INITIAL VERSION

ORAL ARGUMENT SCHEDULED FOR DECEMBER 4, 2015

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

No. 15-1063 (and consolidated cases)

FULL SERVICE NETWORK, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

AT&T INC., *et al.*,
Intervenors for Respondents,

TECHFREEDOM, *et al.*,
Movants-Intervenors for Respondents.

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

JOINT BRIEF FOR INTERVENORS IN SUPPORT OF RESPONDENTS IN CASE NO. 15-1151

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September 21, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), intervenors 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"), CenturyLink, TechFreedom, CARI.net, Jeff Pulver, Scott Banister, Charles Giancarlo, Wendell Brown, David Frankel, and Akamai Technologies, Inc. ("Akamai") certify as follows:

A. Parties and Amici

All parties, intervenors, and amici appearing before the Federal Communications Commission ("FCC") and in this Court are listed in the Joint Brief for Petitioners USTelecom et al. and in the Brief for Respondents.

B. Rulings 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 intervenors are unaware of any other related cases pending before this Court or any other court.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, intervenors USTelecom, NCTA, CTIA, ACA, WISPA, AT&T, CenturyLink, TechFreedom, CARI.net, and Akamai submit the following corporate disclosure statements:

ACA: ACA has no parent corporation and no publicly held corporation owns 10 percent or more of its stock, pays 10 percent or more of its dues, or possesses or exercises 10 percent or more of the voting control of ACA.

As relevant to this litigation, ACA is a trade association of small and medium-sized cable companies, most of which provide broadband Internet access service. ACA is principally engaged in representing the interests of its members before Congress and regulatory agencies such as the Federal Communications Commission.

Akamai: Akamai is a publicly traded company that has no parent company, and no publicly held company owns 10 percent or more of its stock.

AT&T: AT&T is a publicly traded corporation that, through its wholly owned affiliates, is principally engaged in the business of providing communications services and products to the general public. AT&T has no parent company, and no publicly held company owns 10 percent or more of its stock.

CARI.net: Cari.net, Inc., doing business as CARI.net, is a privately held California S-Corporation. It has no parent corporation, and no corporation holds any stock in it.

CenturyLink: The CenturyLink companies participating in this petition for review are CenturyLink, Inc. (a publicly traded company) and its wholly owned subsidiaries. CenturyLink, Inc. owns subsidiaries that provide broadband Internet access and other communications services (e.g., voice, broadband, and video) to consumers and businesses. Among the subsidiaries owned by CenturyLink, Inc. are regulated incumbent local exchange carriers. CenturyLink's local exchange carriers provide local exchange telecommunications and other communications services in 37 states, including broadband Internet access. Another subsidiary is CenturyLink Communications, LLC, which provides intrastate and interstate communications services, both domestically and internationally, including broadband Internet access. CenturyLink, Inc. has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

CTIA: CTIA (formerly known as the Cellular Telecommunications & Internet Association) is a Section 501(c)(6) not-for-profit corporation organized under the laws of the District of Columbia and represents the wireless communications industry. Members of CTIA include service providers, manufacturers, wireless data and Internet companies, and other industry

participants. CTIA has not issued any shares or debt securities to the public, and CTIA has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public.

NCTA: NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving over 80 percent of the nation's cable television customers, as well as more than 200 cable program networks. NCTA's members also include equipment suppliers and others interested in or affiliated with the cable television industry. NCTA has no parent companies, subsidiaries, or affiliates whose listing is required by Rule 26.1.

TechFreedom: TechFreedom is a nonprofit, non-stock corporation organized under the laws of the District of Columbia. TechFreedom has no parent corporation. It issues no stock.

USTelecom: USTelecom is a non-profit association of communications providers. Its members provide broadband services, including retail broadband Internet access and interconnection services, to millions of consumers and businesses across the country. USTelecom states that it has no parent corporation and that no publicly held corporation owns 10 percent or more of its stock.

