ORAL ARGUMENT SCHEDULED FOR DECEMBER 4, 2015

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

Case No. 15-1063 (and consolidated cases)

UNITED STATES TELECOM ASSOCIATION, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

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

BRIEF FOR AMICUS CURIAE TELECOMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONERS

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August 6, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

Parties appearing in this Court and before the FCC are listed in the Joint Brief for Petitioners USTelecom, the National Cable & Television Association, CTIA – The Wireless Association®, American Cable Association, Wireless Internet Service Providers Association, AT&T Inc., and CenturyLink. Amici appearing before this Court are listed below:

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 S. Yoo

B. Ruling Under Review

The ruling under review is the FCC's Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015) ("*Order*") (JA__).

C. Related Cases

The *Order* has not previously been the subject of a petition for review by this Court or any other court. All petitions for review of the *Order* have been consolidated in this Court, and the Telecommunications Industry Association ("TIA") is unaware of any other related cases pending before this or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. R. 26.1, TIA submits the following corporate disclosure statement. TIA is the leading trade association for the information and communications technology industry, with hundreds of members involved in the manufacture and deployment of the hardware and software that constitutes the nation's broadband networks. TIA has no parent companies and no publicly held company has an ownership interest in TIA.

CERTIFICATE OF COUNSEL REGARDING NECESSITY OF SEPARATE AMICUS CURIAE BRIEF

Pursuant to D.C. Cir. R. 29(d), TIA hereby certifies that it is submitting a separate brief from the other *amici* in this case due to the specialized nature of its distinct interests and expertise. TIA was an active participant in the rulemaking proceeding below and the related rulemakings that preceded it. TIA member companies build, maintain, and upgrade the infrastructure that supports broadband Internet access services, affording TIA the ability to provide policymakers with expert insight into the information and communications technology marketplace and supply chain. To its knowledge, TIA is the only *amicus* speaking from the unique perspective of network technologists and manufacturers on the impact of the FCC's reclassification on the investment required to extend and upgrade the nation's broadband infrastructure as Congress has directed the Commission to support. None of the *amici* of which we are aware will be in a position to address first-hand the interplay between investment incentives and network deployment.

Accordingly, TIA, though counsel, certifies that filing a joint brief would not be practicable.

/s/ Bryan N. Tramont
Bryan N. Tramont

August 6, 2015

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2015 Broadband Report	*Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All American in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment*, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, 30 FCC Rcd 1375 (2015) (JA__)
APA	Administrative Procedure Act
Broadband Access Declaratory Ruling	*Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007)
Cable Broadband 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), *aff'd sub nom.* NCTA v. Brand X Internet Servs., 545 U.S. 967 (2005)
Cambridge Study	Cambridge Strategic Management Group, *FCC Reclassification NOI: Economic Impact Assessment* (July 15, 2010) (attached to Comments of the Telecommunications Industry Association, GN Docket No. 10-127 (July 15, 2010))
Communications Act or Act	Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq*.
Entner/Recon Analytics	Roger Entner, Recon Analytics, *Spectrum Fules Speed and Prosperity* (Sept. 2014) (attached to Letter from Scott K. Bergmann, Vice President – Regulatory Affairs, CTIA-The Wireless Association, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, *et al.* (Sept. 25, 2014)) (JA__)
FCC or Commission	Federal Communications Commission

Hassett & Shapiro Analysis	Kevin A. Hassett and Robert J. Shapiro, *The Impact of Title II Regulation of Internet Providers on Their Capital Investment* (Nov. 2014) (attached to Letter from Patrick S. Brogan, Vice President, Industry Analysis, US Telecom, GN Docket No. 14-28 (Nov. 19, 2014)) (JA__)
JA	Joint Appendix
Katz Declaration	Declaration of Michael L. Katz, *Protecting and Promoting Consumer Benefits Derived from the Internet* (July 15, 2014) (attached to Comments of Verizon and Verizon Wireless, GN Docket Nos. 10-127 & 14-28 (July 15, 2014)) (JA__)
Notice	*Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014) (JA__)
Order	*Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (JA__)
USTelecom, *et al.*	Joint Brief for Petitioners USTelecom, NCTA, CTIA, ACA, WISPA, AT&T, and CenturyLink (July 30, 2015)
Wireline Broadband Order	*Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005), *petitions for review denied*, Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007)
Yoo	Christopher S.Yoo, U.S. v. European Broadband Deployment: What Do the Data Say (June 2014), *available at* https://goo.gl/1GTGdd (JA__)

