

ORAL ARGUMENT SCHEDULED FOR DECEMBER 4, 2015
No. 15-1063 (and consolidated cases)

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

UNITED STATES TELECOM ASSOCIATION, et al.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of an Order of the
Federal Communications Commission

BRIEF *AMICI CURIAE* OF COMPUTER & COMMUNICATIONS
INDUSTRY ASSOCIATION AND MOZILLA IN
SUPPORT OF RESPONDENTS

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**CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND
RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1), *amici curiae* Computer & Communications Industry Association (CCIA) and Mozilla hereby submit their Certificate as to Parties, Rulings, and Related Cases as follows:

A. Parties and *Amici*. Except for the following, all parties, intervenors, and *amici* appearing in this Court are listed in the Brief for Petitioners United States Telecom Association (USTelecom), National Cable & Telecommunications Association (NCTA), CTIA – The Wireless Association® (CTIA), American Cable Association (ACA), Wireless Internet Service Providers Association (WISPA), AT&T Inc. (AT&T), and CenturyLink.

B. Rulings Under Review. References to the rulings at issue appear in the Brief for Respondent FCC.

C. Related Cases. Related cases are identified in the Brief for Respondent FCC. *Amici* are aware of no other cases related to this one.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the U.S. Court of Appeals for the District of Columbia Circuit, *amici curiae* the Computer & Communications Industry Association (CCIA) and Mozilla state:

CCIA is an international nonprofit trade association of Internet and technology firms. CCIA has no parent corporation, and no publicly held corporation has an ownership stake of 10% or more in it.

The Mozilla Corporation is a wholly owned subsidiary of the Mozilla Foundation, a 501(c)(3) non-profit (collectively referred to herein as “Mozilla”). No publicly held corporation has an ownership stake of 10% or more in Mozilla.

/s/ Alexandra Sternburg

September 21, 2015

**CERTIFICATE OF COUNSEL REGARDING NECESSITY OF SEPARATE
AMICI CURIAE BRIEF**

Pursuant to D.C. Cir. R. 29(d), CCIA and Mozilla hereby certify that they are submitting a separate brief from other *amici* in this case due to the specialized nature of their distinct interests in this proceeding. To their knowledge, CCIA and Mozilla are the only *amici* focusing on the subjects herein from the unique background and perspectives they represent. Accordingly, CCIA and Mozilla certify that filing a joint brief would not be practicable.

/s/ Alexandra Sternburg

September 21, 2015

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<i>1999 Broadband Progress Report</i>	<i>Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996</i> , 14 FCC Rcd. 2398 (1999)
<i>2010 Order</i>	<i>Preserving the Open Internet</i> , 25 FCC Rcd. 17905 (2010), upheld in part and vacated in part by <i>Verizon v. FCC</i> , 740 F.3d 623 (D.C. Cir. 2014)
API	Application Programming Interface
App	Application
BIAP	Broadband Internet Access Provider
BIAS	Broadband Internet Access Service
<i>Cable Modem Order</i>	<i>Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities</i> , 17 FCC Rcd. 4798 (2002)
Communications Act	Communications Act of 1934, 48 Stat. 1064, codified as amended at 47 U.S.C. § 151 et seq. (1934)
<i>Computer II Order</i>	<i>Amendment of Section 64.702 of the Commission's Rules and Regulations</i> , 77 F.C.C.2d 384 (1980)
DNS	Domain Name System
DPI	Deep Packet Inspection Technology
Edge providers	Providers of Internet content, applications, and services
FCC	Federal Communications Commission
NAM Br.	<i>Amici</i> Brief for National Association of Manufacturers, the Business Roundtable, and the Chamber of Commerce of the United States of America

<i>Order</i>	Report and Order on Remand, Declaratory Ruling, and Order, <i>Protecting and Promoting the Open Internet</i> , 30 FCC Rcd. 5601 (2015)
OSI	Open Systems Interconnection
OTT	Over-the-top
PSTN	Public Switched Telephone Network
<i>Stevens Report</i>	<i>Federal-State Joint Board on Universal Service</i> , 13 FCC Rcd. 11501 (1998)
Title II	Title II of the Communications Act, codified as amended at 47 U.S.C. § 201 et seq. (1934)
URL	Uniform Resource Locator
USTelecom Br.	Joint Brief for Petitioners USTelecom, NCTA, CTIA, ACA, WISPA, AT&T, and CenturyLink

INTERESTS OF *AMICI CURIAE*¹

CCIA represents more than twenty large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services — companies that collectively generate more than \$465 billion in annual revenues.

Mozilla is a consistent advocate for openness, innovation, and opportunity on the web. Since 2004, millions of people worldwide have discovered, experienced and connected to the Web using Mozilla's products and services, including Firefox web browser, Firefox app marketplace, and Firefox OS for tablets, devices, and smart TVs. Developers worldwide have contributed to the Mozilla open-source community since its creation in 1998 as a project at Netscape.

The proper analysis of the Open Internet rules is crucial to the companies, developers, and consumers represented by CCIA and Mozilla.

Counsel for all parties have consented to, or indicated that they do not oppose, the filing of this brief.

¹ *Amici* state that no counsel for any party authored this brief in whole or part; no such party or counsel made a monetary contribution intended to fund its preparation or submission; and no person other than *amici*, its members, and counsel made such a contribution.