WISPA: WISPA is a non-profit association that represents the interests of providers of fixed wireless broadband Internet access services. WISPA has no

parent corporation, and no publicly held corporation owns 10 percent or more of its stock, pays 10 percent or more of its dues, or possesses or exercises 10 percent of the voting control of WISPA. There is no publicly held member of WISPA whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims WISPA is pursuing in a representative capacity.

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GLOSSARY

1996 Act or Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56
2015 Broadband Progress Report	2015 Broadband Progress Report and Notice of Inquiry, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 30 FCC Rcd 1375 (2015)
APA	Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*
Computer II	Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 (1980)
FCC	Federal Communications Commission
FSN	Petitioners Full Service Network, Sage Telecommunications, Telscape Communications, and TruConnect Mobile
NPRM	Notice of Proposed Rulemaking, *Protecting and Promoting the Open Internet*, 29 FCC Rcd 5561 (2014) (JA___-__)
Order	Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015) (JA___-__)
O'Rielly Dissent	Dissenting Statement of Commissioner Michael O'Rielly to *Order* (JA___-__)
Pai Dissent	Dissenting Statement of Commissioner Ajit Pai to *Order* (JA___-__)

Seventeenth Mobile Competition Report	Seventeenth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, 29 FCC Rcd 15311 (Wireless Telecom. Bur. 2014)
Stevens Report	Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501 (1998)

STATUTES AND REGULATIONS

All pertinent statutes and regulations are reproduced in the addenda to the Brief of Petitioners Full Service Network et al. and the Brief for Respondents.

INTRODUCTION AND SUMMARY OF ARGUMENT

The brief of petitioners Full Service Network et al. (collectively, "FSN") presents arguments that FSN lacks standing to raise and that neither the FCC nor this Court could lawfully accept. FSN's "challenge" to the *Order*'s reclassification of broadband in fact urges this Court to *sustain* that decision — just on a different legal basis from the one the FCC adopted. Article III bars FSN from making such a claim, and binding Supreme Court precedent forecloses the alternative legal basis in any event. FSN's attack on the scope of forbearance that the FCC granted likewise assails aspects of the *Order* as to which FSN has demonstrated no injury. Moreover, FSN's contention that the very limited forbearance that the *Order* granted was too much is, again, contrary to settled, directly on-point precedent.

If, however, the Court *were* to vacate the FCC's forbearance decisions, it would also have to vacate the FCC's inextricably intertwined decision to reclassify broadband Internet access as a service subject to Title II common-carrier treatment. Otherwise, the Court would be imposing a result — the *full* application of Title II to broadband Internet access service — that the agency never sought comment on

and expressly rejected because it would have devastating consequences for investment and innovation in a crucial sector of the American economy.

I. Reclassification. FSN objects to the FCC's reasoning in reclassifying fixed and mobile broadband Internet access service as a common-carrier service subject to Title II of the Communications Act. Specifically, FSN contends that, rather than deciding that reclassification falls within its discretion, the FCC should have concluded that the Act unambiguously *requires* that result because, as FSN reads the statute, every "information service" necessarily includes a "telecommunications service" subject to Title II common-carriage obligations. But this Court has clearly established that "disagreement with an agency's rationale for a substantively favorable decision" does not create Article III standing. *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 674 (D.C. Cir. 1994).

Even if the Court could adjudicate FSN's claim, it could not adopt FSN's position because it is foreclosed by Supreme Court precedent. *See NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 986-1000 (2005). In *Brand X*, the Supreme Court upheld an FCC decision classifying broadband Internet access as a single, integrated information service that contains no separate telecommunications-service offering. FSN's suggestion that *Brand X* was wrongly decided is not cognizable in this Court. In any event, the text of the Communications Act, including its definition of an "information service," and decisions of this Court,

see Verizon v. FCC, 740 F.3d 623, 630, 650 (D.C. Cir. 2014), likewise directly contravene FSN's contention.

