, NCTA, CTIA, ACA, WISPA, AT&T, and CenturyLink (Oct. 13, 2015)
VoIP	Voice over Internet Protocol; voice telephone service provided via the Internet.

INTRODUCTION

Intervenors represent a diverse group of Internet stakeholders bound together by a common interest in an open Internet. The panel decision upheld the FCC's rules, which preserve the openness and virtuous circle of innovation on which Intervenors rely. Petitioners again attack these rules before the Court, even though the panel decision presents no conflict with precedent or any issue of exceptional legal importance. This is the last in a trio of D.C. Circuit decisions. In the first two, neither of which was the subject of a rehearing petition, the Court disagreed with the FCC and gave the agency valuable guidance. In the third, the Court agreed that the FCC had faithfully and correctly applied that guidance.

An open Internet is important. But the legal questions raised in this case are ordinary. The Supreme Court has already determined that the Communications Act is "ambiguous" on the classification of broadband access, and that Congress "delegat[ed] . . . authority to the agency to fill the statutory gap in reasonable fashion." *Brand X* at 980. The claim that the agency "fail[ed] to offer a *reasoned* explanation for reclassifying broadband," NCTA Pet. 9 (emphasis in original), is this Court's everyday regimen, not material for rehearing. And as far as Intervenors can determine, this Court has not, in recent memory, ever granted rehearing to address such fact-bound and case-specific complaints.

Petitioners unwittingly betray the ordinariness of the legal issues raised before the panel by raising new ones here. Yet all of their arguments—old and new—rely on distortion or omission of what Congress or the FCC said or did. For example, Petitioners argue that broadband access should qualify as an "enhanced service" under the FCC's definition of that term (and therefore as an information service), but their contention is disproved by the omitted portion of the very definition they rely on. With respect to mobile broadband, Petitioners claim that the congressional intent underlying Section 332 was to protect mobile services from regulation, despite having conceded previously that "Congress enacted § 332 to ensure that all mobile services interconnected with the telephone network were treated in the same manner as landline phone service." USTA Br. 57. They also fault the panel for agreeing with the FCC that VoIP applications enable users to communicate to any telephone user, making the service interconnected. They claim this is inconsistent with the panel's agreement with the FCC that "'broadband Internet access service is today sufficiently independent of these information services that it is a separate offering.'" Op. 38. But on both of these questions, the Court was merely affirming the FCC's analysis, which Petitioners never challenged before on that ground, because no incompatibility exists.

Petitioners are silent on their own prior inconsistent statements, which further illustrate the flimsiness of their case for rehearing. AT&T's predecessor

had stated in 2004 that mobile broadband access "fall[s] within the statutory definition of 'commercial mobile service.'" Cingular Comments 14-15. In 2003, Verizon had explained that "[an ISP] performs a pure transmission or 'conduit' function. . . . analogous to the role played by common carriers in transmitting information selected and controlled by others." Cogent Br. 27. Both companies were right.

Petitioners are also silent on the question of harm. What is it that they relied on being able to do and will now no longer be able to? No Petitioner answers this question. The lack of impact from the Court's decision on ISP investment confirms that the new rules are business as usual for Petitioners.

Nor have Petitioners' First Amendment rights been infringed—doubtless the reason why only one of the Petitioners makes that argument.

ARGUMENT

I. THIS CASE IS NOT IN CONFLICT WITH PRECEDENT

The panel's decision is a painstaking application of D.C. Circuit precedent, as well as of *Brand X*.

1. Circuit Precedent. The FCC's actions to preserve an open Internet have come before this Court three times in the past seven years. *See Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010); *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); *USTA v. FCC*, 825 F.3d 674 (D.C. Cir. 2016). Each of the first two times,

the Court disagreed with the FCC, supplying the agency with an authoritative roadmap for proceeding. The agency applied that guidance thoughtfully, and the Court agreed. Petitioners now request rehearing of the first in this string of decisions not to go their way, no matter that an overlapping but different motions panel denied their stay motion, which hinged, among other factors, on the likelihood of success on the merits. Order, ECF No. 1557040.

2. Supreme Court Precedent. Anyone who pays for broadband access would be surprised to hear from Petitioners that broadband service *does not* qualify as "the offering of telecommunications [defined as the transmission of information of the user's choosing without change] for a fee directly to the public." *Brand X*, 545 U.S. at 987. The record shows this is precisely what consumers pay for today, and the FCC so found below based on the voluminous record before it.