SUMMARY OF ARGUMENT

Over the last two decades, the Internet economy has grown from near non-existence to a major portion of the global economy that touches our lives at almost every level. Open Internet rules spur innovation and, as this Court recognized in 2014, help drive a virtuous cycle of online innovation, consumer demand, and broadband deployment. *Verizon v. FCC*, 740 F.3d 623, 643-49 (D.C. Cir. 2014). The rules adopted in the *Order* under review, such as non-discrimination and no-blocking, give startups and other companies innovating online the certainty needed to invest in developing the applications and services that will continue to drive the Internet economy. These rules are particularly important given that (1) BIAPs have access to increasingly sophisticated filtering and blocking technology that allows them to discriminate against particular traffic, and (2) BIAPs have increased incentives to discriminate against competing over-the-top services such as streaming video content from Netflix, Amazon, and others. This Court previously acknowledged the need for the Open Internet rules adopted in the *Order*, and Petitioners do not oppose the purpose or logic of the rules in their Briefs.

Instead, Petitioners' main argument is that the FCC's decision to reclassify BIAS under Title II of the Communications Act is unlawful, arguing that the decision "upends the decades-old status quo," USTelecom Br. at 2. This argument is wrong, both legally and factually. The FCC's decision was a logical and well-

informed — and certainly reasonable under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) — decision based on a proper reading of the relevant statutory language, which itself was based on a proper understanding of the facts of how BIAS is offered today. The FCC simply followed the Supreme Court’s command that an agency “must consider . . . the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances” *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citations omitted).

In 2002, the FCC based its prior decision to classify BIAS as an information service on its finding that the service offered a transmission component “inextricably intertwined” with additional enhanced capabilities such as e-mail, web hosting, and numerous other services. Today, however, consumers use third-party apps and services for enhanced capabilities such as e-mail and web hosting, and they use BIAS for the “indispensable function” of providing consumers with a “connection link that in turn enables access to the essentially unlimited range of” such third-party apps and services. *Order* ¶ 330. The FCC carefully considered how BIAS is offered, used, and marketed, and how it has evolved since the *Cable Modem Order*. It reached an informed and correct conclusion that BIAS should be classified as a telecommunications service. Far from “upending the decades-long

status quo,” the FCC simply affirmed that services that offer “pure transmission” to the public for a fee are telecommunications services.

ARGUMENT

I. THE FCC’S CLASSIFICATION OF BROADBAND INTERNET ACCESS SERVICE CORRECTLY REFLECTS TODAY’S TECHNOLOGY AND SERVICES

The FCC’s classification of broadband Internet access service (BIAS) as a Title II telecommunications service is the correct and lawful interpretation of the applicable statutory language, and it is grounded in how technology and broadband access service offerings have evolved over time. The facts behind the FCC’s prior analysis and classification of BIAS are simply no longer true today. Indeed, Petitioners and their supporting intervenors and *amici* rely heavily on two prior FCC decisions from over a decade ago, when Internet architecture, services, and user experience were so vastly different as to be almost unrecognizable to today’s broadband users. Those FCC decisions were:

(1) the *Cable Modem Order* in 2002, which came out when the first mobile handsets with color screens were being introduced. This was before not only Facebook but also MySpace or Friendster were founded, before the Motorola RAZR or phones with cameras, and years before the first “app marketplace” or streaming video from Netflix; and

(2) the *Stevens Report* in 1998, which was released before Google was founded, before the first laptop with Wi-Fi was sold, when there were fewer than half a million residential broadband subscribers, *1999 Broadband Progress Report*, 14 FCC Rcd. 2398, 2447 (1999), and when the FCC's benchmark speed for what Internet access services are defined as broadband was 125 times slower than it is today.

As discussed below, much has changed since then, and the FCC's analysis in classifying BIAS under Title II accurately reflects the changes in broadband access services since those early days of Internet access services.

A. The FCC's Prior Classification of BIAS No Longer Holds Because of Changed Factual Circumstances

Based on distinctions first discussed in the *Computer II Order* in 1980, the FCC has consistently viewed telecommunications services as those offering pure or simple transmission, while information services are those that go beyond pure transmission and offer enhanced, computer processing-based capabilities that are distinct from and go beyond the functionality of transmission to end users. FCC Br. at 10-13. In 2002, when the FCC first classified BIAS as an information service in the *Cable Modem Order*, it based its conclusion primarily on its finding that, at the time, cable modem service offered consumers a "single, integrated service" that combined transmission with access to applications such as e-mail, access to newsgroups, and creating a home page that involved the enhanced

capabilities characteristic of information services. *Cable Modem Order* ¶ 38.

While there was disagreement with the FCC's conclusion, *see Brand X*, 545 U.S. at 1005-14 (2005) (Scalia, J., dissenting), it was a "perhaps just barely" plausible application of the statutory language to Internet access services at the time, *id.* at 1003 (Breyer, J., concurring). A decade-plus ago, many users obtained their personal e-mail addresses and the ability to create a home page from their ISP, and ISPs such as AOL and Excite@Home attempted to differentiate themselves via the original content they offered subscribers. *Cable Modem Order* ¶¶ 18, 38. Today, as explained in more detail below, consumers typically use third-party applications and services for e-mail, website hosting, and similar functions. Thus, the FCC correctly analyzed and concluded that broadband access services no longer "inextricably intertwine" transmission and proprietary applications and services, but instead offer the "indispensable function" of providing consumers with a "connection link that in turn enables access to the essentially unlimited range of Internet-based services." *Order* ¶ 330.