II. Forbearance. FSN also lacks standing to attack the scope of the *Order*'s forbearance because FSN has not claimed, much less substantiated, a concrete harm from those determinations. FSN was required, but "failed," "to explain *how* it was being injured" by those decisions. *Core Communications, Inc. v. FCC*, 545 F.3d 1, 2 (D.C. Cir. 2008); *see* D.C. Cir. R. 28(a)(7). The provisions from which the *Order* forbears do not apply to FSN, and FSN has presented no concrete business plan under which it would benefit if the scope of forbearance were narrowed.

Even if FSN's attacks on the *Order*'s forbearance were cognizable, they fail on the merits. The *Order* undoubtedly is not a logical outgrowth of the *NPRM*. But the alternative FSN advocates — *zero* forbearance — would make the *Order* an even *more* glaring violation of the APA. The *NPRM* asked questions about using Title II only as a source of additional authority for discrete Open Internet rules, and forbearing from all but a few "core" provisions if the FCC ultimately decided to reclassify, identifying only six provisions the agency contemplated imposing. *NPRM* ¶ 154 (JA___). FSN's approach of imposing all of Title II thus would further widen the chasm between the *NPRM* and the *Order*.

FSN's substantive attacks on forbearance are equally meritless. It claims that the FCC could not forbear from *anything* and that broadband providers must bear the full weight of Title II regulation. But FSN offers nothing to refute the *Order*'s repeated findings that the result it supports would inflict massive damage on the American economy. *E.g.*, *Order* ¶¶ 495, 501, 514 (JA___-__, ___, ___-__). To be sure, the forbearance the *Order* affords is insufficient to mitigate the immense harms reclassification imposes. *See* USTelecom Pet'rs Br. 55. But eliminating even that modest relief would make matters worse, substantially increasing the *Order*'s costs and burdens. FSN's further claim that the FCC could not address forbearance on a nationwide basis contradicts controlling precedent, *see EarthLink, Inc. v. FCC*, 462 F.3d 1, 8 (D.C. Cir. 2006), and common sense: it would be irrational to require a market-by-market forbearance analysis in the same *Order* that (unlawfully, in our view) reclassified *all* broadband Internet access providers on an across-the-board, nationwide basis.

III. Severability. The irony of FSN's submission is that, if its attacks on forbearance were cognizable and meritorious, they would only provide *more* reason to vacate the entire *Order*. The reclassification and forbearance decisions are undoubtedly "intertwined." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1028 (D.C. Cir. 2000). Indeed, the FCC explicitly relied on its forbearance determinations in deciding to reclassify. *E.g.*, *Order* ¶ 360 (JA___). To uphold

reclassification without forbearance would, in the FCC's own assessment, apply burdensome, ill-fitting, and unnecessary regulation to broadband services and not "sensibly serve the goals" the FCC intended those determinations to further. *MD/DC/DE Broadcasters Ass'n v. FCC*, 253 F.3d 732, 734 (D.C. Cir. 2001). Any vacatur of the forbearance decisions thus must result in vacatur of the FCC's closely related reclassification decisions as well. Any other result would create a regime that the agency itself repudiated; would impose an even greater shock to the economy than the *Order* on review; and would be deeply unfair to thousands of broadband Internet access providers, large and small, that the FCC concedes relied on immunity from the aspects of Title II from which it forbore.[1]

[1] All intervenors submitting this brief (except Akamai) join in all arguments made herein. Accordingly, although FSN claims (at 2-3) that the TechFreedom parties' timely intervention — filed within 60 days of a petition for review consolidated in this case — was untimely as to FSN's petition alone, the Court need not reach that issue because FSN does not challenge the other intervenors' timeliness (nor does FSN challenge TechFreedom's intervention as to the other petitions). Akamai agrees that the Court should reject FSN's challenge to the FCC's forbearance rulings and joins Part II.C.3 of the brief.