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE AS AMICUS CURIAE

TIA represents manufacturers and suppliers of global communications networks through standards development, policy advocacy, business opportunities, market intelligence, and events and networking. Since the early days of radio and wireline telephony, TIA and its predecessor entities have provided economic analyses and market research to help its members make data-based decisions about communications infrastructure investment – and to help policymakers make data-based decisions that foster such investment. Those efforts ultimately have benefitted American consumers, who enjoy the most robustly competitive broadband options in the world.

TIA actively participated in the Federal Communications Commission ("FCC" or "Commission") rulemaking at issue in this docket, as well as in prior related FCC rulemakings, by submitting empirical evidence concerning how wireline and wireless broadband technologies work and the investment considerations behind deployment decisions. TIA, therefore, has a demonstrated interest in this proceeding. *See* Fed. R. App. 29(b)(1). To its knowledge, TIA is the only *amicus* speaking with the unique voice of network technologists and manufacturers on the impact of reclassification on the investment required to extend and upgrade the nation's broadband infrastructure – which plainly is key to the deployment goal that Congress has directed the Commission to support. TIA

believes that its perspective on the issues raised will aid the Court in reaching an appropriate decision in this case.

TIA filed a Motion for Leave to File a Brief as *Amicus Curiae* in Support of Petitioners USTelecom, *et al.*, *see* D.C. Cir. R. 29(b), which the Court granted on August 4, 2015. TIA's submission is in support of Petitioners USTelecom, *et al.*, in the consolidated cases here.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No party or its counsel, and no person other than *amicus curiae*, made a monetary contribution intended to fund the preparation or submission of this brief. The same law firm representing petitioner CenturyLink authored this brief.

STATUTES AND REGULATIONS

Pertinent statutes are contained in the USTelecom, *et al.* Brief.

BACKGROUND/SUMMARY OF ARGUMENT

As the leading trade association for the global information and communications technology industry, TIA is uniquely focused on the ways in which federal policy affects investment in next-generation broadband networks and, in turn, the indisputable benefits that infrastructure deployment confers on American consumers. When the FCC or other policy-makers take steps that undercut broadband providers' investment incentives, TIA's members – which produce the full range of broadband infrastructure solutions, including fiber-optics, wireless cell sites, routers, and smartphones – are the first to bear the brunt of such

decisions. This Court has previously recognized that "[f]irms that sell goods and services that are inputs to . . . information services . . . have the incentive to make a completely unbiased judgment" as to whether agency action will increase or decrease investment. *United States v. W. Elec. Co.*, 993 F.2d 1572, 1582 (D.C. Cir. 1993).

But TIA members will not be the *last* to feel the *Order*'s negative impact: As the FCC and others often emphasize, the expansion of ever-more-capable broadband networks fuels American productivity and competitiveness, gives voice to the disenfranchised, expands health care and educational opportunity, and promotes civic engagement. Regulatory initiatives that run contrary to strong evidence of past broadband investment and that present a demonstrable risk of undermining future investment incentives are thus highly momentous, and can be made only after candid consideration of the costs they will impose.

In the *Order* on review, the FCC failed to conduct this candid assessment. In particular, it failed to consider and respond adequately to extensive record evidence demonstrating that reclassification of broadband Internet access as a common-carriage "telecommunications service" under the Communications Act would significantly diminish investment in broadband networks and thereby disserve the ends the *Order* purports to further. This failure would, in any context, constitute arbitrary and capricious rulemaking subject to vacatur.

The FCC's actions are especially egregious here, however, given that its action disrupts broadband providers' substantial reliance on the Commission's long, consistent history of classifying Internet access as an "information service" subject to light-touch regulation that is the antithesis of common carriage. These reliance interests can come as no surprise to the agency – it *invited* such reliance, expressly citing its interest in promoting broadband investment when it repeatedly classified broadband Internet access as an integrated information service prior to adopting the *Order* on review. Providers took the FCC up on this invitation, driving over $800 billion into the nation's broadband infrastructure since 2002. Under these circumstances, the Supreme Court has emphasized, an agency bears an even higher burden under the APA in explaining why its change of course is warranted. Having failed to satisfy even the lower procedural burden applicable to all agency actions, the FCC has certainly failed to satisfy the heightened burden applicable here.