The FCC's decision does not "upend[] the decades-old status quo," USTelecom Br. at 2; rather, it simply examines broadband access services as they have evolved over the last decade and recognizes that factual circumstances have changed in the more than a decade since its prior analyses. As the Supreme Court has said, an agency "must consider . . . the wisdom of its policy on a continuing

basis, for example, in response to changed factual circumstances” *Brand X*, 545 U.S. at 981 (citations omitted); *see also Home Care Ass’n of America v. Weil*, No. 15-5018, slip op. at 19-20 (D.C. Cir. Aug. 21, 2015) (upholding Department of Labor regulations that adopted a different interpretation of the Fair Labor Standards Act after four decades of changed circumstances). Perhaps the easiest way to analyze BIAS as it is offered today is to consider a typical consumer, using third-party apps such as Facebook, Netflix, YouTube, Twitter, or MLB.tv, or a Web browser to access any of thousands of websites. The consumer connects her laptop, tablet, or smartphone to a Wi-Fi network at home, work, a hotel, friend’s house, coffee shop, or elsewhere, or on the go via a mobile broadband network. At any of these locations, once the consumer’s device is connected, the online experience is essentially the same. This is because BIAS at each of these locations performs the same basic function of providing consumers with a “connection link that in turn enables access to the essentially unlimited range of Internet-based services,” *Order* ¶ 330 — *i.e.*, pure transmission or telecommunications. Far from “upending the decades-long status quo,” the FCC in fact reaffirmed the decades-long status quo that services that offer “pure transmission” to the public for a fee are telecommunications services.

The FCC had other reasons to reexamine the continuing wisdom of its policy; for example, broadband Internet access providers (BIAPs) have a much

greater ability and incentive to harm Internet openness than they did at the time of the *Cable Modem Order*. *Order* ¶ 329. BIAPs today have a much greater ability to discriminate against online content and applications via easily available filtering technology such as deep packet inspection technology (DPI). As explained by venture capitalists in a brief filed as *amici curiae* in the *Verizon* case, “the Internet was built to be application-blind, and network nodes that routed Internet traffic were not built to analyze the traffic they were routing” but, over time, “broadband providers have acquired specialized tools to identify packets against which the broadband providers would like to discriminate.”² DPI technology today can gather enough information to block and filter even encrypted traffic using heuristics or “inferred application classification” that gather clues based on packet size, source, destination, and traffic pattern.³ With the proliferation of such powerful technology, BIAPs have “an unprecedented ability to discriminate among sources and types of traffic in real time with little cost.” Internet Ass’n Comments, GN Docket No. 14-28, July 14, 2014, at 13.

BIAPs also have greater incentives to harm Internet openness than they did at the time of the *Cable Modem Order*. The rise of online, over-the-top (OTT) video offerings such as Netflix, Hulu, YouTube, Amazon Prime and Dish

² Brief of Venture Capital Investors as *Amici Curiae* Supporting Appellee at 16, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (No. 11-1355).

³ Mike Hibbard, *Encryption: will it be the death of DPI?*, telecoms.com, Feb. 13, 2012, <http://telecoms.com/39718/encryption-will-it-be-the-death-of-dpi/>.

Network's Sling TV compete with content offerings from the same companies that are also the largest BIAPs. FCC Br. at 2-3. Vertical integration of content providers and BIAPs, such as Comcast's acquisition of NBCUniversal and Verizon's acquisition of AOL (which owns online content such as Huffington Post, Engadget, and TechCrunch⁴), gives BIAPs direct ownership over valuable content. As BIAPs seek to expand their offerings into other market segments, such as streaming video gaming,⁵ the incentives to discriminate against a wider range of online content will only increase.

B. BIAS as Offered Today is Not an Information Service

A decade or so ago, in the early days of broadband access networks, BIAPs offered services such as web hosting and email that at the time were reasonably considered to be core offerings of ISPs. Today, however, third parties offer those enhanced capabilities characteristic of information services. Even when offered by BIAPs, users see them as separate services from the underlying broadband access service and its core function of transmission. In other words, to the extent that BIAPs continue to provide enhanced capabilities via applications and services such as e-mail, web hosting, and so on, such capabilities are no longer inextricably

⁴ Press Release, AOL Inc., AOL's Multi-Platform User Growth Fastest among the Top 5 Internet Properties (May 8, 2015), <http://ir.aol.com/phoenix.zhtml?c=147895&p=irol-newsArticle&ID=2045974>.

⁵ Sam Schwartz, *Game On: Experience a New Way to Play on Your TV*, ComcastVoices (July 14, 2015), <http://corporate.comcast.com/comcast-voices/game-on-experience-a-whole-new-way-to-play-on-your-tv>.

intertwined with the underlying transmission service. As the FCC has long made clear, a service provider cannot escape regulation of a transmission service as a telecommunications service by “offering” the service together with separate, non-integrated information services, *Brand X*, 545 U.S. at 997-98. A contrary policy would invite all manner of regulatory arbitrage. Thus, the FCC was correct in applying the statutory definition of “information service” to today’s broadband access services, and then concluding that BIAS as offered today is no longer an information service. *Order* ¶¶ 365-81.

An information service is defined as the “offering of a capability for *generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available* information via telecommunications” 47 U.S.C. § 153(24) (emphasis added). The FCC correctly concluded that consumers today use broadband access services not to perform the eight capabilities listed above, but rather as a means to transmit data to and receive data from competing applications and services offered by third parties that perform such capabilities. *Order* ¶¶ 347-50. These third-party applications are Open Systems Interconnection (“OSI”)⁶

⁶ The OSI model describes a telecommunications system’s communications functions, independent of its underlying internal structure and technology, by dividing the functions into seven layers. Layer 7, or the Application Layer, is the highest layer and refers to the applications that run “on top” of the transmission and other layers of the network. In other words, the “application layer represents the purpose of communicating in the first place.” PC Magazine Encyclopedia,

layer 7 applications, distinct from the transmission functions of the broadband network. The eight information service capabilities used by consumers today are discussed below.