ARGUMENT

I. FSN'S ARGUMENTS FOR RECLASSIFYING BROADBAND ARE NOT PROPERLY BEFORE THE COURT AND LACK MERIT

A. FSN Does Not Have Standing To Challenge the FCC's Rationale for Reclassifying Broadband

FSN comes not to bury reclassification but to praise it. FSN *supports* the FCC's reclassification of fixed and mobile broadband Internet access service as a Title II telecommunications service. *See* FSN Br. 40. FSN, however, contends that the FCC should have used different reasoning to reach that result — namely, it should have held that the statute unambiguously requires reclassification. *See id.* at 20-30.

FSN lacks standing to challenge the agency's reasoning in support of a substantive outcome that FSN supports. It is well established that "mere disagreement with an agency's rationale for a substantively favorable decision does not constitute the sort of injury necessary for purposes of Article III standing." *Crowley Caribbean Transp.*, 37 F.3d at 674; *see Telecommunications Research & Action Ctr. v. FCC*, 917 F.2d 585, 588 (D.C. Cir. 1990) ("That TRAC disagrees with the rationale employed by the FCC to reach a result it endorsed below does not constitute injury cognizable for standing purposes.").

B. FSN's Arguments in Support of Reclassifying Broadband Internet Access Service Are Meritless and Foreclosed by Binding Precedent

Even aside from FSN's lack of standing, its argument that the FCC was *compelled* to reclassify broadband Internet access as a Title II telecommunications service subject to common-carrier regulation is plainly wrong.

FSN claims that, as a statutory matter, *every* offering of an "information service" necessarily includes a separate offering of a "telecommunications service" that is subject to Title II. *See, e.g.*, FSN Br. 25 ("[T]he only way for the statute and the [FCC] regulation[s] to coexist is if . . . there is a regulated telecommunications service included in the public offering of an information service.").

The Supreme Court considered and rejected that very argument in *Brand X*. The Court specifically upheld the FCC's conclusion that broadband Internet access service is a single, integrated information service with *no* separable last-mile telecommunications service offering. *See, e.g.*, 545 U.S. at 990 (concluding that, from a customer's perspective, last-mile "high-speed transmission" is "sufficiently integrated" with information-service functionalities that there was no separate "offering" of a telecommunications service).

Indeed, EarthLink (represented by the same counsel as FSN here) unsuccessfully made the same argument in *Brand X* that FSN now raises. *See* Br. for Respondents EarthLink et al. at 18, *NCTA v. Brand X Internet Servs.*, 545 U.S.

967 (2005) (Nos. 04-277, -281) (arguing that the FCC's conclusion "that cable modem service does not *include* a telecommunications service . . . is contrary to the plain text of the statute, as well as to prior precedent under which the telecommunications component of an information service retains its independent regulatory status"). The Supreme Court squarely addressed and rejected that claim. *See* 545 U.S. at 996-97 (holding that the statute "fails unambiguously to classify facilities-based information-service providers as telecommunications-service offerors").

FSN argues that this Court should reach a different conclusion from *Brand X* but offers no basis on which it could properly do so. Quoting *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), FSN argues that *Brand X* improperly ignored the "'design and structure of the statute as a whole,'" FSN Br. 27 (quoting 134 S. Ct. at 2442). Even if that claim were correct (and it is not, *see Brand X*, 545 U.S. at 992-97), this Court is not free to hold that the Supreme Court erred in *Brand X* or that a later case overruled it "by implication." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). The Supreme Court "alone" has the "prerogative" to invalidate one of its past decisions. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

FSN's arguments would require overruling not only *Brand X*, but also multiple decisions of this Court that treated broadband Internet access as a single,

integrated information service with no separate offering of a common-carrier telecommunications service. *Verizon* held that the FCC could not impose common-carriage duties on an information-service provider where there was no separate offering of telecommunications service. *See* 740 F.3d at 630, 650. And *Cellco Partnership v. FCC*, 700 F.3d 534 (D.C. Cir. 2012), upheld the FCC's statutory interpretation excluding "providers of 'information services'" from common-carriage obligations, again in a context where there was no separate offering of a telecommunications service. *Id.* at 538. FSN's argument that every information service includes a common-carrier telecommunications service is directly contrary to these binding decisions.