The FCC's failure to comply with core APA mandates, and the harms that the *Order* will wreak on consumers in the marketplace, dictates vacatur of the agency's broadband reclassification and of the Internet Conduct Standard, which amounts to *per se* common carriage.[1]

[1] TIA does not address the Internet Conduct Standard at length here but agrees with USTelecom, *et al*., that the rule is unlawfully vague because it affords the FCC

(continued on next page)

ARGUMENT

I. THE *ORDER* ARBITRARILY DISREGARDED EVIDENCE SHOWING THAT RECLASSIFICATION WOULD UNDERMINE INVESTMENT IN BROADBAND NETWORKS.

The APA's fundamental promise to participants in an agency rulemaking is that their arguments will be considered and addressed on the merits, not brushed aside as nuisances standing in the way of a politically driven outcome. The *Order*, however, took the latter course. It ignored or discounted without cause extensive record evidence showing that a decision supplanting the long-standing classification of broadband Internet access as an information service with a new telecommunications service framework would lead to reduced investment and therefore undercut the FCC's articulated goals. The agency even illogically claimed that positive investment data drawn from the period *before* reclassification proved that there would be no negative impact on investment *after* reclassification. This decision-making was arbitrary and capricious under basic APA requirements – and given the billions of dollars' worth of reliance interests at stake here, it fell well short of the heightened burden for an agency's reversal of course.

(footnote continued)
virtually limitless discretion unbounded even by the agency's own common carriage precedent. USTelecom, *et al.* at 79-81 (JA__-__).

A. The Record Is Replete With Evidence That Reclassification Would Work At Cross-Purposes With The FCC's Purported Goal.

Agencies must consider and address all arguments, including supporting evidence, submitted to them. The Supreme Court "insist[s] that an agency 'examine the relevant data....'" *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Thus, "it most emphatically remains the duty of this court to ensure that an agency engage the arguments raised before it." *Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216, 224 (D.C. Cir. 2014) (citing *NorAM Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998)).

Likewise, an agency's judgments about the "likely economic effects of a rule . . . must be based on some logic and evidence, not sheer speculation." *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014) (citations omitted); *see also id.* at 707, 709-710 (finding that an FCC rule designed to deter fraud was arbitrary and capricious because the agency had "offer[ed] no evidence suggesting there is fraud to deter"); *Business Roundtable v. SEC*, 647 F.3d 1144, 1148-1149 (D.C. Cir. 2011). The *Order* fails to satisfy these requirements.

The FCC's purported aim of fostering broadband investment is not an end in itself but instead goes hand-in-hand with increasing deployment for consumers' ultimate benefit. 47 U.S.C. § 157. The record shows that consumer use of

broadband has climbed exponentially since 2010, *see* TIA Comments at 6-7 (JA__-__), and that users will suffer if networks cannot meet demand for high-capacity uses and next-generation offerings.[2] *See, e.g.*, Alcatel-Lucent at 5-6 (JA__). The skyrocketing demand for wireless capacity in particular will be impeded by an investment climate riddled with uncertainty. *See, e.g.*, AT&T Reply at 79, 86-87 (JA__, __-__); Entner/Recon Analytics at 11-13 (JA__-__). Even advocates of reclassification acknowledge that today's networks sometimes struggle technically to keep pace with demand. *See* New America's Open Technology Ex Parte at 2 (JA__).

No party disputes that additional private investment in broadband infrastructure is necessary to satisfy consumer demand, as well as Congressional objectives for "encourag[ing] the deployment" of broadband "by removing barriers to infrastructure investment." 47 U.S.C. § 1302(a), (b). Given the success of the FCC's light-touch regulatory scheme in encouraging substantial investment in network infrastructure, as discussed below, any radical reversal of policy by the agency required finding that a new common carriage regime would enhance, or at least sustain, the rapid pace of investment. The FCC could not – and did not – so find.

