No. 15-1063

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Telecom Association, Petitioner

v.

Federal Communications Commission
and
United States of America, Respondents

Independent Telephone and Telecommunications Alliance, et al.,
Intervenors

Consolidated with
15-1078, 15-1086, 15-1090, 15-1091, 15-1092,15-1095,
15-1099, 15-1117, 15-1128, 15-1151, 15-1164

ON PROTECTIVE PETITION FOR REVIEW

REPLY BRIEF OF
AMICUS CURIAE
WILLIAM J. KIRSCH
IN SUPPORT OF AFFIRMANCE IN PART AND REVERSAL IN PART

WILLIAM J. KIRSCH
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Amicus, William J. Kirsch, files this reply brief in accordance with the clerk's order filed on August 4, 2015 granting my motion to participate and directing the clerk to file my brief and reply brief.

The FCC is correct that the origins of common carrier law date from the era of the Magna Carta and consumer protections against fradulent transactions including related to the sale of blind horses. Title II classification better aligns federal with state regulation and provides the basis for a consistent approach for intrastate and interstate broadband services. See, for example, Bruce Kushnick, How The Pundits...Got It Wrong, Huffington Post, Sept. 15, 2015.

The virulent, but somewhat understandable, opposition of the petitioners, however, is in part a recognition that this FCC is using the bread and circuses model of the Roman Empire to engage in a Robin Hood-like transfer of wealth not from the rich to the poor but from the middle class to the poor or to favored political constituencies. The subsidies involve tax-like mandates of between one-fifth and one-sixth of the cost of service. This is well in excess of biblical charitable tithing of one-tenth. Therefore, while the infamous complaint of the former FCC Chairman (now head of a petitioner cable television trade association) about an advertiser-based information service model may involve the sin of envy associated with a sometimes less lucrative subscription-based telecommunications services model, one can read between the lines that there is a legitimate concern about the FCC's voracious appetite for glory eating all the profits.

Neither the petitioners nor the respondents, however, mention, much less,

address amicus concerns about the FCC's statutory authority and legal responsibility for international telecommunications. To the contrary, the FCC, apparently oblivious to irony, seeks to use this Court's *Cable and Wireless* decision to justify an untenable effort to pass off a *Notice of Inquiry* as a *Notice of Proposed Rulemaking* and continue its generation long failure to apply the "same footing as regards privileges" standard dating to the essentially concurrent *Foreign Participation Order*, 12 FCC 23891 (1997) despite the accession of the People's Republic of China to the World Trade Organization (WTO)(Report of the Working Party on the Accession of China, WTO, WT/ACC/CHN/49/Add.2, Oct. 1, 2001) and the assessment of the Director of the National Security Agency of the devastating damage in ensuing years. See E. Johnson, NSA Chief, Chinese Cyber-Theft Most Significant Transfer of Wealth in History, National Review, June 23, 2013.

Fortunately, the Congress and the Office of the United States Trade Representative (USTR) recognize the problem. The Trade Act of 2015 provides in Section 102(a)(1) for an affirmation of the same footing standard with its direction for USTR to obtain more open, equitable and reciprocal market access and in 102(b)(8) for the elimination or prevention of trade distortions and unfair competition favoring state-owned and state-controlled enterprises. The FCC brief not only ignores the Trade Act of 2015, but also fails to address critical provisions such as 47 U.S.C. 34-39, 214 and 310.

The FCC has also continued unlawfully to stonewall related Freedom of Information Act and Privacy Act requests while USTR has engaged in a constructive

dialogue that may result in release of the draft Trans-Pacific Partnership (TPP) text. See, for example, USTR FOIA 13082776, 15072074 and 15080583. For without the release of the draft TPP text, we may not know before a Congressional fast track vote, what, if any, positive impact may result from the liberalization, if any, of trade in telecommunications and information services. See, for example, United States International Trade Commission FOIA Request 15-27 (August 13, 2015). With the public release of sensitive U.S. network information (see, for example, Tom Simonite, First Detailed Public Map of U.S. Internet Backbone Could Make It Stronger, MIT Technology Review, Sept. 15, 2015), it would be folly for USTR to not release the text and permit all participants in this proceeding to improve the draft text.

USTR apparently now recognizes, or is at least beginning to recognize, the historic mistake associated with the WTO Agreement on Basic Telecommunications (ABT) failure to secure same footing as regards privileges market access from other ABT Member States and any market access at all from the half of WTO Member States not participating in the ABT. The resulting tragedy of the commons associated with the threat to network and national security should not be allowed to continue and should be addressed by vacating, reversing and remanding an FCC so-called general conduct standard that is oblivious to these concerns. Petitioners are not entitled, and the FCC may not permit common carriers, to build inadequate facilities at premium rates funded by captive ratepayers.

The Phoenix Center is correct that a court-directed FCC review of rates is likely to be a complex and arduous task and that drudgery is no excuse for FCC avoidance of

its legal responsibility in light of the decimation of its common carrier expertise. Life may not fair, but a government of the people, by the people, and for the people must be or it will perish from the earth. The FCC Brief inadvertently acknowledges that it has engaged in invidious discrimination against disfavored companies or industries including legacy telephone companies. This Court, which played a critical role by its decision in *Verizon v. FCC* in obtaining the correct Title II classification, should now finish the important pro-competitive impact for international telecommunications services that it began in *Cable & Wireless* towards a more open and competitive global open internet. The petitioners and the FCC ignorance of the international dimension is likely to lead to the worst of two worlds -- that is, no market access for U.S. telecommunications and information services providers abroad and legally binding commitments to permit intrusive access by foreign state-owned enterprises to the U.S. network. Our trading partners have not lived up to their Uruguay Round commitment to progressively liberalize trade in telecommunications and information services. Rather than continuing to ignore this transgression, the FCC must act accordingly. The FCC brief makes it clear that the FCC will not do so absent court direction. As Winston Churchill once said, the truth is incontrovertible. Malice may attack it, ignorance may deride it, but in the end, there it is.

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William J. Kirsch

September 2015