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 MOBILE FUTURE IN SUPPORT OF PETITIONERS CTIA AND AT&T

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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 United States Telecom Association, National Cable & Telecommunications 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 Mobile Future is unaware of any other related cases pending before this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. R. 26.1, Mobile Future submits the following corporate disclosure statement. Mobile Future is a broad-based association of businesses and non-profit organizations interested in and dedicated to advocating for an environment in which innovations in mobile wireless technology and services are enabled and encouraged. Mobile Future has no parent companies and no publicly-held company has an ownership interest in Mobile Future.

CERTIFICATE OF COUNSEL REGARDING NECESSITY OF SEPARATE AMICUS CURIAE BRIEF

Pursuant to D.C. Cir. R. 29(d), Mobile Future 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. To its knowledge, Mobile Future is the only amicus focusing on mobile issues, and at least some of the amici in support of the petitioners may assert positions in potential conflict with Mobile Future. For example, Mobile Future believes that mobile broadband should be exempt from common carrier regulation under Title II even if fixed broadband is subject to those duties and regardless of whether the information service classification applies, whereas other amici may argue that fixed and mobile broadband should be regulated in a similar manner. Also, none of the amici of which we are aware will be in a position to address the unique technical, operational, and competitive issues surrounding mobile broadband, or the reliance of mobile broadband providers on the FCC's former measured regulatory approach for mobile broadband.

Accordingly, Mobile Future, through 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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Competition White Paper	CTIA, *The Wireless Difference: Competition Demands a Mobile-Specific Approach to Open Internet Rules* (Feb. 10, 2015) (JA__)
FCC	Federal Communications Commission
Fifteenth Report	Fifteenth Report, *Analysis of Competitive Market Conditions With Respect to Mobile Wireless*, 26 FCC Rcd 9664 (2011)
Fourteenth Report	Fourteenth Report, *Analysis of Competitive Market Conditions With Respect to Mobile Wireless*, 25 FCC Rcd 11407 (2010)
Lerner/Ordover	Andres V. Lerner and Janusz A. Ordover, *The "Terminating Access Monopoly" Theory and the Provision of Broadband Internet Access* (Jan. 15, 2015) (JA__)
LTE	Long-Term Evolution, a high-speed mobile broadband network technology
Ninth Report	Ninth Report, *Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 19 FCC Rcd 20597 (2004)
Notice	Notice of Proposed Rulemaking, *Protecting and Promoting the Open Internet*, 29 FCC Rcd 5561 (2014) (JA__)
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Stevens Report	Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501 (1998)
Twelfth Report	Twelfth Report, *Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 23 FCC Rcd 2241 (2008)
Wireless Broadband Order	Declaratory Ruling, *Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901 (2007)
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USTelecom *et al.*	Petitioners USTelecom, NCTA, CTIA, ACA, WISPA, AT&T, and CenturyLink
USTelecom *et al.* Brief	Joint Brief for Petitioners USTelecom, NCTA, CTIA, ACA, WISPA, AT&T, and CenturyLink (Jul. 30, 2015)

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

Mobile Future is an association of cutting-edge technology and communications companies and a diverse group of non-profit organizations, working to support an environment that encourages investment and innovation in the dynamic mobile wireless sector. Its mission is to help inform and educate the public and key decision-makers in business and government on the broad range of mobile wireless innovations that are transforming our society and the nation's economy, including mobile broadband.

Mobile Future actively participated in the agency proceedings below, demonstrating that mobile broadband is different from fixed broadband and there is no need for additional mobile open Internet rules. Mobile Future, therefore, has an established interest in the outcome of this case. To its knowledge, Mobile Future is the only amicus focusing on mobile issues, and an understanding of the dynamics of the mobile marketplace and the unique legal framework applicable to mobile broadband providers is essential for the Court's consideration of the case. Mobile Future believes that its perspective on the issues raised will aid the Court in reaching an appropriate decision. *See* Fed. R. App. P. 29(b).

On August 4, 2015, the Court granted Mobile Future's Motion for Leave to File a Brief as Amicus Curiae in Support of Petitioners CTIA – The Wireless Association® and AT&T Inc. *See* D.C. Cir. R. 29(b).

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

In their opening brief, USTelecom *et al*. demonstrate that the FCC's decision to reclassify mobile broadband and subject it for the first time to common carrier regulation is unlawful because, among other things: (1) it is inconsistent with at least two different provisions of the Communications Act, 47 U.S.C. §§ 153(24) and 332(c); (2) it is arbitrary and capricious; and (3) the FCC failed to provide sufficient notice. Mobile Future submits this brief to emphasize how the FCC arbitrarily failed to account for the competitive and operational differences that make mobile broadband unique, as well as providers' investment-backed reliance on the FCC's prior classification of mobile broadband as an information service subject to light-touch regulation.