[2] Network degradation also chills the introduction of new application business models that require specialized network management services, which previously would have been treated as unregulated information services but now may be considered highly regulated telecommunications services.

1. Network Providers and Equipment Manufacturers Submitted Direct Evidence of Substantial Investments Under True Light-Touch Regulation.

The record contained considerable evidence that reclassification of broadband Internet access would significantly impair capital investment. Broadband providers large and small, as well as their suppliers, submitted declarations and data attesting to the positive effect of the original light-touch regulation on infrastructure investment. For example, cable operators – which have never been subject to common carriage regulation as broadband providers – discussed the "massive investments" they made in reliance on the old classification and explained that the change of course would "expos[e] broadband providers to a substantial range of new legal and regulatory risks that disincentivize further investment." Charter at 15 (JA__). Suddenlink Communications, a mid-sized cable provider, explained that the information services classification enabled the company to invest in an initiative to deliver Gigabit-capable broadband service to virtually all of its customers, but that reclassification would impede its access to the public debt and equity markets, thereby jeopardizing the scope and timing of its investments. *See* Brill Letter at 1-2 (JA__-__). Similarly, the American Cable Association ("ACA"), which represents smaller cable providers, explained that broadband reclassification would "impair [its members'] ability to maintain and expand their broadband Internet offerings." ACA at 61, 66 (JA__, __).

Mobile providers, too, underscored the negative effect reclassification would have on their broadband offerings – which, like cable, have never been regulated as telecommunications services. Record data showed remarkable levels of investment in mobile broadband, exceeding nearly all other sectors of the U.S. economy. *See, e.g.*, Mobile Future Reply Comments at 4-6 (JA__-__). A former FCC Chief Economist cautioned that new rules would "attenuate mobile broadband wireless network investment" and would be "especially harmful" to competition and consumers. Katz Declaration at 38 (JA__).

Wireline providers submitted comparable evidence. For example, Frontier Communications, a mid-sized provider, detailed its investment of more than $10 billion in newly acquired and upgraded infrastructure since 2009 and explained that reclassification would "chill further investment at a time when it is most needed." Frontier Comments at 2-3 (JA__-__); *see also id*. at 3 (JA__) ("Frontier has been able to compete for broadband share in ways that would not have been possible under a Title II regulatory regime …. increasing broadband penetration up over 85% in four years").

Dozens of other small broadband providers emphasized that their businesses also relied extensively on FCC's information services framework. *See* WISPs Ex Parte at 1 (JA__) ("We have been able to enter the market and provide service because, in part, the 'light touch' rules the FCC adopted in 2010 did not place

extraordinary regulatory burdens on us."). They expressed concern that reclassification of broadband as a telecommunications service would "undermine the business model that supports our network, raise[]our costs and hinder[] our ability to further deploy broadband." Municipal ISPs Ex Parte at 1 (JA__).[3]

Manufacturers supplied additional data illustrating the benefit of truly light-touch regulation for network investment incentives. ADTRAN demonstrated that under the FCC's 2010 Open Internet rules – which maintained the information services classification – investment in wireless broadband increased. ADTRAN at 15 (JA__).

2. Empirical Analyses and Expert Opinion Confirmed the Link Between Regulatory Classification and Investment Incentives.

Economic analyses and expert opinions in the record corroborated providers' claims regarding the investment effects of reclassification– although the FCC took little or no note of that evidence either. TIA provided a detailed case study by the Cambridge Study, which concluded that the increased regulatory burden imposed by reclassification would "impair[] the commercial case for network investment"

[3] *See also, e.g*, Letter from Robert J. Dunker, Owner/President, Atwood Cable Systems, Inc., to the Honorable Thomas Wheeler, Chairman, FCC, GN Docket Nos. 14-28 & 10-127, at 1 (Feb. 17, 2015) (JA__) (reclassification requires diversion of limited resources); Letter from Laurence Brett Glass, d/b/a LARIAT, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1 (Jan. 9, 2015) (JA__) (prospect of reclassification "scared away potential investors").