1. Generating: In the decade-plus since the *Cable Modem Order*, user-generated content has grown from e-mails to apps that allow Internet users to share their thoughts, pictures, videos, and music. Indeed, a key part of human relationships today centers around sharing information online through posts on social networks like Facebook or Twitter, professional contacts via LinkedIn, personal information on any of numerous dating services, video calls on services like FaceTime, Google Hangout, and Firefox Hello, email via programs like Gmail and Yahoo Mail, blogs like WordPress or Tumblr, or photos and videos via sites like Instagram and YouTube. These third-party applications offer Internet users the capability to generate information, which is then transmitted via the transmission path provided by the BIAP.

2. Acquiring: Broadband users today acquire information by receiving the user-generated content described above, as well as other important information such as news, music, videos, responses to search queries, and email. Users also acquire content from platforms such as iTunes or Google Play. The combination of “Generating” and “Acquiring” also is critical to video chat communications and

<http://www.pcmag.com/encyclopedia/term/48642/osi-model> (last visited Sept. 21, 2015).

online gaming. Again, third-party application layer programs and apps offer consumers the capability of acquiring information via the transmission path provided by BIAPs.

3. Storing: Many consumers today use the Internet in lieu of cabinets and filing systems of the past. Numerous third-party apps and services such as Dropbox, SpiderOak, and options from Google, Amazon, and Apple, provide personal and business accounts for files including photos, videos, and documents.

4. Transforming: Consumers today transform information using a variety of unaffiliated apps and services, ranging from Google Drive to Pinterest to Photoshop. For example, portions of this brief were written using collaborative online document sharing services.

5. Processing: Consumers use a variety of applications, services, and software programs to process information, including Amazon Web Services and a variety of data processing or compression apps and services.

6. Retrieving: Broadband users are constantly retrieving information from third-party sources via each visit to a webpage, use of a mobile app, download of a file, or click to stream content. *See also* “Acquiring,” *supra*.

7. Utilizing: Consumers utilize information in a variety of ways using devices and applications that are independent of the transmission path provided by

the broadband access network. For example, many consumers use their Facebook logins to sign-in to other third-party apps.

8. Making available: Broadband users make information available in a variety of ways by publishing information to a website, posting information to social media sites such as Facebook, Twitter, and Instagram, and uploading content to YouTube and similar sites.

C. BIAS as Offered Today is a Telecommunications Service

The Communications Act defines a “telecommunications service” as the “offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used,” 47 U.S.C. § 153(53), with “telecommunications” defined as “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content,” § 153(50).

The service offering, consumer perception, and marketing of BIAS today all point to it being a transmission service offered to the public for a fee, in which the transmission is of OSI layer 7 traffic of the user’s choosing — generated from third-party applications and services selected by the user — between or among Internet end points specified by the user. Moreover, the packets generated by the layer 7 applications and services used by broadband subscribers are transmitted to their desired end points without change in the form or content of the transmissions

by the BIAP. *Order* ¶ 362. Thus, as offered today, BIAS meets the statutory definition of a “telecommunications service,” and the FCC was correct in classifying it as such.

As discussed above, broadband access service today is not a combination of transmission with “inextricably intertwined” applications and services. *See Brand X*, 545 U.S. at 978 (finding that Internet service “involves data transport elements,” but “it also ‘offers end users information-service capabilities inextricably intertwined with data transport’”) (quoting *In re Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 11501, 11531 ¶ 63 (1998)). Instead, BIAS today provides consumers with capacity for transmitting data from the various layer 7 applications and services discussed in Section I.B, *supra* pp. 9-13, to remote Internet end points selected by the users of the service, and users themselves view broadband access services as providing them with such capacity. This capacity is often rate-limited per user, with BIAPs typically offering tiers based on the amount of data transferred and/or the available data transmission speeds. *Order* ¶ 353. BIAPs also market their services emphasizing speed — including high speeds that allow users to operate third-party streaming video services such as Netflix — and reliability of transmissions. *Id.* ¶¶ 351-52.

Amicus Christopher Yoo argues that BIAS does not involve transmission of data “between or among points specified by the user” because the user is not aware

of the “specific geographic location” of the destination of the transmission. *Yoo Br.* at 1, 3-9. This argument elevates form far above substance. Modern telecommunications networks have moved toward increasingly intelligent routing, and developments such as number portability, 800- and 900-numbers, and mobile networks have loosened the connection between, for example, a dialed telephone number and a specific geographic location. Many consumers placing telephone calls do not know the specific geographic location of the recipient of the call — *e.g.*, calls to a customer service line, calls that are routed differently depending on the time of day, calls to mobile numbers, and so on — but they are still engaged in the transmission of the call using the dialed number as a means for specifying the intended destination. When using a BIAS, users select an endpoint for transmitted data by, for example, entering a URL, clicking on a link or a command, or opening an app. The FCC correctly concluded that because BIAS users select the endpoints, the transmissions are “between or among points specified by the users” even if users are not aware of the specific geographic location of the server to which data is transmitted. *Order* ¶ 361. Moreover, such interpretations of statutory language in a “technical and complex area” are precisely within the FCC’s purview as the “expert” agency. *Brand X*, 545 U.S. at 992, 1003.