When the FCC last attempted to adopt sustainable open Internet rules in 2010, it concluded that mobile broadband services differed fundamentally from fixed services, and thus warranted mobile-specific regulatory treatment. *2010 Order* ¶¶ 94-105 (JA__-__). In particular, the FCC recognized that mobile

broadband services have flourished in a competitive marketplace in which consumers "have more choices for mobile broadband" than for fixed broadband. *Id*. ¶ 95 (JA__). The FCC also found that mobile networks "present operational constraints" not applicable to their fixed counterparts, which "create[] additional challenges in applying a broader set of rules to mobile." *Id*. (JA__). These constraints include spectrum capacity limits and constantly changing operating conditions that require active network management. The FCC accordingly adopted a "measured" approach, subjecting mobile broadband to the FCC's transparency rule but declining to impose a non-discrimination standard for mobile broadband services. *Id*. ¶¶ 96-105 (JA__-__). While the FCC also adopted a no-blocking rule for mobile broadband (which was more limited than the rule adopted for fixed broadband), that rule was later vacated. *Verizon v. FCC*, 740 F.3d 623, 659 (D.C. Cir. 2014). In so doing, the Court acknowledged the "differential treatment" between mobile and fixed broadband and neither criticized nor overruled the distinction. *See id*. at 633-34.

The record in the proceeding below demonstrated that these competitive and technical differences are even more pronounced today than they were in 2010. A host of competing providers have aggressively deployed advanced fourth-generation mobile networks and new service plans and offerings. Mobile wireless consumers today enjoy more choices, lower prices, faster and more reliable

service, greater differentiation, and reduced costs to change providers compared to five years ago. Moreover, there have not been any demonstrated openness-related harms in the mobile ecosystem, either before or after the FCC's *2010 Order*. Rather, competition and (since 2010) the transparency rule have deterred harmful conduct, because a provider pursuing objectionable practices would drive customers to its competitors. Meanwhile, mobile networks have become ever more complex, demanding differentiation among users and user services on a real-time, dynamic basis that is fundamentally inconsistent with a heavy-handed regulatory approach.

Despite the consistent line of evidence since 2010 showing that new rules for mobile are unnecessary and the *Notice*'s tentative conclusion to maintain the mobile distinction, *see Notice* ¶ 62 (JA__), the *Order* abruptly changes course, abandoning the earlier findings without adequate justification. The *Order* credits the change with a suddenly "evolved" marketplace that "demonstrates the ubiquity and wide scale use" of mobile broadband service, *Order* ¶¶ 92, 398 (JA__, __), but a successful market says nothing about the *need* for additional rules. Instead, the *Order* cites anecdotal instances of alleged harm and costs to switch providers, *id.* ¶¶ 96-98 (JA__-__), but this ignores evidence that none of the claimed harms is real and that switching costs have *fallen*, according to the FCC's own data. *See infra* Part I.A. And the *Order* abandons the FCC's prior findings that technical

differences merited limited mobile rules, now finding that the earlier exception for reasonable network management provides sufficient flexibility. *Order* ¶¶ 100-01 (JA__-__). But again, this ignores record evidence that the exception is not a solution and that expanded, more prescriptive rules threaten the flexibility mobile broadband providers need to manage their networks and respond to burgeoning consumer demand. *See infra* Part I.B.

While the FCC may reverse its position, it must "show that there are good reasons" and "provide a more detailed justification" when, as here, its new policy rests upon factual findings contradicting those supporting its prior policy or that prior policy has engendered serious reliance interests that must be taken into account. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-16 (2009); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015). The *Order* fails to meet these standards.

The *Order* also fails to consider adequately the investment-backed reliance interests of mobile broadband providers on at least two key decisions that the *Order* casts aside. First, in 2007 (building on decisions reached in 2002 and 2005), the FCC correctly found that mobile broadband service is an information service subject to only "minimal" regulation – a finding made with the express goal of "provid[ing] the regulatory certainty needed to help spur growth and deployment" of mobile broadband. *Wireless Broadband Ruling* ¶¶ 1-2, 27. Second, the FCC

reinforced this finding in its *2010 Order*, recognizing that mobile broadband differed from fixed broadband and merited only a "measured" regulatory response. *2010 Order* ¶¶ 94-96. In reliance on these decisions, mobile providers collectively have invested billions of dollars deploying networks based on the expectation of a light-touch "information service" framework that has yielded tremendous consumer benefits. *See infra* Part II. Given providers' "serious reliance interests," *Fox*, 556 U.S. at 515, the *Order* fails to justify adequately departing from the prior regulatory framework.

For these reasons, and those set forth in the USTelecom *et al*. Brief, the Court should grant the petitions for review of CTIA – The Wireless Association® and AT&T Inc. and vacate the *Order*.

ARGUMENT

I. THE ORDER FAILS TO JUSTIFY ITS DEPARTURE FROM THE FCC'S "MEASURED" APPROACH TO MOBILE BROADBAND.

The *Order* abandons prior findings that intense competition and unique operational characteristics merit a limited, "measured" approach to open Internet regulation for mobile broadband, without providing the "detailed justification" such a departure requires. *Fox*, 556 U.S. at 515. The record below amply demonstrated that the FCC's original findings are even more well-founded today, and the *Order*'s failure to address adequately this record evidence is reversible error. *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 520 (D.C. Cir. 2009) ("An

agency's failure adequately to consider a relevant and significant aspect of a problem may render its rulemaking arbitrary and capricious."). The *Order*'s claims to the contrary do not withstand scrutiny and are not entitled to deference.[1]

A. Competitive Conditions Warrant Limited, Narrowly Tailored Open Internet Regulation for Mobile Broadband.

The agency's record demonstrated that vigorous competition in an open mobile broadband market makes additional regulation unnecessary. Competition and regulatory restraint have spurred unprecedented investment and innovation in the mobile broadband marketplace for two decades, including since the FCC last adopted open Internet rules in 2010, and have promoted deployment of innovative and consumer-friendly service options. All of this has benefitted American consumers. The *Order*'s reliance on speculative concerns and an erroneous view of consumer costs to switch from one provider to another ("switching costs") cannot overcome this evidence and justify burdensome new rules.