in both urban and rural areas. *See* TIA Comments at 4-5 n.5, 18-19 (JA__-__,__-__) (incorporating by reference the Cambridge Study); Cambridge Study at 5, 8. Economists indicated that reclassification "'would be counterproductive'" because it would undercut "'increased broadband connectivity and the associated economic benefits that connectivity would bring.'" *See* CenturyLink at 7-8 (JA__) (quoting Coleman Bazelon, *The Employment and Economic Impacts of Network Neutrality Regulation: An Empirical Analysis*, The Brattle Group, Inc. (Apr. 23, 2010)). The Brattle Group also noted that "'experience with analogous regulatory episodes suggests that price and/or access regulation imposed on privately owned infrastructure can be expected to impede investment and sector development.'" CenturyLink at 8 n.23 (JA__). Another economic analysis estimated that common carriage regulation would result in a decline in total investment in both wireline and wireless infrastructure of up to $45.4 billion, representing a reduction of as much as 20.8%, over the next five years. *See* Hassett & Shapiro Analysis at 4 (JA__).

Financial commentators concurred. When the FCC previously seriously considered (but ultimately rejected) reclassification, analyst Craig Moffett advised that the uncertainty surrounding a light-touch version of common carriage would produce "'a profoundly negative impact on capital investment.'" Comcast at 46 (JA__) (quoting Craig Moffett, *Quick Take-U.S. Telecommunications, U.S. Cable*

& Satellite Broadcasting: The FCC Goes Nuclear, Bernstein Research (2010)). More recently, another experienced analyst stated that "'[t]hose who fantasize that Title II could successfully be extended to broadband ignore the wishes of two key constituencies – consumers and investors.'" *See* CenturyLink at 8 (JA__) (quoting Anna-Maria Kovacs, *The Internet is Not a Rotary Phone* (May 12, 2014)).

Finally, the record showed that, when pursued in Europe, policies akin to reclassification led to drastic reductions in network investment. Christopher Yoo of the University of Pennsylvania submitted a regression analysis demonstrating that facilities-based competition promotes broadband network investment, whereas the common carriage model adopted by many European countries had a demonstrably negative impact on fiber and latest-generation wireless broadband deployment, investment, download speeds, and price. Yoo at i, 11-12 (JA__, __-__). A separate economic study similarly found that although the U.S. and European countries have very similar demographics that affect broadband deployment, "'investment in telecommunications networks in the US per capita is more than 50% higher than in Europe,'" resulting in U.S. advantages "'in terms of broadband supply, quality and price'" – which the authors attributed in part to the divergent regulatory schemes in the U.S. and Europe. Comcast at 47 (JA__) (quoting Martin H. Thelle & Dr. Bruno Basalisco, Copenhagen Economics, *How*

Europe Can Catch Up With the US: A Contrast of Two Contrary Broadband Models 3 (June 2013)).

B. The FCC's Rationale For Ignoring Or Disregarding Evidence Is Exceedingly Thin Or Patently Illogical.

The evidence before the FCC was central to the rulemaking because the *Order* rests on the agency's purported desire to increase broadband investment and thereby promote what it called the "virtuous cycle" of "innovation, investment, and competition." *Order* ¶ 94 (JA__); *see also id.* ¶¶ 102, 128.(JA__, __) If the FCC could not persuasively rebut the cavalcade of evidence indicating that reclassification would depress network investment, its decision would be at odds with the very ends that the *Order* claimed to advance. *See, e.g.*, *Sorenson*, 755 F.3d at 709-710 (agency failure to deal with "contrary evidence questioning [interim rule's] efficacy and necessity" left "serious concerns unaddressed").

The FCC, however, failed to meet its statutory responsibilities. Rather than directly address evidence regarding reclassification's impact on investment, it either ignored the data or offered a transparently weak excuse for disregarding it.[4]

[4] In contrast, the FCC frequently credited investment arguments made by commenters that do not actually make the investments. For example, the FCC agreed with the advocacy group Free Press that "once last-mile networks are built, the substantial initial investment has already been outlayed." *Order* ¶ 420 (JA__). This obviously is contrary to the FCC's recognition elsewhere that existing broadband networks must be upgraded regularly to expand capacity, as well as extended to new locations. *See 2015 Broadband Report* ¶¶ 133-140 (JA__-__).