Even if the issue were not resolved by precedent, FSN's claim is meritless. The 1996 Act's definition of "information services" provides that the term broadly encompasses services that offer "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications.*" 47 U.S.C. § 153(24) (emphasis added). Congress thus defined all information services to include "transmission." *Id.* § 153(50) (defining telecommunications). But Congress did not — as FSN contends — define all information services to be provided via a "telecommunications service," *id.* § 153(53), and only telecommunications services can be subject to common-carrier regulation, *see id.* § 153(51). In fact, the FCC has consistently held that Congress

intended the categories of "information service" and "telecommunications service" to be "mutually exclusive." *E.g.*, *Stevens Report* ¶ 13; *see Verizon*, 740 F.3d at 630 ("[T]he Act defines two categories of entities: telecommunications carriers . . . and information-service providers . . . ."). That congressional choice is fundamentally inconsistent with FSN's argument.

FSN's argument is likewise contrary to the Communications Act's structure. FSN claims that all communications services are subject to common-carriage regulation except where Congress has expressly said otherwise. *See* FSN Br. 25. FSN has things backward. The Act states explicitly that telecommunications providers may be regulated as common carriers *only* when they are offering a specific service that meets the definition of a telecommunications service. *See* 47 U.S.C. § 153(51) ("A telecommunications carrier shall be treated as a common carrier under this chapter *only to the extent* that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.") (emphasis added). And this Court has recognized that common-carrier treatment is permissible only where a provider voluntarily offers its service on a common-carriage basis or where it may lawfully be compelled to do so (*i.e.*, to address demonstrated market power). *See* USTelecom Pet'rs Br. 73-75.

Congress similarly made plain that providers of mobile services can be subject to common-carriage duties only when they offer a service that is properly classified as a "commercial mobile service." *See* 47 U.S.C. § 332(c)(1)(A) ("A person engaged in the provision of a . . . commercial mobile service shall, *insofar as such person is so engaged*, be treated as a common carrier for purposes of this chapter . . . .") (emphasis added). Indeed, despite the fact that this clear limitation in § 332 provides an entirely *independent* reason why mobile broadband cannot be subject to common-carriage duties, *see* USTelecom Pet'rs Br. 57-59, FSN does not address this statutory provision at all.

Nor does the FCC's pre-1996 *Computer* regime support FSN's argument (or the FCC's result) here. Contrary to FSN's argument, *see* FSN Br. 21-23, 28-29, the *Computer* rules did not impose the same common-carriage obligation that the *Order* creates. The *Order* is explicit in defining the service subject to Title II as extending from an end user all the way to the connection to the "edge provider" (*e.g.*, Google) or another Internet network. *See, e.g.*, *Order* ¶ 195 (JA___). By contrast, where they applied, the FCC's *Computer* decisions only required a local telephone company to tariff the *last-mile* connectivity between the end user and the enhanced service provider's facilities. *See* USTelecom Pet'rs Br. 9 n.8; *Computer II* ¶ 231; AT&T Feb. 2, 2015 Ex Parte (H) 4 (JA___). Even today, when local telephone companies have chosen to offer last-mile broadband connectivity

pursuant to tariff, that service is limited to a wholesale, point-to-point, last-mile connection.[2] None of that history supports the conclusion that it is permissible (much less, as FSN claims, *required*) for the FCC to subject the full broadband Internet access service — from the end user all the way across the Internet — to common-carrier regulation as a telecommunications service.