A previous Commission arrived at a different conclusion, more than a decade ago, because it believed that the transmission component of broadband service was not being "offered" standing alone at the time. *Cable Modem Order* at 4823 ¶ 39. The *Brand X* Court affirmed that conclusion out of deference, and not because it was the best interpretation of the statute. In the words of Justice Thomas: "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is

the best statutory interpretation." *Brand X*, 545 U.S. at 980. And according to Justice Breyer: "I join the Court's opinion because I believe that the Federal Communications Commission's decision falls within the scope of its statutorily delegated authority—though perhaps just barely." *Id.* at 1003 (Breyer, J., concurring). Some Petitioners continue to claim incorrectly that *Brand X* compels that same classification decision now, but they cannot convincingly turn the Supreme Court's deference to an earlier agency decision into compulsion for the agency to reach the same result.

Brand X belies Petitioners' arguments in another way, as well. In Petitioners' revisionist history, the FCC has, "since the advent of data processing services offered over the telephone networks," AT&T Pet. 3, "repeatedly found that broadband Internet access is an 'information service,'" CTIA Pet. 4, a finding that Congress immutably codified in 1996, NCTA Pet. 3-4; USTA Pet. 4. This is an invention. In *Brand X*, the Supreme Court recognized that the FCC's information service classification was a departure from the agency's prior practice—which had treated DSL as a telecommunications service—and ruled that the agency had the leeway to change its mind: "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under

the [APA]." *Brand X*, 545 U.S. at 981. Clearly, therefore, the Supreme Court recognized that the FCC had previously treated broadband access as a telecommunications service—the opposite from Petitioners' account.

Moreover—and this is yet another valuable teaching of *Brand X*—the agency has the same authority now that the Supreme Court recognized then to reclassify broadband access as a telecommunications service.

II. THIS CASE DOES NOT PRESENT ISSUES OF EXCEPTIONAL LEGAL IMPORTANCE

1. The Panel Decision Does not Conflict with any Prior Decision of this or any other Court, and Presents no Legal Question of Exceptional Significance. While the Open Internet rules are of critical importance for the open Internet, that is not what it takes for rehearing. The legal questions arising in this case are neither novel nor exceptionally significant within the meaning of FED. R. APP. P. 35(a)(2).

This is a straightforward agency reasonableness case. Even one of the Petitioners no longer argues that the agency's classification of broadband access as a telecommunications service is prohibited by statute. NCTA Pet. 9. The panel below did what this Court is called upon to do daily: examine the reasonableness of the agency's statutory interpretations and actions under a prism of deference. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc*, 467 U.S. 837, 844

(1984); *Blue Ridge Envtl. Def. League v. Nuclear Regulatory Comm'n*, 716 F.3d 183, 195 (D.C. Cir. 2013).

2. The Order*'s Alleged Effects on Internet Investment Provide no Basis for* En Banc *Review.* Petitioners plead for *en banc* review on the ground that the *Order* vitiates important industry reliance interests and will inhibit broadband investment into the future. NCTA Pet. 1; USTA Pet. 1. But they have repeatedly disavowed any intent to do anything the *Order* prohibits them specifically from doing (including offering paid prioritization). And the petitions for rehearing have dropped all challenges to the *Order*'s bright-line rules and to the general conduct standard.

The *only* thing Petitioners now challenge is reclassification in itself. But they completely fail to identify any practice they wish to engage in that they were permitted to do previously, but are prohibited from doing now as a result of reclassification. Some Petitioners drop hints that the FCC may, someday, use the reclassification to impose a rule that *does* prohibit Petitioners' members from doing something they actually want to do—for example, by imposing rate regulation. CTIA Pet. 9. But the *Order* forebears from rate setting. *Order* ¶451 (JA3690). Any change in that policy would require new agency action that would be subject to judicial review at that time. Court review would also be available for

any FCC determination that a particular arrangement violates the general conduct standard or any Title II rules.