[1] The *Order*'s outcome-driven analysis further eviscerates any basis for deference. For example, to reach the result it desired, the FCC had to find that mobile broadband had somehow transformed both from an information service to a telecommunications service and from a private mobile service to a commercial mobile service. *See* USTelecom *et al.* Brief at 56-59. Such a simultaneous shift is unlikely, given that the relevant statutory dichotomies are entirely unrelated and turn on different factors. Yet the FCC conveniently claims to have benefited from just such a coincidence here – even while it contends that nothing about the technology or function of mobile broadband service has changed.

1. The Record Demonstrated that Competition Benefits Consumers and Renders Additional Rules Unnecessary.

In 2010, the FCC pointed out that "most consumers have more choices for mobile broadband than for fixed (particularly fixed wireline) broadband." *2010 Order* ¶ 95. It recognized that this competition, in addition to mobile broadband's technological characteristics (addressed below), warranted only "measured steps" to regulate mobile broadband services. *Id*. ¶¶ 94-96. Today, the mobile broadband market is even more competitive than it was in 2010, making additional regulation unnecessary. *Competition White Paper* at 6, 14-21 (JA__, __-__).

The record demonstrated that mobile wireless consumers enjoy even more choices, lower prices, faster and more reliable service, greater differentiation, and reduced switching costs than in 2010 – all characteristics of a market that is robustly competitive and producing benefits for consumers. *Competition White Paper* § II.A (JA__-__); *Lerner/Ordover* at 6-10 (JA__-__). As Department of Justice Antitrust Division Chief William Baer has made clear, "the [wireless] market is thriving and consumers are benefitting from the current competitive dynamic." Edward Wyatt, *Wireless Mergers Will Draw Scrutiny, Antitrust Chief Says*, N.Y. Times, Jan. 30, 2014, at B3. Indeed, FCC Chairman Tom Wheeler has remarked that "[t]he American consumer has been the beneficiary" of "new pricing and new services that have been spurred by competition" in today's wireless

marketplace. Remarks of Tom Wheeler, Chairman, FCC, 2014 CTIA Show, Las Vegas, NV, at 2 (Sept. 9, 2014), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0909/DOC-329271A1.pdf.

Data introduced into the record from the FCC's *Seventeenth Report* on mobile wireless competition, issued just a few months before the *Order*, highlighted growing competition. As of January 2014, more than 93% of Americans could choose among three or more mobile broadband providers, while 82% could choose among four or more mobile broadband providers. *Seventeenth Report* ¶ 51, cht. III.A.2, *cited in Competition White Paper* at 15-16 (JA__-__). By comparison, in 2010, less than 82% of Americans had the ability to choose among three or more mobile broadband providers, while only 68% could choose among four or more providers. *Fifteenth Report* at 9670.

Other record evidence confirmed the benefits the competitive mobile broadband market is delivering to consumers. For example, U.S. smartphone speeds increased eight times since 2010 due to massive investments in mobile wireless infrastructure – including a record $33 billion in 2013. *See Competition White Paper* at 16 (JA__). Indeed, 97.5% of Americans have access to mobile broadband download speeds of greater than 10 megabits per second. *Id.* (JA__); *see also Lerner/Ordover* at 9 (JA__). Moreover, the U.S. boasts 47% of the

world's LTE subscribers despite having only 5% of its overall mobile subscribers. *Competition White Paper* at 17 (JA__).

Meanwhile, mobile prices in the U.S. continue to decline. The wireless Consumer Price Index has fallen nearly 43% since December 1997, while the overall Consumer Price Index for all items *increased* 34%. *See id*. (JA__). And the price per megabyte of data dropped a full 93% between 2008 and 2012. CTIA 2/10/15 Letter at 9 (JA__). As one commenter noted in July 2014, such price declines have "accelerated dramatically," AT&T 9/15/14 Reply at 60-63 (JA__-__), with "all major providers reducing prices and moving away from long-term service contracts." *Lerner/Ordover* at 7 (JA__).

The record also demonstrated that providers are increasingly differentiating the plans and services they offer to attract and retain customers. *See* CTIA 9/15/14 Reply at 2, 18-19 (JA__, __-__); T-Mobile 9/15/14 Reply at 3 (JA__). In 2013 alone, the four major wireless carriers offered nearly 700 combinations of smartphone plans, and a family of five had in excess of 250 choices. *Competition White Paper* at 19 (JA__). This differentiation is evident across all metrics, as mobile providers compete "on the basis of price, network coverage and reliability, plan characteristics, and with respect to important aspects of the wireless ecosystem, including the provision of valuable services, handset devices, operating systems, applications, and content." *Lerner/Ordover* at 7 (JA__).

Finally, the costs customers incur in switching from one mobile provider to another have fallen in recent years. As the FCC has acknowledged, mobile switching costs have been "reduced" and switching barriers have "eased" as carriers have introduced no-contract plans and facilitated wider availability of premium phone models. *Seventeenth Report* ¶ 69, *cited in Competition White Paper* at 3 (JA__). Customers' ability to keep their numbers when they change providers ("number portability") also eliminates a major barrier to switching. *Ninth Report* ¶ 25; *see also* Memorandum Opinion and Order, *Telephone Number Portability*, 18 FCC Rcd 20971, ¶ 26 (2003) (noting that most wireless number porting occurs within two and a half hours), *aff'd sub nom Cent. Tex. Tel. Coop. v. FCC*, 402 F.3d 205 (D.C. Cir. 2005).