II. THE COURT SHOULD REJECT FSN'S CHALLENGES TO THE FCC'S FORBEARANCE RULINGS

A. FSN Lacks Standing To Challenge the FCC's Forbearance Rulings

FSN also has failed to establish that it has standing to challenge the forbearance granted in the *Order*. Under the Court's rules and precedent, a petitioner must establish standing in its opening brief, unless its standing is self-evident. *See* D.C. Cir. R. 28(a)(7); *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002). Contrary to FSN's claim (at 8), its standing to challenge the FCC's forbearance decision is not at all self-evident because FSN is not complaining that it is the *object* of any of those FCC decisions. FSN contends instead that, through forbearance, the FCC reduced the regulation that would apply to *other parties* as a result of the FCC's reclassification decision. *See* FSN Br. 13.

[2] *See* AT&T Feb. 2, 2015 Ex Parte (H) 3-4 & n.9 (JA___-__) (citing NECA Tariff No. 5, § 8.1.1).

FSN has not come close to making the required showing of standing to raise that argument. FSN offers only vague statements alleging adverse impact on its "ability to compete." *Id.* at 8; *see also* FSN Pet. 2 (asserting that enforcement of forborne-from provisions would "enable [FSN] to engage in competitive offerings of broadband Internet access service to consumers"). FSN has not substantiated those allegations with declarations, as Circuit Rule 28(a)(7) requires. Even taken at face value, FSN's hazy assertions are insufficient. FSN has not offered any concrete business plan under which it would benefit from the relevant regulations being imposed (for the first time) on other parties.

In this respect, FSN is similarly situated to Core Communications, which challenged an FCC decision *not* to forbear from regulations that applied to other companies. This Court dismissed Core's petition for lack of standing because Core "failed to explain *how* it was being injured" by the FCC's decision: "It did not reveal what services it offered or planned to offer that are or would be affected by the[ ] statutory provisions" at issue or "say anything to indicate the seriousness of its plans." *Core Communications*, 545 F.3d at 2. Like Core, "[a]t no point . . . in the opening brief" does FSN "show how its position, with respect to some specific service, would be improved by grant of its petition" for review of the FCC's forbearance decisions. *Id.* at 3-4.

B. The FCC's Glaring Notice Violations Cannot Be Remedied Piecemeal

Even if FSN has standing to raise them, its notice-related arguments about forbearance miss the mark. FSN contends that the FCC provided insufficient notice under the APA for its forbearance decisions. *See* FSN Br. 12-13. The *NPRM* indeed provided insufficient notice of the regulatory regime the FCC ultimately adopted. The FCC pulled a bait-and-switch by deciding — *after* the notice-and-comment process — to design a "Title II tailored for the 21st Century" nowhere foreshadowed in the *NPRM* (or authorized by Congress). *See* USTelecom Pet'rs Br. 83-94; TechFreedom Br. 6. The FCC provided no notice of its path to reclassification and, moreover, indicated that it was considering using Title II solely as a potential additional source of legal authority for "Open Internet" rules, rather than an end in itself. *See NPRM* ¶¶ 149-150 (JA___-__).

The notice problems with the FCC's core reclassification decision require vacatur of the *Order* in its entirety. Instead of remedying the FCC's error by vacating the entire *Order*, however, FSN urges the Court to exacerbate that error by vacating *only* the forbearance determinations while leaving the reclassification ruling intact. But there is no basis on which the Court could find that the *NPRM* provided adequate notice of the reclassification decision but insufficient notice as to the FCC's forbearance decisions. The FCC *never* suggested that it would apply all of Title II without any forbearance. In fact, to the extent the *NPRM* discussed

Title II at all, it gave every indication to the contrary. *See NPRM* ¶¶ 153-155 (JA___-__).[3] Leaving reclassification in place but vacating forbearance thus would result in an order bearing even *less* resemblance to the *NPRM* than the *Order* the FCC adopted. *See also infra* Part III. If the Court concludes that the FCC's forbearance decision violated the APA's notice requirements, the entire *Order* must be vacated.

