Oral Argument Scheduled For March 12, 2015

No. 14-1154 (consolidated with Nos. 14-1179 and 14-1218)

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

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,

Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents

On Petitions For Review Of Orders Of
The Federal Communications Commission

TELECOMMUNICATIONS INDUSTRY ASSOCIATION'S REPLY TO OPPOSITION FOR MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE*

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REPLY

The Telecommunications Industry Association ("TIA") respectfully files this Reply to the National Association of Broadcasters' ("NAB") Opposition to TIA's Motion for Leave to Participate as *Amicus Curiae*. Nothing about the procedural history of this case thus far has been prejudicial to Petitioners; in fact, the Court's prior orders have been very favorable to them. Moreover, TIA's Motion and proposed brief are obviously timely under the Federal Rules of Appellate Procedure ("FRAP") and this Court's rules, address issues not raised by any party, provide a unique perspective, and meet the criteria for *amici* established by the rules.

A. Petitioners Have Been Treated Very Fairly By This Court.

Everything about the procedural history of this case, including TIA's Motion, fully comports with the reasonable expectation of any Petitioner in this Court. As background, FRAP 29(e) allows for *amici* on either side to file briefs seven days after the principal brief of the party being supported, but FRAP 29(f) prohibits *amici* from filing reply briefs. Meanwhile, Circuit Rule 28(d)(4) requires intervenors on each side to join a single brief, Circuit Rule 29(d) requires the same for *amici*, and Circuit Rule 28(d)(1) and FRAP 29(d) limit intervenor and *amicus* briefs, respectively, to half the length of the principal briefs.

Read together, these rules mean that every principal litigant appearing in this Court may reasonably anticipate (in the worst case) the following opposing briefs: (1) a brief of equal length from the principal opposing party, (2) a brief of half-length from intervenors, and (3) a brief of half-length from *amici*. By design, however, non-principal briefs must be filed within seven days, ensuring that the principal parties have a fair opportunity to respond in their own briefs. Finally, since *amici* cannot file reply briefs, Petitioners will always have the last word.

In this case, Petitioners were granted an 18,000-word principal brief and a 9,000 word reply brief. *See* Order, No. 14-1154 (Oct. 22, 2014) (per curiam) ("Order"). Respondents, however, were limited to 16,000 words, *i.e.*, less than equal length, while intervenors were limited to a combined 8,750 words, *i.e.*, less than half-length. *See id.* Moreover, since *amici* were not included in the briefing order, any proposed *amicus* brief was further limited by FRAP 29(d) to half the maximum length prescribed in the rules, *i.e.*, 7,000 words instead of 9,000, and the time for filing was restricted by FRAP 29(e) and Circuit Rule 29(b) to seven days after the FCC's brief, rather than the (fixed) eight days intervenors received. *See* Order. When an actual *amicus* brief was lodged, it was just 3,988 words.

In short, Petitioners have not been "extreme[ly] prejudiced," Opp. 1; rather, they have been very fortunate. 9,000 words of briefing are still outstanding in this proceeding, and Petitioners control all of them.

B. TIA's Motion is Plainly Timely.

NAB's claims that TIA's Motion is untimely, Opp. 2-4, or that granting the Motion would encourage other litigants to "flout" the Court's rules, Opp. 1-2, 4, are plainly incorrect. To be sure, Circuit Rule 29(b) *formerly* required prospective *amici* to notify the Court within 60 days of docketing. However, the Court repealed the timing requirement in 2010, reverting to the seven-day time limitation in FRAP 29(e). *See* Mark J. Langer, *Notice of Final Rule and Handbook Revisions*, November 16, 2010 (D.C. Cir.). This change allowed for *amicus* participation after some merits briefs have already been filed – a useful tool if there are concerns that the parties have not adequately addressed certain issues.

Circuit Rule 29(b) also now encourages prospective *amici* to provide early notification, but does not mandate it. However, to the extent the Court requires reasons for not following its encouragement, or questions TIA's motives or "tactics," Opp. 2, TIA respectfully advises the Court that it did not receive or review any draft of the FCC's brief prior to its filing on December 16. Moreover, TIA's proposed brief was drafted entirely in the seven-day period between December 16 and December 23.

TIA understands that the Court has complete discretion to accept or reject an amicus brief. TIA has simply *relied* upon this Court's rules – rules that place

TIA's proposed brief at a disadvantage compared to the parties – not "flouted" them.[1]

C. TIA's Interest Differs From the Parties.

NAB's suggestion that TIA's members are already represented in this proceeding, Opp. 6-8, misses the mark. CTIA – The Wireless Association has historically focused on representing wireless service providers such as AT&T, Verizon, T-Mobile, and Sprint; TIA specifically excludes such companies from membership. The Consumer Electronics Association ("CEA") has a very broad membership focusing on consumer products. TIA's member base is more focused on technologies such as networking equipment and solutions, wireless routers, antennas, and cabling. TIA's members work regularly with the FCC's Office of Engineering and Technology, for example, on issues related to the authorization of telecommunications equipment, including wireless equipment, and have familiarity with the use of propagation models among other matters. TIA respectfully submits that it has a unique interest, *and* that its proposed brief provides a unique perspective to the Court that is not reflected by any party's brief.

[1] Circuit Rule 29(b) now encourages non-governmental entities to file either (A) a written representation of consent, or (B) a motion for leave to participate, as "promptly as practicable." However, FRAP 29(b) requires that motions for leave be "accompanied by the proposed brief." TIA followed these rules.