In this environment, mobile broadband providers must maintain and promote openness on their networks for the same reasons that businesses in other ultra-competitive markets do – consumers and the competitive market command it. *Competition White Paper* § II (JA__-__); *Lerner/Ordover* at 4 (JA__); *see* AT&T 9/15/14 Reply at 74 (JA__); Mobile Future 9/15/14 Reply at 1, 5-6 (JA__, __-__); Sprint 9/15/14 Reply at 7 (JA__); T-Mobile 9/15/14 Reply at 2, 16 (JA__, __); Verizon 9/15/14 Reply at 25-27, 62 (JA__-__, __). As Chairman Wheeler has stated, competition is "[o]ne of the most effective tools for ensuring Internet openness." Remarks of Tom Wheeler, Chairman, FCC, National Cable &

Telecommunications Association, Los Angeles, CA, at 4 (Apr. 30, 2014), *available at* https://www.fcc.gov/document/chairman-tom-wheeler-remarks-ncta.

Indeed, the *2010 Order* recognized that "there have been meaningful recent moves toward openness in and on mobile broadband networks." *2010 Order* ¶ 95. Since then, mobile broadband providers have publicly and repeatedly confirmed their commitment to open networks and have published policies supporting Internet openness. CTIA 7/18/14 Comments at 11-13 (JA__-__) (citing examples). The 2010 transparency requirement, moreover, has ensured that consumers are able to learn about providers' practices and make their market decisions accordingly. *Id*. at 11 (JA__). As the record showed: "[T]he risk of losing wireless subscribers imposes a powerful competitive constraint on wireless broadband providers. There is significant competition for subscribers, and subscribers have the ability and incentive to switch providers in response to any limitation in access to high-quality content." *Lerner/Ordover* at 4 (JA__); *see* AT&T 9/15/14 Reply at 74 (JA__).

Given the vigorously competitive market, it is no surprise that an October 2014 national consumer survey found that 90% of consumers believed that the then-existing level of limited regulation (or less) would help spur further innovation. Mobile Future 11/3/14 Letter at 1 (JA__) (citing Mobile Future, *New Survey: U.S. Mobile Consumers Overwhelmingly View More Regulation as*

Impediment to Innovation (Nov. 3, 2014), *available at* http://mobilefuture.org/newsroom/new-survey-u-s-mobile-consumers-overwhelmingly-view-more-regulation-as-impediment-to-innovation/).

2. The Order's Speculative Concerns and Switching Costs Cannot Justify Burdensome Rules.

While the *Order* concedes that "there may be more competition among mobile broadband providers," *Order* ¶ 94 (JA__), the FCC now alters course to find that competition no longer merits a limited, measured mobile broadband approach given "concerns" regarding the practices of mobile broadband providers and alleged switching costs. *Id*. ¶¶ 96-99 (JA__). But speculative concerns based on fear, not facts, cannot ground a rule, *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014) (deference to an agency's predictive judgments "must be based on some logic and evidence, not sheer speculation") (internal quotation omitted), and the FCC's failure here to "'articulate a satisfactory explanation for its action'" is arbitrary and capricious, *id*. (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

The *Order* largely disregards the extensive data showing that competition has flourished since 2010, suggesting in a footnote that some of the FCC's own coverage data may be overstated. *See Order* n.194 (JA__). Even if that were true, coverage is still extensive and growing. *Seventeenth Report* ¶¶ 50, 59. And the

myopic focus on coverage data alone ignores all of the other evidence – namely, evidence showing lower prices, faster and more reliable service, greater differentiation, and increased openness – which demonstrates that the competitive conditions meriting a measured regulatory approach under an information services classification in 2010 apply even more so today. The FCC's failure to adequately address the evidence, and to provide the detailed explanation needed to disregard its prior factual findings, is clear error. *Fox*, 556 U.S. at 515-16; *Am. Farm Bureau*, 559 F.3d at 520.

The *Order* also indicates that broadband providers can threaten Internet openness regardless of competition, *see Order* n.194 (JA__), asserting that their alleged role as "gatekeepers" gives them a so-called "terminating monopoly," *see id*. ¶ 80 (JA__). The "terminating monopoly" concept – which itself is "largely invented" and "does not appear to be an accepted economic term," *see Verizon*, 740 F.3d at 663-64 & n.7 (Silberman, J., concurring in part and dissenting in part) – has been thoroughly debunked in the context of mobile broadband. *See Lerner/Ordover* at 3-5 (JA__-__); Verizon 1/15/15 Letter at 2 (JA__). The *Order*'s failure to address this evidence is error. *Am. Farm Bureau*, 559 F.3d at 520; *Verizon*, 740 F.3d at 643-44. Moreover, this concern was as relevant in 2010 as in 2015, and could not warrant a change in course here. If anything, consumers

can switch carriers more easily today than they could in 2010, as discussed below, making the FCC's newfound concern insufficient to explain its new findings.

Once these marginal assertions fall away, the *Order* is left with only rife speculation as grounds for disregarding the competitive mobile dynamic. The *Order* hypothesizes that mobile broadband providers have the "incentive" and "ability" to limit Internet openness, *Order* ¶¶ 91, 94, 97 (JA__, __, __), but this is no different than in 2010, when the FCC found only limited, measured rules were needed for mobile broadband.