The 282-page *Order* never mentions the Cambridge Study, which ran several variations on its case studies to account for different possible regulatory outcomes – all of which indicated that, at best, a new cable build-out in a rural town would not break even and telephony upgrades in an urban setting would incur great losses. *See* Cambridge Study. Nor did the *Order* address the financial analyst warnings or the specific business impact concerns raised by the majority of broadband providers in the docket. Even where the FCC deigned to acknowledge the evidence, it simply brushed the input aside. For example, it criticized the Hassett/Shapiro Analysis on the basis that it "erroneously" assumed that no wireless services were already classified as common carriage. *Order* ¶ 420 (JA__). That study made clear, however, that it addressed only wireless broadband offerings, which were not so classified. The FCC likewise claimed that the study overstated the impact of regulation on investment decisions, *id.* (JA__), but cited no empirical evidence for its claim. The agency also breezed past international comparisons by asserting, without empirical support, that weaknesses in the European Internet ecosystem were attributable to factors other than common carriage regulation of broadband. *Id.* ¶ 417 (JA__).

The FCC offered two principal justifications for finding "that any effects [of reclassification] are likely to be short term and will dissipate over time": (1) providers invested heavily prior to reclassification, and (2) forbearance from some

common carrier mandates will somehow preserve investment incentives. *Id.* ¶ 410 (JA__); *see also id.* ¶¶ 37-40, 411-425 (JA__-__, __-__). Neither argument has record support.

First, the FCC claimed that "the remarkable increases in investment and innovation seen in recent years – while the [2010 Open Internet] rules were in place – bear out the Commission's view" that the *Order* would not affect network investment. *Id.* ¶ 76 (JA__). This is illogical. The FCC cannot rest on facts concerning a time when common carriage regulation *did not* apply as the basis for predictions concerning a time when common carriage regulation *will* apply. The FCC also misreads history in contending that telecommunications services regulation of mobile voice service did not deter investment in wireless broadband infrastructure. *Id.* ¶¶ 421-423(JA__-__). The record showed that the vast preponderance of mobile network investment was directed at wireless broadband offerings, which until the *Order* were classified as information services. *See, e.g.*, Verizon Ex Parte at 2-4 (JA__-__).

Second, forbearance from direct application of some Title II provisions does nothing to strengthen the FCC's contention that reclassification has little or no impact on investment. Most crucially, the FCC did *not* forbear from sections 201 or 202, which constitute the very heart of burdensome common-carriage regulation. The full implications of that decision remain amorphous – the *Order*

indicates that some forborne mandates may be incorporated into the FCC's enforcement of these fundamental provisions. *See, e.g.*, *Order* ¶¶ 497-498 (components of rate regulation), ¶ 513 (interconnection) (JA__-__, __). Similarly, although the FCC foreswore "rate regulation" in public statements, the *Order* itself permits *ex post* rate complaints, which can have the same practical effect. *Compare Wheeler Separate Statement* at 315 *with Order* ¶¶ 443, 451-452 (JA__, __-__).

Other provisions of the Act now imposed on broadband providers are similarly nebulous. For instance, Section 222, 47 U.S.C. § 222, crafted for the traditional voice telephony era, protects customer "proprietary information" – such as call quantity, location, destination, and amount of use – then available only to telephone companies. Yet mobile app providers and web publishers today may have even more such information than do broadband providers, resulting in asymmetric regulation among companies that all operate in the same ecosystem. Section 222 obligations also may be extended in ways that make no sense to broadband, *see, e.g.*, 47 U.S.C. § 222(h) (shielding local and long-distance billing information). In addition, applying rotary-telephone era mandates to broadband networks threaten to disrupt long-established models for Internet business, such as the delivery of ad-supported content.

The Internet Conduct Standard, which bans conduct that might "unreasonably interfere with or unreasonably disadvantage" customers or edge providers, takes common carriage concepts to a new extreme. *Order* ¶ 135 (JA__). It also crystallizes the swirl of business uncertainty surrounding reclassification, for even current FCC leadership cannot identify what conduct the standard permits or prohibits. *See* FCC News Conference, *Open Internet Rules* (Feb. 26, 2015), http://goo.gl/rXOebG (Remarks of Chairman Wheeler) ("[W]e don't really know. … [W]e don't know where things go next. … The FCC will sit there as a referee able to throw the flag.").

C. The FCC Completely Discounted Evidence Of Providers' Reliance On The Prior Classification Of Broadband In Making Their Network Investments.