D. TIA's Proposed Brief is Not an "Extension" of the FCC's Brief.

Large portions of TIA's proposed brief simply provide additional factual context or background information that will assist the merits panel. Indeed, only *two cases* are cited in the entire proposed brief, with many more citations to technical reports. TIA's proposed brief provides context regarding market developments and urges the Court to move quickly (Section I), attempts to de-mystify radio propagation modeling using layman's terms (Section II-A), provides historical information regarding the Longley-Rice methodology (Section II-B), describes the FCC's relevant prior use of the word "methodology" (Section II-C), and provides relevant perspective regarding software development (Section III).

This does not imply that TIA makes no legal argument. For example, Petitioners claim that the statutory phrase "the methodology in OET Bulletin No. 69"[2] unambiguously requires the use of particular software and input values under *Chevron* step one, *see* Pet. Br. 33-48, while the FCC finds ambiguity and requests deference under step two, *see* FCC Br. 27-30.[3] Both briefs cite the dictionary definition of "methodology" to support their arguments. *See* Pet. Br. 37; FCC Br. 27-28. But TIA illustrates why, based the *history* of Longley-Rice and the FCC's

[2] 47 U.S.C. § 1452(b)(2).

[3] *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984)

own prior use of the term, the statute must unambiguously be read as *opposite* from what Petitioners claim, *see* TIA Br. 14-15 – an argument advanced by no party.

E. TIA's Proposed Brief Satisfies the Standards of Rule 29.

Procedural issues aside, FRAP 29(b)(2) suggests that any proposed *amicus* brief must be "desirable." While case law is sparse, this Court is best guided by the very comprehensive discussion of Rule 29 provided in *Neonatology Associates, P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128 (3d Cir. 2002) (Alito, J., in chambers). Then-Judge Alito made the following observation:

> Even when a party is very well represented, an amicus may provide important assistance to the court. Some amicus briefs collect background or factual references that merit judicial notice. Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group.

Id. at 132 (internal quote omitted). Moreover, a "broad reading" of Rule 29, *id.*, is also prudent for procedural reasons:

> The decision whether to grant leave to file must be made at a relatively early stage of the appeal. It is often difficult at that point to tell with any accuracy if a proposed amicus filing will be helpful. Indeed, it is frequently hard to tell whether an amicus brief adds anything useful to the briefs of the parties without thoroughly studying those briefs and other pertinent materials…. Furthermore, [the] motion may be assigned to a judge or panel of judges who will not decide the merits of the appeal, and therefore the judge or judges who must rule on the motion must attempt to determine, not whether the proposed amicus brief would be helpful to them, but whether it might be helpful to others who may view the case differently. Under these circumstances, *it is preferable to err on the side of granting leave*. If an amicus brief that turns out to be unhelpful is filed, the merits panel, after

> studying the case, will often be able to make that determination without much trouble and can then simply disregard the amicus brief. On the other hand, if a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance.

Id. at 132-33 (emphasis added).

At least one judge of this Court has approvingly cited *Neonatology Associates*. *See Boumediene v. Bush*, 476 F.3d 934, 936 (D.C. Cir. 2006) (Rogers, J., dissenting on other grounds); *see also Jin v. Ministry of State Security*, 557 F. Supp. 2d 131, 138 (D.D.C. 2008) (granting *amici* status over plaintiffs' objection that the proposed brief was a "tactical ploy").

However, TIA advises the Court that a circuit split – or at least a split between two noted appellate jurists – exists regarding the appropriate standard of review. NAB quotes from Judge Posner's pessimistic view of *amici*, *see* Opp. 6, citing *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J., in chambers). NAB also cites an Eleventh Circuit opinion that in turn quotes Judge Posner, *Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (quoting *Voices for Choices v. Illinois Bell Tel.* Co., 339 F.3d 542, 544 (7th Cir. 2003) (Posner, J., in chambers). However, *Glassroth* involved a party's request to recover *attorney fees* related to soliciting *amicus* briefs, *see id*. Finally, NAB's reliance on *In re Halo Wireless, Inc.*, 684 F.3d 581 (5th Cir. 2012) can yet again be traced back to Judge Posner, *see id.* at 596 (quoting *Ryan*).

TIA's proposed brief easily qualifies under either the Alito or Posner standards. As amply described in the Motion, TIA's proposed brief is not duplicative of arguments raised by the parties, provides background and factual information that a merits panel may find valuable, and suggests "far-reaching" alternative grounds upon which the Court may eventually base its holding. Finally, while TIA does not deny that it has an interest in seeing the underlying spectrum auction conducted quickly, this is irrelevant to granting *amici* status:

> The argument that an amicus cannot be a person who has a pecuniary interest in the outcome … flies in the face of current appellate practice. A quick look at Supreme Court opinions discloses that corporations, unions, trade and professional associations, and other parties with "pecuniary" interests appear regularly as amici.

Neonatology Associates, 293 F.3d at 131-32.

F. Conclusion

Whether in the proposed brief, the accompanying Motion, or this Reply, TIA has endeavored to be a candid and helpful friend to this Court. For the reasons in the Motion and in this Reply, TIA respectfully urges this Court to grant its Motion.

Respectfully submitted,

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January 5, 2015

CERTIFICATE OF SERVICE

I, Dileep S. Srihari, hereby certify that on January 5, 2015, I electronically filed the foregoing Reply with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit using the appellate CM / ECF system. I also hereby certify that I caused 4 copies of this Reply to be hand delivered to the Clerk's Office pursuant to Circuit Rule 31(b). Participants in the case who are registered CM / ECF users will be served by the CM/ECF system:

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