D. DNS, Caching, and Network Security-Related Features of BIAS Fall Under the Telecommunications Systems Management Exception

Congress has specified what an information service is not; specifically, an information service “does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(24). The FCC correctly concluded that features such as DNS, caching, and attack mitigation and other security features involve computer processing capabilities used for the “management, control, or operation of a telecommunications system” or “the management of a telecommunications service” and thereby fall within this telecommunications systems management exception. *Order* ¶¶ 366-75.

DNS may involve retrieving and utilizing information from a database, but is used for routing traffic to the end point chosen by the user — in other words, for the management, control, or operation of the network and not for providing enhanced processing capabilities to end users. In this way, DNS is similar to a variety of call-routing capabilities in PSTN networks, like call forwarding, that fall within the telecommunications systems management exception. *Id.* ¶¶ 368-69. The same is true of caching, which involves storing of information, but is also used for managing the traffic flow within a network — *i.e.*, for management of the network. *Id.* ¶ 372. Finally, attack mitigation and other security-related aspects of

BIAS may involve computer processing capabilities, but they too involve network management. In each of these cases, the computer processing capability of the network involves a network management function rather than an information processing capability that is offered for the BIAS subscriber's use.

The fact that third parties offer features such as DNS and caching — *e.g.*, Google and Open DNS for DNS and Akamai for caching — does not change this analysis. Instead, what matters is the functionality of these features within the system — *i.e.*, whether the feature is used for the “management, control, or operation of a telecommunications system” or “the management of a telecommunications service.” For example, computer-provided directory assistance, like DNS, involves querying a database for the purpose of routing a call, but it is classified as part of the telecommunications service offering even though consumers have the option of using third-party directory assistance providers. *North American Telecommunications Association Petition for Declaratory Ruling Under §64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, 101 F.C.C.2d 349, 360, ¶ 26 (1985) (noting that directory assistance allows access to a database that provides information “necessary to allow use of the network” and is thus classified as adjunct to a basic service and not an enhanced service).

Moreover, contrary to Petitioners' claims, USTelecom Br. at 40, there is nothing arbitrary about the FCC's decision to note that BIAS features like DNS and caching are adjunct-to-basic functions that fall within the telecommunications systems management exception, but those same features are information services when provided separately from an underlying transmission service. In the latter case, the third-party provider of DNS or caching does not provide the basic transmission service, so there is no basic service being provided that the DNS or caching service is adjunct to and no telecommunications service being provided that is being managed.

Amicus Richard Bennett generally argues that because broadband networks perform bandwidth management, attack mitigation, DNS lookup, and routing, and because each of these capabilities involves complex processing and is more complicated than analogous functions on the PSTN, they do not fall under the telecommunications systems management exception — they amount to capabilities that transform BIAS into an information service offering. Bennett Br. at 6-14. However, whether these capabilities fall under the telecommunications systems management exception turns not on their complexity or whether they are directly analogous to functionality provided on PSTN networks, but rather on their function in the service being offered.

As discussed above, in each of these cases, the functionality of capabilities such as bandwidth management, attack mitigation, DNS lookup, and routing involves the “management, control, or operation” of the network. There is no doubt that modern communications networks involve increasingly sophisticated routing and other network management, but that alone does not change the relevant inquiry of whether a service offering involves transmission with associated network management capabilities, regulated as a Title II telecommunications service, or enhanced computer processing capabilities that transform a service into a Title I information service. Indeed, the PSTN network evolved from switchboards and live operators to automatic switching to advanced signaling and network management using newer standards such as Signaling System No. 7. Each of these steps involved significant advances in technology and processing capability at the time, but they did not affect the basic functionality — network management — and did not affect the regulatory classification of the PSTN service being offered.

II. THE OPEN INTERNET RULES ARE NEEDED TO SUSTAIN THE THRIVING INTERNET ECONOMY

Without Title II non-discrimination and no-blocking rules in place, BIAPs’ gatekeeping behavior will be detrimental to the rest of the Internet ecosystem. This Court previously recognized the Commission’s determination “that Internet openness fosters the edge-provider innovation that drives this ‘virtuous cycle,’”

which has been a hallmark of the Internet's explosive growth. *Verizon*, 740 F.3d at 644; *see also Order* ¶ 7 (explaining the “virtuous cycle” as represented by “innovations at the edges of the network enhance consumer demand, leading to expanded investments in broadband infrastructure that, in turn, spark new innovations at the edge”).

Through its history, the exponential growth in web content and services has been predicated on the inherently open nature of the Internet where anyone with an Internet connection can access any destination on the web. Some of the largest and most popular Internet companies such as Google, Amazon, and eBay were started in garages and living rooms in the mid-1990s, at a time when Internet access was subject to Title II common carrier non-discrimination and no-blocking rules. As noted in the venture capital investors' *amici curiae* brief in the *Verizon* case, *Venture Capital Investors Br.*, *supra* note 2, at 4, 7, the original Internet was free of gatekeepers, which was critical to its success and growth:

Innovators on the Internet did not need to gain permission from anyone in order to test new ideas with Internet users. To the contrary, any person with an idea could build a Web site and have an instant audience. . . . The Internet's openness has been critical to its unparalleled success. Its technological environment has enabled robust competition among many thousands of Internet application developers and content providers offering increasingly sophisticated software and content.