While the *Order* cites mobile switching costs as a factor threatening the open Internet, *see id*. ¶ 97 (JA__), those costs have (as noted above) *fallen* since 2010. *Seventeenth Report* ¶ 69, *cited in* CTIA 2/10/15 Letter at 3 (JA__). The *Order* fails to explain (and could *not* explain) how higher switching costs in 2010 merited a measured regulatory approach, whereas "reduced" switching costs today necessitate more expansive regulation. *See* CTIA 2/10/15 Letter at 3 (JA__). This failure, too, is reversible error. *See Am. Farm Bureau*, 559 F.3d at 520; *AT&T Wireless Svcs., Inc. v. FCC*, 270 F.3d 959, 968 (D.C. Cir. 2001) (explaining that, in the face of conflicting evidence, an agency's "[c]onclusory explanations" will "not suffice" to survive review).

Indeed, the record detailed at length the ways that abundant competitive choice and providers' rivalry have resulted in a significant rate of switching by

mobile broadband subscribers. *Lerner/Ordover* at 10-11 (JA__-__). For example, 12% of Verizon and AT&T customers, 19% of T-Mobile customers, and 26% of Sprint customers change providers *each year*. *Id*. (JA__). They do so because switching is easy and choices abound. Contracts and device incompatibility with the technology deployed on a network also have become less relevant; the standard two-year wireless contract means that roughly 50% of mobile subscriber contracts expire each year and most consumers upgrade their devices with the same frequency. *Id*. at 12-13 (JA__-__). Moreover, major wireless providers now pro-rate their early termination fees and are "increasingly offer[ing]" to pay those fees when incurred by customers switching to their services. *Seventeenth Report* ¶144; *Lerner/Ordover* at 13-14 (JA__-__); *see Seventeenth Report* ¶145 ("The purpose of ETF buyouts is to encourage customers to switch from rivals by reducing switching costs."); AT&T 9/15/14 Reply at 60-65 (JA__-__).

Nor is there any *evidence* to suggest any greater threat to Internet openness in the mobile context today than there was in 2010. Instead of outlining any actual harm requiring redress, the *Order* cites only a handful of instances where "concerns" have arisen with the "potential" to affect Internet openness. *Order* ¶ 96 (JA__). In each case, the record establishes that these "concerns" are overblown and do not support a finding of any genuine threat to Internet openness.

For example, the *Order* cites allegations that AT&T purportedly blocked Apple's FaceTime application over its mobile data network in 2012. In fact, AT&T did not block access to FaceTime over this network; rather, it phased in usage to ensure that use of FaceTime did not consume network resources to the point that other users' service would be materially degraded. AT&T 7/15/14 Comments at 24-25 (JA__-__). Moreover, the FCC was well aware of AT&T's approach, but undertook no enforcement action against it, as one might expect if the FCC found that AT&T's actions threatened Internet openness.

The *Order* also cites Verizon's consent decree with the FCC regarding tethering as a basis for imposing additional rules to protect Internet openness on mobile broadband networks. That agreement, however, had nothing to do with user access to content, applications, or other edge-provider offerings subject to the open Internet rules; instead, it related to compliance with distinct requirements attached to Verizon's Upper 700 MHz C Block license. Verizon 9/15/14 Reply at 9 (JA__).

Finally, the *Order* references limitations by some providers on use of the Google Wallet application, but fails to acknowledge that the application required a degree of interaction with and control over a user's device that would compromise the device's security, and thus was harmful to consumer interests. *See* CTIA 9/15/14 Reply at 17 (JA__). Importantly, not one of these examples involves an

adjudicated finding of actual harm or a rule violation.[2] In any event, the *Order* fails to explain why the purported "concerns" raised by each of these examples could not have been addressed under the 2010 transparency rule.

Quite simply, the *Order* failed to "articulate a satisfactory explanation for its action, including a "'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Because the *Order*'s predictions concerning mobile-specific harms are based on pure conjecture, they deserve no deference. *Sorenson*, 755 F.3d at 708.

B. Technical Characteristics Warrant Limited, Narrowly Tailored Open Internet Regulation for Mobile Broadband.

In 2010, the FCC recognized that mobile networks' "operational constraints" differ from those of fixed broadband networks and thus treated them differently. *2010 Order* ¶ 95. Those constraints include spectrum capacity limits, constantly changing user requirements, and operating conditions that require active network management. The FCC found that those differences "put[] greater pressure on the

[2] The *Order* also mentions Internet connectivity speed reductions allegedly applied to customers using "unlimited data plans" in a non-transparent fashion, *Order* ¶ 96 (JA__), but, even if such a violation exists, it would be addressed by enforcement of the pre-existing transparency rule. In addition, concerns over blocked or degraded traffic based on anecdotal overseas experiences and a recent European survey are irrelevant. *See id.* (JA__).

concept of 'reasonable network management,'" thereby creating "additional challenges in applying a broader set of rules to mobile." *Id*. The FCC therefore concluded that a reasonable network management exception alone was not enough, and that different rules were needed for mobile. The record indicates that mobile broadband's technical differences have only deepened, making retention of a limited, "measured" regulatory approach for mobile broadband even more appropriate now. Indeed, as USTelecom *et al*. demonstrate, many of these same operational characteristics confirm that mobile broadband is an integrated information service that cannot be subject to Title II regulation. USTelecom *et al*. Brief at 30-33. While the *Order* indicates that the new rules coupled with a reasonable network management exception will afford mobile providers flexibility to manage their networks, this finding ignores record evidence that a reasonable network management exception alone is not a solution.