C. The FCC's Refusal To Apply All of Title II Was Neither Arbitrary Nor Capricious

FSN's attacks on the reasoning and result of the *Order*'s forbearance analysis have no more substance. The result FSN advocates — reclassification without *any* forbearance — would subject broadband to every aspect of Title II's utility-style regime. FSN's preference for comprehensive regulation cannot be reconciled with Congress's announced "policy" of "preserv[ing] the vibrant and competitive free market that presently exists for the Internet . . . , unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(2), or with its directive that the FCC "encourage the deployment . . . of advanced telecommunications capability . . . by utilizing . . . regulatory forbearance," *id.* § 1302(a). Nor can FSN's

[3] Even in the *NPRM*'s cursory discussion of a more limited and focused Title II, it suggested far *greater* forbearance than the FCC actually adopted. *See NPRM* ¶ 154 (JA___) (identifying only six provisions of Title II as to which the FCC would not forbear).

regulatory vision be reconciled with the FCC's repeated statements that narrower forbearance than the *Order* afforded would cause adverse consequences and undermine the public interest. *See, e.g.*, *Order* ¶ 495 (JA___) ("undesired detrimental effects on broadband deployment" that would exist if broadband providers were subject to an "untailored" Title II); *id.* ¶ 500 (JA___) (more limited forbearance would "risk needlessly detracting from providers' broadband investments"); *id.* ¶ 501 (JA___) (forbearance is "part of an overall regulatory approach designed to promote infrastructure investment"); *id.* ¶ 514 (JA___-__) ("[T]he public interest . . . is best served by an overall regulatory framework that includes forbearance from these provisions, which balances the need for appropriate Commission oversight with the goal of tailoring its regulatory requirements.").

FSN offers nothing to refute these FCC determinations. FSN nevertheless urges the Court to vacate the *Order*'s forbearance because, it claims, the FCC could not forbear without first conducting localized market analyses, without more evidence that broadband is competitive, and without determining precisely how certain Title II provisions *would* apply if the FCC did *not* forbear from them. None of FSN's claims has merit.

1. FSN criticizes (at 14-16) the FCC's use of a nationwide approach to forbearance from statutory provisions (such as § 251) that apply to local telephone

companies. This Court has rejected that argument, holding that the forbearance statute "imposes no particular mode of market analysis or level of geographic rigor." *EarthLink*, 462 F.3d at 8. And the Court has twice upheld FCC grants of forbearance on a nationwide basis, including with respect to a statutory provision (47 U.S.C. § 271) that applies to local telephone companies on a state-by-state basis. *See id.*; *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 909 (D.C. Cir. 2009) (upholding nationwide forbearance from dominant-carrier regulation under Title II for certain telecommunications service offerings); *see also* FCC Br. 135-38 (rejecting claims that forbearance can be granted "*only* on the basis of competition" and that competition must be assessed in "each local market").

Assuming *arguendo* that the Title II reclassification is upheld, the FCC's decision to grant forbearance on a nationwide basis is consistent with the statute and existing precedent. By contrast, the FCC *was* required to conduct a market-by-market analysis in its underlying reclassification decision. *See* USTelecom Pet'rs Br. 73-75. The FCC's decision to impose common-carrier duties on all broadband Internet access service providers across the nation and the extension of those duties to interconnection, without finding that any provider (much less every provider) has market power (or voluntarily served consumers indifferently), was unlawful. At the very least, FSN cannot have it both ways: if the FCC erred in forbearing

without engaging in a market-by-market inquiry, then its undifferentiated, nationwide reclassification decision was *ipso facto* unlawful as well.

FSN's reliance (at 16) on *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), is misplaced because that case did not address forbearance under § 160. In any event, the Court there upheld the FCC's use of a nationwide analysis under § 251. *See* 359 F.3d at 587.[4]

2. FSN is also wrong to suggest (at 18-20) that forbearance was inappropriate because broadband Internet access service is not competitive. As noted, the FCC reclassified thousands of broadband providers without finding that any one of them has market power in any properly defined geographic and product market, while ignoring the substantial variations in competitive circumstances that prevail in different places around the country. The FCC certainly did not conclude that every provider nationwide has such power.