Without baseline Open Internet protections, the very foundation on which a thriving Internet ecosystem has been built would be shaken. Besides jeopardizing

the current content and services already available, lack of Open Internet rules would create market uncertainty that would stymie the very venture capital investment that has fueled this remarkable growth as “entrepreneurs will not make steep economic investments without assurances that broadband network providers will not stymie their likelihood of achieving commercial success.” *See* Google Reply Comments, GN Docket No. 09-191, Apr. 26, 2010, at 12. In fact, this is already happening. The managing partner of Union Square Ventures, whose early stage investments include Twitter, Etsy, Kickstarter, Foursquare and Zynga, recently stated that he would “stay away from” investing in Internet-based video, media, and financial payment companies without clear, enforceable Open Internet rules.⁷

The *Order*’s reclassification and associated regulations will ensure that the Internet maintains the low barriers to entry that have fostered incredible innovation

⁷ David Talbot, *Talk of an Internet Fast Lane Is Already Hurting Some Startups*, MIT TECH. REV. (May 7, 2014), <http://www.technologyreview.com/news/527006/talk-of-an-internet-fast-lane-is-already-hurting-some-startups/> (quoting VC Brad Burnham as saying that “[t]his is absolutely part of our calculus now,” regarding the “crushing disadvantage” that startups would face in competing with incumbents who could take advantage of paid, prioritized lanes). *See also* Barbara van Schewick, Oral Testimony at the Federal Communications Commission’s Second Public En Banc Hearing on Broadband Network Management Practices at Stanford University at 2 (Apr. 17, 2008), *available at* https://transition.fcc.gov/broadband_network_management/041708/vanschewick-oral.pdf (recounting a group of Stanford graduate students who were denied funding by three private equity firms because of concerns that their application would be blocked or interfered with by BIAPs).

for the past twenty years. Practices like paid prioritization would ultimately thwart this fast-moving innovation by erecting high barriers to entry. For example, without the *Order*'s protections, ISPs could begin charging edge providers “a fee, not for transport, but *to reach their customers*.”⁸ At the worst, an Internet company would have to negotiate with every broadband provider to avoid being blocked.⁹ As Netflix's CEO pointed out, “allowing ISPs to set up ‘digital toll roads’ just ‘because they can’ will cause havoc in the Internet ecosystem and for end users in terms of higher prices for some content and spotty access to others.”¹⁰ If a startup decided it could not pay more for a prioritized service, it would not reach the same consumers as before. Ultimately, consumers and the Internet marketplace would suffer.

A pay-to-play regime would short-circuit the dynamic Internet marketplace, tilting the playing field further toward entrenched incumbents and hindering competition from new players. As the Commission noted in the *2010 Order*, and

⁸ Tim Wu, *Understanding Net Neutrality as a Pricing Rule*, at 2, http://www.timwu.org/NN_as_pricing.pdf (last visited Sept. 21, 2015) (emphasis in original).

⁹ Free Press Comments, GN Docket No. 14-28, July 17, 2014, at 133 (“Does the Commission seriously expect each of these billions of content providers to negotiate with every *individual* broadband provider in order to avoid being blocked?”).

¹⁰ Reed Hastings, *Internet Tolls And The Case For Strong Net Neutrality*, NETFLIX US & CANADA BLOG, Mar. 20, 2014, <http://blog.netflix.com/2014/03/internet-tolls-and-case-for-strong-net.html>. See also CCIA Comments, GN Docket No. 14-28, July 15, 2014, at 2.

this Court acknowledged in *Verizon*, restrictions on the ability of edge providers “to reach end users . . . [would] reduce the rate of innovation.” *Verizon*, 740 F.3d at 644-45 (quoting *2010 Order*, 25 FCC Rcd. 17905, 17911 ¶ 14 (2010), *upheld in part and vacated in part* by *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014)).

Facilitating a competitive, dynamic top-layer of the Internet allows new, consumer-friendly, disruptive technologies and business models to quickly displace legacy players and incumbents if they build a better product.

III. THE OPEN INTERNET ORDER WOULD BE INCOMPLETE IF IT DID NOT ADDRESS INTERCONNECTION ARRANGEMENTS

Interconnection, or the physical linkage of networks so data can pass from one to the other, is fundamental for the Internet to function, and unavoidable for application and content providers that wish to connect with consumers. Classified as a telecommunications service, BIAS is subject to the requirement that “[a]ll charges, *practices*, classifications, and regulations for and in connection with [a telecommunications] service, shall be just and reasonable.” 47 U.S.C. § 201(b) (emphasis added). Because interconnection arrangements are necessary for BIAS to enable consumers to reach all Internet endpoints, it is clearly a “practice” in connection with that Title II service. As the *Order* explains, BIAPs’ “representation[s] to retail customers that they will be able to reach ‘all or substantially all Internet endpoints’ necessarily includes the promise to make the interconnection arrangements necessary to allow that access.” *Order* ¶ 28.

Moreover, FCC authority over interconnection arrangements is necessary for the Open Internet rules to be effective. Open Internet rules would be largely toothless if blocking, discrimination, and paid prioritization could simply be executed at a different point on the transmission path of data from edge providers to consumers. As CCIA stated before the FCC in the Open Internet proceeding last year, “anticompetitive conduct and discrimination would simply migrate upstream if the No-Blocking and No-Discrimination rules did not cover points of interconnection.” CCIA Reply Comments, GN Docket No. 14-28, Sept. 15, 2014, at 12.

Absent FCC authority to hear interconnection disputes, BIAPs could freely degrade an edge provider’s traffic at interconnection points. Although traffic can take many routes across the Internet, to get to a specific end-user it must eventually interconnect with a BIAP’s last-mile network. There is no other way to get to a Verizon, AT&T, or Comcast customer than to interconnect with their networks, directly or indirectly.