1. The Record Demonstrated that Unique Technical Challenges Necessitate Retaining a Measured Approach.

The record explained in great depth how mobile broadband networks are fundamentally different from fixed networks in critical ways that demand far more flexible, complex and aggressive network management. Mobile Future 9/15/14 Reply at 9-11 (JA__-__); *Rysavy* at 3-5, 11-12 (JA__-__, __-__); *Reed/Tripathi* at 3, 30-31 (JA__, __-__); CTIA 9/15/14 Reply at 8-14 (JA__-__). In fact, mobile

"networks are managed and operated in a far more … complex manner than the networks in place in 2010," given "ever-increasing usage and scarcity of spectrum resources" and the introduction of LTE. *Reed/Tripathi* at 1 (JA__); *see also* Mobile Future 9/15/14 Reply at 2 (JA__); CTIA 7/18/14 Comments at 2, 14-20 (JA__, __-__). The *Order* fails to provide the detailed justification necessary to explain how less complicated operational challenges in 2010 merited a limited, "measured" regulatory approach, whereas more complex challenges today necessitate prescriptive rules and reclassification. *Fox*, 556 U.S. at 515.

First, mobile providers are constrained by the availability of spectrum, a finite and scarce resource. *Rysavy* at 9 (JA__); *see also id.* at 3-5, 17-18 (JA__-__, __-__); *Reed/Tripathi* at 19 (JA__); Mobile Future 7/15/14 Comments at 9-11 (JA__-__); CTIA 7/18/14 Comments at 17 (JA__). Thus, while a wireline network engineer knows precisely how much bandwidth is available in a single fiber optic strand, wireless engineers face ever-changing radio environments impaired by interference, multipath propagation, and signal blockage. *See* CTIA 9/15/14 Reply at 13 (JA__).

Put differently, fixed networks offer significantly higher capacity and greater predictability, whereas mobile networks are far more capacity-limited, featuring constantly changing user requirements and operating conditions. *See* CTIA 9/4/14 Letter at 2 (JA__). Mobile broadband operators therefore must manage their

networks actively and quickly to provide a high quality of service to consumers. *Reed/Tripathi* at 3 (JA__). And "new spectrum availability will not keep up with constant increases in user demand," *Reed/Tripathi* at 14 (JA__), heightening the need for aggressive network management going forward.

Moreover, mobility itself complicates the provision of broadband service and maintenance of the level of quality customers expect. "[T]he quality of a radio signal can vary moment to moment, especially if a user is mobile, due to complex ways that radio signals propagate, diffract, and reflect in the environment." *Rysavy* at 11 (JA__). Providers must also account for shifting levels of traffic within a particular coverage area, varying service types, changing radio channel conditions, and other factors that can affect quality of service on a moment-to-moment basis. *See* CTIA 7/18/14 Comments at 14-20 (JA__-__). The need to accommodate a large variety of devices raises additional challenges, as these devices must be tightly integrated with the mobile network to ensure satisfactory service. *Id.* (JA__). And because mobile networks experience interference limits on a dynamic basis, varying by location and from one millisecond to the next, it is far more difficult to manage shared use of mobile spectrum than shared use of fixed facilities. *See Reed/Tripathi* at 2, 18 (JA__, __); CTIA 9/15/14 Reply at 13-14 (JA__-__).

Given the above, mobile broadband providers must differentiate among users and user services on a real-time, dynamic basis in order to maintain quality of service. *Reed/Tripathi* at 31 (JA__). For example, management may be required to ensure that machine-to-machine services and public welfare systems (such as wireless monitoring of bridges) are fully functional; protect public safety personnel uses; ensure one network user does not monopolize network resources at the expense of others; prevent data-intensive applications used by some from degrading service for all others; or ensure dependable voice service. *Id*. at 4-5, 30-31 (JA__-__, __-__); *Rysavy* at 13-14 (JA__-__). Absent such management, the quality and reliability of service "would be severely impacted." *Reed/Tripathi* at 4-5 (JA__-__). It is only because of this aggressive network management that mobile broadband succeeds today. *Rysavy* at 4-5 (JA__-__).

The *Order* fails to consider adequately this evidence, *Am. Farm Bureau*, 559 F.3d at 520. Instead, the *Order* imposes more aggressive no blocking, no throttling, no paid prioritization, and no unreasonable interference/disadvantage rules on mobile broadband providers, declaring that a "reasonable network management" exception alone will ensure sufficient flexibility to manage mobile networks. *Order* ¶¶ 14-21, 223 (JA__-__, __); *see also id*. ¶¶ 101, 148 (JA__, __). Yet it fails to explain how operational challenges "put[] greater pressure on the concept of 'reasonable network management'" in 2010, *2010 Order* ¶ 95, but do

not do so today, given our more complex networks, *see Fox*, 556 U.S. at 515. In fact, as discussed below, the *Order* arbitrarily disregards evidence that a reasonable network management exception cannot cure the otherwise unlawful new rules.