Petitioners' insistence that their reliance interests have been assailed was thoroughly discredited in the record before the Court. As Verizon's CEO said in September 2015, the framework that the FCC has "put in place in and of itself the way [the FCC is] talking about implementing it today doesn't have much impact on [Verizon]." *See* Cogent Br. 39-41. And since the decision, Petitioners' argument has continued to be directly contradicted by their (and their members') actions. Just over a month ago, Petitioner AT&T assured the public that it "continues to deploy fiber and to connect [its] customers to broadband services . . . across the country." Joan Marsh, *Broadband Investment: Not for the Faint of Heart*, AT&T POLICY BLOG (Aug. 30, 2016), http://www.attpublicpolicy.com/fcc/broadband-investmentnot-for-the-faint-of-heart/. Verizon agreed to acquire edge provider Yahoo Inc. in July 2016 for almost $5 billion, even though the rules prohibit it from favoring its own edge provider affiliates. Ryan Knutson and Deepa Seetharaman, *Verizon Finalizes $4.8 Billion Yahoo Deal*, WALL ST. J., July 25, 2016, at B1. None of these continued investments would make sense if Petitioners had previously invested in reliance on the absence of Open Internet rules. They vindicate the FCC's finding that the rules "will not have a negative

impact on investment and innovation in the Internet marketplace as a whole." *Order* ¶410 (JA3667).

III. THE PANEL DECISION IS CORRECT

1. Reclassification. Confronted with the case's simplicity, Petitioners resort to tactics of desperation. Many of the Petitioners' primary arguments are new, and all are easily proven wrong.

AT&T claims that broadband access is an enhanced service, and therefore an information service, because "the FCC defined enhanced services to include services that permit 'subscriber interaction with stored information.'" AT&T Pet. 11. But the very definition on which AT&T relies includes language, blatantly omitted by AT&T, which disproves that claim: "the term enhanced service shall refer to services, *offered over common carrier transmission facilities used in interstate communications*, which . . . involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a) (emphasis added). "Enhanced service" refers to over-the-top services—i.e., services that deliver content over the transmission lines—not to the transmission itself.

On the separate issue of whether there was adequate notice for the FCC's actions on interconnection, Petitioners claim: "[B]oth the NPRM and the Chairman made clear that [interconnection] was *off the table*." NCTA Pet. 14. But, in fact, the *NPRM* sought comment on whether the FCC "should expand the scope of the

open Internet rules to cover issues related to [interconnection]," and on how the Commission could "ensure that a broadband provider would not be able to evade our open Internet rules by engaging in traffic exchange practices that would be outside the scope of the rules as proposed." *NPRM* ¶59 (JA74). Petitioners, including NCTA, submitted comments in response. FCC Br. 123-24.[1]

2. Mobile. The most glaring inaccuracies are found in the arguments made by AT&T and CTIA that mobile broadband access does not qualify as a commercial mobile service under Section 332.

a. Purpose of Section 332. Petitioners claim the FCC's classification of mobile broadband is inappropriate because "the whole point of Section 332 is to provide extra protection for mobile services in order to foster innovation." CTIA Pet. 3.

In fact, the main point of Section 332 is the opposite. Far from intending to provide extra protection to mobile services, Congress intended to ensure that mobile services previously classified as private would be regulated as commercial, common carrier services. "Functionally, these 'private' carriers have become

[1] One Petitioner also elevates the concern over the comments submitted to the FCC by the President from the atmospheric sideshow it was in their prior brief to center stage. NCTA Pet. 6-7, 14. But Petitioners never argued agency irregularity before, and they still do not argue it now—because they cannot. The Executive Branch's participation in FCC proceedings is common, and its communications with the FCC were properly disclosed pursuant to FCC rules. 47 C.F.R. § 1.1206.

indistinguishable from common carriers but private land mobile carriers and common carriers are subject to inconsistent regulatory schemes." H.R. REP. No. 103-111, at 260 (1993) (footnote omitted). The House Report stated that these "*disparities* in the current regulatory scheme could impede the continued growth and development of commercial mobile services *and deny consumers the protections they need if new services such as PCS were classified as private*." *Id.* (emphasis added).