By increasing congestion at its interconnection points, and demanding payment to alleviate that congestion, BIAPs can achieve the same effect as affirmatively slowing or degrading traffic while it is on their networks. This is not

a hypothetical situation, as the well-documented example of Netflix makes clear.¹¹ In a comprehensive filing to the FCC, Netflix explicitly explained how Comcast timed network congestion with payment demands. *Petition to Deny of Netflix, Inc., In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57 (Aug. 25, 2014), at 52-60. Eventually, Netflix was forced to pay significant sums of money to Comcast (and later to AT&T, Time Warner, and Verizon) to ensure that their traffic would pass freely to customers of these BIAPs. *See id.* at 58 (noting that “[w]ithin a week of that agreement (with Comcast), viewing quality for Netflix streaming video on Comcast’s network shot back up to HD-quality levels”). Netflix is not the only example of this phenomenon. *See, e.g.*, Letter from Voxel dot Net, Inc., MB Docket No. 10-56 et al. (filed Jan. 11, 2011), at 2 (describing similar network management and interconnection practices by Comcast).

The Open Internet rules would have little purpose if the FCC could not ensure that interconnection agreements are carried out on a “just and reasonable”

¹¹ Timothy B. Lee, *Comcast’s deal with Netflix makes network neutrality obsolete*, WASH. POST, Feb. 23, 2014, <https://www.washingtonpost.com/news/the-switch/wp/2014/02/23/comcasts-deal-with-netflix-makes-network-neutrality-obsolete/>.

basis. Finally, contrary to Petitioners' claims, the FCC gave clear notice that interconnection agreements were in the scope of the FCC's proposed rulemaking.¹²

IV. THE OPEN INTERNET ORDER WILL SPUR INVESTMENT AND BROADBAND ACCESS

[C]onsumers don't buy fat pipes; they buy applications and content that require fat pipes. As consumer demand for more bandwidth-intensive applications and content increases, so does the incentive for network owners to provide more bandwidth . . .¹³

Contrary to the claims of Petitioners and their *amici*, see, e.g., NAM Br. at 10-16 (claiming that the Open Internet rules create uncertainty that will thwart investment), Open Internet rules will not stymie investment. The FCC correctly noted that application of Title II, with appropriate forbearance, is necessary to preserve the virtuous cycle described in Section II, *supra* pp. 19-23, which drives broadband investment. Innovation in new online applications and services drives consumers to purchase broadband access or increase their Internet speeds. FCC Br. at 38. Though some *amici* in support of Petitioners complain to the contrary, NAM Br. at 10-16, we agree with the FCC and the industry representatives

¹² Notice of Proposed Rulemaking, *Protecting and Promoting the Open Internet*, 29 FCC Rcd. 5561, 5582 ¶ 59 (2014) (asking "how can we ensure that a broadband provider would not be able to evade our open Internet rules by engaging in traffic exchange [*i.e.* interconnection] practices that would be outside the scope of the rules as proposed?", and seeking comment on whether the agency "should expand the scope of the open Internet rules to cover issues related to traffic exchange.").

¹³ Robert M. McDowell, Luncheon Address at the Broadband Policy Summit III (June 7, 2007), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-273742A1.pdf.

responsible for investment and broadband deployment that reclassification and forbearance would spur investment by providing regulatory certainty and predictability. *Order* ¶ 410.

Indeed, allowing BIAPs to discriminate and charge for Internet fast lanes would *decrease* incentives for network operators to invest in their networks in two significant ways. As network congestion increases, the amount network operators could charge for “premium” Internet access would also increase, suggesting that “the ISP’s incentive to invest on capacity under a discriminatory network is smaller than under a neutral regime.”¹⁴ Furthermore, as the premium lanes become more valuable, BIAPs would divert resources from investing in their networks to investing in technology to better monitor and prioritize Internet traffic. Google Reply Comments, GN Docket No. 09-191, Apr. 26, 2010, App. A.

Empirical evidence and statements from BIAP executives themselves support these conclusions. Petitioners paint a picture showing they have invested more in infrastructure since broadband was reclassified as an information service and that reclassification as a telecommunications service subject to Title II regulation would force them to invest less in the future. The facts simply do not support these assertions. Free Press Comments, GN Docket No. 14-28, July 17, 2014, at 6, 103.

¹⁴ Jay Pil Choi & Byung-Cheol Kim, *Net Neutrality and Investment Incentives*, 41 RAND J. OF ECON. 448, 464-65 (2010).

Petitioners claim that they “invested *hundreds of billions* of dollars in reliance on that [non-Title II] policy.” USTelecom Br. at 3 (emphasis in original). More specifically, “from 2002 to 2013, fixed and mobile providers invested more than \$800 billion in broadband — more than \$2,500 for every American.” *Id.* at 15; *see also id.* at 51 (“Between 2002 and 2013, fixed and mobile providers, including smaller providers serving rural and underserved areas, invested more than \$800 *billion* in broadband service.”) (emphasis in original). While that figure may be accurate, petitioners are merely distracting from the truth that they invested far more *before* the FCC began deregulating the Internet in 2002 with the *Cable Modem Order*. *See also Verizon*, 740 F.3d at 629-33 (explaining the development of the FCC’s Internet regulations).