2. The Order Disregarded Evidence that a Reasonable Network Management Exception Cannot Cure the Rules' Unlawfulness.

The *Order* arbitrarily disregards evidence that in mobile networks, active network management is the norm, not an exception: "The exception would either simply subsume any rules … or providers would be stripped of their ability to evolve and manage networks for the betterment of the entire subscriber base." *Reed/Tripathi* at 2-3 (JA__-__). As the FCC effectively recognized in 2010, it is "folly to presume that the differences between fixed and mobile services can be adequately accounted for as part of the FCC's case-by-case consideration of what constitutes … reasonable network management." CTIA 9/15/14 Reply at 32-33 (JA__-__). As the *Order* concedes, the exception remains a "case-by-case" tool that lacks a "detailed definition," *Order* ¶¶ 218-22 (JA__-__), and providers seeking greater clarity have only the time-prohibitive options of requesting a declaratory ruling or seeking an advisory opinion before deploying a network management practice. *Id*. ¶ 219 (JA__).

The *Order*'s framework therefore ignores evidence that providers will be saddled with the risk that any decision they might make – including those

establishing new pricing plans or business models, implementing new network configurations, or addressing network threats in real time – will trigger costly complaints and *post hoc* evaluation by regulators to determine what is or is not permissible under the new standard. CTIA 9/15/14 Reply at 33-37 (JA__-__). Such regulatory uncertainty will cause network operators to become overly cautious, undermining the experience of consumers, whose needs necessitate aggressive real-time network management. Indeed, the mere risk that services, practices, or plans may be challenged and ultimately deemed unlawful will in some cases deter providers from even deploying them in the first instance. *Id*. (JA__). Consequently, "mobile broadband providers will always be left to guess at whether a given practice will pass muster, guaranteeing that investment and innovation remain chilled by uncertainty." *Id*. at 37 (JA__).

The *Order*'s failure to consider adequately this evidence is yet another reason why it is arbitrary and capricious. *State Farm*, 463 U.S. at 43 (an agency rule is arbitrary "if the agency … entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency").

II. THE ORDER DOES NOT CONSIDER ADEQUATELY MOBILE PROVIDERS' RELIANCE INTERESTS.

The *Order* fails to demonstrate that its about-face on mobile regulation is warranted, given the "serious reliance interests" of mobile broadband providers on the FCC's prior policy. *Fox*, 556 U.S. at 515. Those providers collectively have spent billions of dollars deploying networks based on the expectation of a light-touch "information service" framework that has yielded tremendous consumer benefits. In fact, Congress and the FCC helped foster this reliance by treating mobile service differently, as Section 332's bar against common carrier treatment of mobile broadband and the information services classification make clear. *See* USTelecom *et al*. Brief at 57-59. Where, as here, parties develop reliance interests based on agency interpretations, "more substantial justification" is required for a reinterpretation. *Perez*, 135 S. Ct. at 1209.

As USTelecom *et al*. demonstrate, Congress in 1993 fenced off services like mobile broadband from common carrier treatment, thus providing carriers incentives to invest. *See* USTelecom *et al*. Brief at 9-10, 56-57. In 2007, the FCC reinforced what it correctly deemed a pro-investment policy by classifying wireless broadband Internet access service as an integrated information service under the Communications Act, *Wireless Broadband Ruling* ¶¶ 1-2, thus "removing [it] from potential regulation under Title II." Notice of Proposed Rulemaking, *Preserving the Open Internet*, 24 FCC Rcd 13064, 13074 ¶ 29 (2009). In classifying wireless

broadband, the FCC merely confirmed what it had made clear in 1998, 2002, and 2005 – that Internet access services are integrated information services under the statute. *Stevens Report* ¶¶ 73-76; *Cable Broadband Order* ¶ 38; *Wireline Broadband Order* ¶¶ 13-15. Consistent with Congressional goals, the FCC sought to establish "a minimal regulatory environment for wireless broadband Internet access service that promotes our goal of ubiquitous availability of broadband to all Americans." *Wireless Broadband Ruling* ¶¶ 2, 27. The decision sought to "provide the *regulatory certainty needed to help spur growth and deployment*" of mobile broadband, *id*. ¶ 27 (emphasis added), and to deliver "reliable, ever-increasing bandwidth to individuals at ever-decreasing cost." *Id*. at 5933 (Statement of Commissioner Robert M. McDowell).[3]

The FCC's plan worked, generating the investment, innovation, and consumer benefits the FCC envisioned eight years ago. Following the agency's

[3] FCC Commissioner statements at the time and in subsequent proceedings reflect the agency's intention to promote investment. Chairman Kevin Martin noted, "Today's classification eliminates unnecessary regulatory barriers for wireless broadband Internet access service providers and *will further encourage investment* and promote competition in the broadband market." *Id*. at 5926 (Statement of Chairman Kevin J. Martin) (emphasis added). Commissioner Robert McDowell, in supporting the item, sought to "*spark investment*, speed competition, empower consumers, and make America a stronger player in the global economy." *Id*. at 5933 (Statement of Commissioner Robert M. McDowell) (emphasis added). And in 2010, Chairman Julius Genachowski promoted continued flexibility, recognizing that "any reduction in innovation and investment in mobile broadband applications, devices or networks" would be "cause for concern." *2010 Order* at 18041 (Statement of Chairman Julius Genachowski).