The FCC's burden to explain its action and rebut counter-arguments is higher here than it would be in an ordinary case because its decision upsets massive reliance interests. It is axiomatic that an agency may change course on a settled policy matter only if it provides a well-reasoned and factually supported reason for doing so. *See, e.g.*, *Fox*, 556 U.S. at 515. But as the Supreme Court recently "underscored," an agency's evidentiary burden increases if the supplanted policy "engendered serious reliance interests that must be taken into account." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) (internal citations omitted); *see also Huerta v. Ducote*, 2015 U.S. App. LEXIS 11167 (D.C. Cir. June

30, 2015) (finding National Transportation Safety Board decision "departed so severely from regulatory text and precedent" and accompanied only by "the most superficial Board analysis" that it " must be vacated as arbitrary and capricious"). Even if the FCC had satisfied basic APA requirements here, which it did not, the agency plainly did not meet the heightened standard.

The record amply demonstrated that providers have invested heavily in the nation's broadband infrastructure. In opening the proceeding, the FCC acknowledged that nearly "$250 billion in private capital has been invested in U.S. wired and wireless broadband" since 2009, *Notice* ¶¶ 7, 30 (JA__, __), that "broadband capital expenditures have risen steadily, from $64 billion in 2009 to $68 billion in 2012," *id.* ¶¶ 30, 32 (JA__, __), and that "[a]nnual investment in U.S. wireless networks grew more than 40 percent between 2009 and 2010, from $21 billion to $30 billion, and exceeds investment by the major oil and gas or auto companies," *id.* ¶ 30 (JA__). Over the longer time-frame of 2002-2013, providers invested more than $800 billion in broadband networks, including an estimated $223 billion invested by cable providers. *See* USTelecom, *Historical Broadband Provider Capex*, http://goo.gl/Uzg2Is (JA__); USTelecom, *Capex by Type of Provider*, http://goo.gl/5a5tpT (JA__).

Not only were those sums invested in reliance on the information services designation, the FCC actively invited that reliance. From 2002 through 2010, the

FCC explicitly and repeatedly explained that light-touch regulation was designed to encourage investment. *See Cable Broadband Order* ¶ 5 ("broadband services should exist in a minimal regulatory environment that promotes investment" and so in classifying cable broadband as an information service, FCC "seek[s] to remove regulatory uncertainty that in itself may discourage investment"); *Wireline Broadband Order* ¶ 19 (action intended to "promote infrastructure investment"); *Broadband Access Declaratory Ruling* ¶ 2 (information services classification intended to "provide regulatory certainty" to "promote[] our goal of ubiquitous availability of broadband to all Americans"); *2010 Order* ¶ 1 (rules will "help[] ensure … robust private investment").

Facing evidence showing that its original classification of broadband supported strong infrastructure investment and that reclassification put that investment at notable risk, the FCC was required to undertake a thorough and dispassionate analysis. Yet in reversing course, the FCC offered no empirical support to justify its changed view. Instead, it simply "disagree[d]" that regulation had any direct effect on investment and stated that it was not "reasonable" to take the FCC's earlier classification decisions at their word. *See Order* ¶ 360 (JA__). The agency's back-of-the-hand dismissal or denial of evidence contrary to its favored outcome falls woefully short of satisfying ordinary APA obligations, and it

plainly cannot withstand the heightened scrutiny required under *Perez*, 135 S.Ct. at 1209.

CONCLUSION

For the reasons stated herein and in the Brief of USTelecom, *et al*., the Court should vacate the FCC's reclassification decision and Internet Conduct Standard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Cir. R. 32(e)(2)(C), I hereby certify that the foregoing brief complies with the type-volume limitation of D.C. Cir. R. 32(e)(3), F.R.A.P. 29(d), and the August 4, 2015 Order in this case because this brief contains 3,870 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(e)(1). This certification is made in reliance on the word count function of the word processing system used to prepare this brief (Microsoft Word 2010).

Further, I certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in a proportionally spaced typeface (14-point Times New Roman), and the type style requirements of Fed. R. App. P. 32(a)(6).

/s/ Bryan N. Tramont
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CERTIFICATE OF SERVICE

I hereby certify that, on August 6, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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