USTelecom’s own statistics prove this point. Between 1996 and 2000, U.S. broadband capital expenditures increased markedly every year, reaching a peak of \$118 billion in 2000.¹⁵ However, in 2002, when the FCC for the first time reclassified cable modem service as an “information service,” *Cable Modem Order* ¶ 41, investment dropped off precipitously to \$72 billion. *See Historical Broadband Provider Capex*, *supra* note 15. In the intervening twelve years, investment has never exceeded \$80 billion – hovering around \$70 billion in most

¹⁵ Historical Broadband Provider Capex, USTelecom, <http://www.ustelecom.org/broadband-industry-stats/investment/historical-broadband-provider-capex> (last visited Aug. 2, 2015) (displaying Broadband Provider wireline investment, 1996-2014).

years. *Id.*; *see also* FCC Br. at 84 (noting that the highest investment in DSL wireline broadband occurred before the service was reclassified in 2005). Indeed, *amici* in support of Petitioners proudly state that “[i]n 1996, ISPs invested \$24.8 billion, yet by 2013 annual broadband related investments had reached a staggering \$75 billion,” Georgetown Ctr. for Bus. & Pub. Policy Br. at 10-16, neglecting to mention that the level of investment easily surpassed \$75 billion several times in the Title II era. Furthermore, wireline investment followed this same pattern, reaching a peak of \$79 billion in 2000 before crashing in 2002 to \$34 billion and never moving beyond \$32 billion after that.¹⁶

Petitioners claim that “[i]ndividually and collectively, these rules [from the *Order*] will undermine future investment by large and small broadband providers, to the detriment of consumers.” USTelecom Br. at 4. However, for more than a decade in venues outside of FCC proceedings, BIAP executives from AT&T,¹⁷

¹⁶ Historical Wireline Provider Capex, USTelecom, <http://www.ustelecom.org/broadband-industry-stats/investment/historical-wireline-provider-capex> (last visited Aug. 2, 2015) (displaying Broadband Provider wireline investment, 1996-2014).

¹⁷ *See* Letter from AT&T, CC Docket No. 02-33 *et al.*, at 2 (filed Aug. 16, 2002) (stating that AT&T opposed “reclassification of any wireline broadband service as an unregulated Title I service,” and that Title I reclassification “was unnecessary to create broadband investment incentives” because the rules were “sufficiently flexible to fully compensate the Bell Companies for any new investment in facilities for the purpose of providing advanced services”).

Time Warner Cable,¹⁸ Comcast,¹⁹ Verizon,²⁰ and Windstream²¹ conveyed the opposite regarding the effect of common carriage regulations on their investments.

The same contradictory messaging has marked this proceeding. BIAP executives loudly opposed reclassification from the outset of the *Order*'s proceeding, claiming that reclassification would depress future investment.²² Yet just a few weeks after it became clear that Chairman Wheeler favored reclassification under Title II,

¹⁸ JP Morgan Global Technology, Media and Telecom Conference: Time Warner Cable, Inc. Management Discussion (May 19, 2010) (quoting Time Warner Cable's Chief Operating Officer Landell Hobbs, stating that proposed Title II classification "is a light regulatory touch. . . . So . . . yes, we will continue to invest.").

¹⁹ Michelle Ow, *Top MSOs Weigh In on Reclassification*, SNL Kagan, May 12, 2010 (quoting Comcast CEO, a week after Genachowski's announcement, as stating "the government is not a big worry" and that he "expected the industry to continue to invest and innovate.").

²⁰ Niraj Sheth, *Verizon in Talks to License 4G Spectrum to Rural Carriers*, WALL ST. J., May 13, 2010 (stating that Lowell McAdam, then-CEO of Verizon Wireless "emphasized that the company had no plans to slow investment in its wireless broadband network as a result of the FCC's move.").

²¹ Tim Doyle, *Windstream CEO: USF Reform Fine, Title II Fight an "Overreaction"*, SNL Financial (May 19, 2010), <http://www.snl.com/InteractiveX/article.aspx?id=11217794&KPLT=4> (quoting Windstream Corp. President and CEO Jeff Gardner telling investors regarding Genachowski's proposal: "I don't think that there is tremendous financial risk out there with respect to this . . . issue.").

²² See Letter from Broadband for America, GN Docket No. 14-28 (filed May 13, 2014) *available at* <http://www.broadbandforamerica.com/sites/default/files/CEOLettertoFCC-5.13.14.pdf> (explaining views of 24 broadband CEOs that reclassification "would greatly distort the future development of, and investment in, tomorrow's broadband networks and services").

executives of some of the biggest BIAPs told investors or industry participants that reclassification would not adversely affect their companies' investment plans.²³

CONCLUSION

Accordingly, CCIA and Mozilla urge that the petitions for review be denied.

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²³ See Brian Fung, *Comcast, Charter and Time Warner Cable all say Obama's net neutrality plan shouldn't worry investors*, WASH. POST, Dec. 16, 2014, <https://www.washingtonpost.com/news/the-switch/wp/2014/12/16/comcast-charter-and-time-warner-cable-all-tell-investors-strict-net-neutrality-wouldnt-change-much/>; Brian Fung, *Verizon: Actually, strong net neutrality rules won't affect our network investment*, WASH. POST, Dec. 10, 2014, <https://www.washingtonpost.com/news/the-switch/wp/2014/12/10/verizon-actually-strong-net-neutrality-rules-wont-affect-our-network-investment/>.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and D.C. Cir. R. 32(e) because it contains 6,994 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).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the types style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

/s/ Alexandra Sternburg

September 21, 2015

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2015, I electronically filed the foregoing Brief *Amici Curiae* of the Computer & Communications Industry Association and Mozilla with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I further certify that on September 21, 2015, service of the foregoing will be made electronically via the CM/ECF system upon the participants in the case who are registered CM/ECF users. Participants who are not registered CM/ECF users will receive service by U.S. mail unless another attorney for the same party is receiving service through the CM/ECF system.

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