information service classification decision, "[d]uring 2008 and 2009, mobile wireless service providers … focus[ed] largely on the upgrade and expansion of mobile broadband networks to enable high-speed Internet access and other data services for their customers." *Fourteenth Report* ¶ 105. And between 2009 and 2012, "[a]nnual investment in U.S. wireless networks grew more than 40% . . . from $21 billion to $30 billion." FCC, *Significant FCC Actions and Key Developments in the Broadband Economy*, at 1 (2013), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-319728A1.pdf. This investment – totaling over $175 billion since the *Wireless Broadband Ruling* and a record $33 billion in 2013 alone – relied upon a regulatory environment that treated mobile broadband as an information service. CTIA 2/10/15 Letter at 7-8 (JA__-__); *see* AT&T 7/15/14 Comments at 8 (JA__); Mobile Future 7/15/14 Comments at 14 (JA__); Verizon 7/15/14 Comments at 39 (JA__). The *2010 Order* did not alter that information service classification, and its decision to subject mobile broadband only to measured open Internet rules cemented that reliance. *See 2010 Order* ¶¶ 96, 105.

As a result of this investment, new mobile broadband deployment throughout the country has been dramatic. According to the *Seventeenth Report*, 93.4% of Americans live in census blocks covered by three or more mobile broadband providers. *Seventeenth Report* cht. III.A.2 & tbl. III.A.iv. By

comparison, just 41% of the population in 2007 had a choice of at least three mobile broadband providers. *Twelfth Report* ¶ 145 & tbl. 12. In fact, virtually all Americans (99.7%) now enjoy access to mobile broadband services. *Seventeenth Report* tbl. III.A.iv. This demonstrates a significant increase from May 2007, when only 82% of the population had access to these services. *Twelfth Report* at tbl. 12.

The record also shows that Americans now enjoy markedly faster connection speeds than they experienced in 2007, fulfilling another goal of the *Wireless Broadband Ruling*. With the rollout of fourth-generation services, the vast majority of U.S. consumers have access to wireless broadband download speeds of 10 megabits per second or greater. CTIA 2/10/15 Letter at 9 (JA__). Conversely, technologies deployed in 2007 provided average download speeds of only 400-800 kilobits per second. *Twelfth Report* at 2248. Thus, the average consumer has access to mobile broadband networks built in reliance on the *Wireless Broadband Ruling* that are *more than 20 times faster* than the networks available in 2007.

This increase in speed has occurred as prices have fallen. In the four years following the *Wireless Broadband Ruling*, the price for data services fell dramatically, from $0.46 per megabyte in 2008 to $0.03 in 2012. CTIA 2/10/15 Letter at 9 (JA__). At the same time, overall data usage soared. According to one

estimate, U.S. mobile data traffic in 2012 was approximately 73 times the volume of mobile traffic in 2007. *Sixteenth Report* ¶ 264.

Yet despite the fact that mobile broadband market has succeeded in just the ways the FCC wanted it to – based on a light-touch "information service" framework that encouraged investment and innovation – the *Order* now abruptly reverses course. It manufactures an urgency to regulate to "protect" the very thing its prior classification enabled: widespread, available, robust mobile broadband services. *See Order* ¶ 88 (JA__). In other words, having provided a legal foundation for remarkable growth, the FCC now arbitrarily pulls the carpet out from underneath the industry.

Rather than addressing investment-backed reliance head on, the *Order* disregards any meaningful link between regulation and investment. *See Order* ¶ 414 (JA__). It notes that "sizable investments" have been made by CMRS providers in mobile voice services subject to Title II. *Id*. ¶¶ 420-23 (JA__-__). This finding is inapposite. As the record evidence shows, third- and fourth-generation *data services* regulated as information services, not "telecommunications service" voice offerings, have driven investment in mobile services. Verizon 2/19/15 Letter at 1-4 (JA__-__); *Rysavy* at 5 (JA__); *Fourteenth Report* ¶ 105; *see also id*. at 11425 (noting that "data services consume greater amounts of bandwidth than traditional voice services"). The fact that mobile

carriers have made investments in services like voice that are subject to Title II regulation does not alter the reality that data, not voice, has been the overwhelming catalyst for investment in mobile networks.

While the *Order* includes a footnote questioning whether investment before 2007 can be attributed to mobile broadband's information service classification and noting that voice service still accounts for significant mobile revenues, *see Order* n.1249 (JA__), that passing comment is hardly the "detailed justification" that is required where, as here, the FCC's prior measured approach to mobile open Internet regulation "engendered serious reliance interests that must be taken into account." *Fox*, 556 U.S. at 515. In any case, mobile-broadband driven investment made in reliance on an information services classification was reasonable even prior to 2007, given the FCC's finding in 2002 that cable broadband service was an information service. *Cable Broadband Order* ¶ 38.

Ultimately, given providers' well-established reliance on the FCC's prior open Internet framework for mobile broadband, the *Order* fails to satisfy the heightened standard under *Fox* and *Perez*. *Fox*, 556 U.S. at 515; *Perez*, 135 S. Ct. at 1209. Lacking sufficient justification, it should be declared unlawful and set aside.

CONCLUSION

For the reasons stated herein and in the USTelecom *et al*. Brief, the Court should grant the petitions for review of CTIA – The Wireless Association® and AT&T Inc. and vacate the *Order*.

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) and Fed. R. App. P. 29(d) because this brief contains 6,753 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) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (14-point Times New Roman).

/s/ Bryan N. Tramont
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August 6, 2015

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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