Even Petitioners' joint brief before the panel acknowledged that Congress intended regulatory parity: "Congress enacted § 332 to ensure that all mobile services interconnected with the telephone network were treated in the same manner as landline phone service." USTA Br. 57. Traditional cellphone companies did not want their emerging competitors to be unregulated. No wonder that AT&T's predecessor argued in 2004 that mobile broadband qualifies as a commercial mobile service. Cingular Comments 14-15. AT&T's predecessor was correct then.

b. Alleged Incompatibility with Reclassification Rationale. Petitioners CTIA and AT&T also invent a false incompatibility. AT&T Pet. 12-14; CTIA Pet. 12-14. The Court agreed with the FCC that VoIP applications are "adjunct" applications enabling every mobile broadband user to communicate to "telephone users through VoIP." Op. 71. Since "the capability *either* to 'communicate to *or*

receive communications from' is enough," it follows that "the capability of mobile broadband users 'to communicate to' telephone users via VoIP suffices to render the network—and, most importantly, its users—'interconnected.'" *Id.* Thus, the FCC "permissibly exercised" its "express authority to define 'interconnected service'" and to "determine that—in light of the increased availability, use, and technological and functional integration of VoIP applications—mobile broadband should now be considered interconnected with the telephone network." *Id.* at 70-71.

AT&T interprets the Court's words to mean that "third-party VoIP applications should be considered an inseparable part of the *broadband Internet access service itself*." AT&T Pet. 14 (emphasis in original). It then argues that this finding is incompatible with the FCC's determination that broadband providers are *not* "offering a service in which transmission capabilities are 'inextricably intertwined' with various proprietary applications and services." *Order* ¶330 (JA3663).

Petitioners did not make this argument to the panel, although they were well aware of both of these agency findings. They did not make it for good reason. There is no inconsistency.

Giving a "capability," *id.* ¶401 (JA3663), and being "inextricably intertwined," *id.* ¶330 (JA3619), are two different things. For example, a fax

machine enables faxes to be sent, but cannot be said to be inseparable from, or inextricably intertwined with, the telephone network. The difference between them looms even larger if one considers the context of the two findings—two different provisions using different language. On the one hand, the FCC concluded that transmission and information services are not inextricably intertwined in order to determine that ISPs "offer" a telecommunications service within the meaning of the statutory definition of that service. On the other hand, the FCC concluded that VoIP applications provide the capability to send or receive communications in order to determine whether mobile broadband access meets the agency's definition of interconnected service under Section 332. But "capability" is not relevant to interpreting "offer." Petitioners do not argue that the capability supplied by VoIP applications makes these applications a part of the Internet access offer they make to the consumer.

Taken to its conclusion, Petitioners' implausible argument would suggest that all mobile telephony is no longer "interconnected" under Section 332. Every smartphone today requires an application (which, in fact, may use VoIP technology) to make even a voice connection possible. Petitioners do not articulate a distinction between calls made with the device's "native" telephone function and those made using a VoIP application. Op. 69-70. And so if the need for a VoIP application disqualifies mobile broadband service from being interconnected, so

would every smartphone's need for that native software. But not even the Petitioners are arguing this.

IV. PETITIONER ALAMO'S FIRST AMENDMENT CLAIMS ARE UNFOUNDED

1. ISPs Rely on Their Status as Passive Conduits. The ISP industry has gone to great lengths to show that ISPs are passive conduits for speech rather than speakers. *See, e.g.*, Cogent Br. 27. Nothing in the record suggests that Alamo's subscribers are supplied access to a *different Internet*, based on Alamo's editorial preferences, than if they subscribed to Internet access from another provider.

2. Number of Recipients is Immaterial. First Amendment protection does not turn on how many people are the recipients of a message. Alamo claims that telephone companies mostly transmit private, person-to-person communications, Alamo Pet. 6, as if that were the relevant test. However, if a carrier enabled a conference call with thousands of participants, that would not change the First Amendment analysis. "The constitutionality of common carriage regulation of a particular transmission medium thus does not vary based on the potential audience size." Op. 112.

3. Common Carriage is a Factual Determination, not a Mere Label. All common carriers must carry information in a nondiscriminatory manner. The novel interpretation advanced by Alamo could call into question the constitutionality of Title II as well as other common carrier laws. For example, a

telephone company could deny service to a political party, or a railroad refuse to carry military freight on the ground that they are pacifists. This is antithetical to long-standing principles of common carriage and in no way compelled by the First Amendment.

CONLUSION

For the reasons stated herein, the petitions for rehearing and rehearing *en banc* should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd of October 2016, I caused true and correct copies of the foregoing Joint Response to Petitions for Rehearing and Rehearing En Banc for Intervenors in Support of the FCC to be filed electronically with the Clerk of the Court using the Case Management and Electronic Case Files ("CM/ECF") system for the D.C. Circuit. Participants in the case will be served by the CM/ECF system or by U.S. Mail.

Sincerely,

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