Nor could it have done so. As the record demonstrates, there is widespread competition in broadband Internet access service. For example, the most recent FCC data show that, as of December 2013, 65 percent of households were in

[4] FSN incorrectly suggests (at 9-10) that the FCC's forbearance ruling must be judged by the procedural filing standards set out in 47 C.F.R. §§ 1.53-1.59. Those rules apply to forbearance petitions filed by regulated parties under § 160(c). *See* FCC Br. 140-41. They do not (and cannot) undermine the FCC's obligation, under § 160(a), to forbear when the statutory criteria are met.

census tracts where three or more providers offered broadband at speeds of at least 10 Mbps (download)/1.5 Mbps (upload) — more than double the percentage of households in 2012. *See* Industry Analysis & Technology Div., FCC, *Internet Access Services: Status as of December 31, 2013*, fig. 5(a) (Oct. 2014), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-329973A1.pdf. On the mobile side, 98 percent of U.S. consumers live in areas covered by at least two 4G LTE providers, 93 percent live in areas covered by three providers, and most have access to four. *See, e.g.*, Pai Dissent 358 & n.282 (JA___) (citing *2015 Broadband Progress Report* ¶ 109); *Seventeenth Mobile Competition Report* ¶ 51 & chart III.A.2. This vibrant competition has resulted in increased speeds, falling prices, and greater consumer choice. *See* O'Rielly Dissent 395 & nn.46-47 (JA___). FSN's argument that broadband is not competitive cannot be squared with the evidence.

3. Finally, and contrary to FSN's argument (at 31), the FCC did not need to determine whether provisions of §§ 251 and 252 apply to broadband providers — that is, to resolve whether the reclassified broadband service is "telephone exchange service" or "exchange access"[5] — before determining that it would forbear from those provisions. This Court has repeatedly rejected arguments that

[5] *See Order* ¶ 513 & n.1575 (JA___-__) (declining to resolve those issues).

the FCC must determine whether a particular statutory requirement applies before deciding whether it would forbear from that requirement if it applied. *See, e.g.*, *Feature Grp. IP West, LLC v. FCC*, 424 F. App'x 7, 9 (D.C. Cir. 2011) (per curiam) ("Nothing in [§ 160] requires the FCC to determine a party's existing legal obligations before ruling on a forbearance petition."); *AT&T Inc. v. FCC*, 452 F.3d 830, 836-37 (D.C. Cir. 2006) (FCC could not refuse to consider a forbearance petition on the ground that "the petition seeks forbearance from uncertain or hypothetical regulatory obligations"). The FCC expressly relied on this Court's decisions and explained why "exhaustively determining provision-by-provision and regulation-by-regulation whether and how particular provisions and rules apply" was both undesirable (because it "could create precedent with unanticipated consequences") and unnecessary (because it "would not alter the ultimate regulatory outcome in this Order in any event"). *Order* ¶ 542 (JA___). That judgment was reasonable.[6]

[6] Even if the FCC had not forborne, or if it had addressed the application of §§ 251 and 252 before doing so, FSN is wrong to argue (at 16-18) that broadband Internet access is an intrastate, local service. This Court has repeatedly upheld the FCC's classification of Internet access service as an interstate service because it is jurisdictionally mixed and nonseverable. *See Core Communications, Inc. v. FCC*, 592 F.3d 139, 144 (D.C. Cir. 2010); *cf. Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 6 (D.C. Cir. 2000) (agreeing that cases presenting "a single, continuous communication, originated by an end-user . . . and eventually delivered to its destination" are properly classified using end-to-end jurisdictional analysis).

III. THE FCC'S FORBEARANCE DECISION IS NOT SEVERABLE FROM ITS RECLASSIFICATION DECISION

If the Court nevertheless accepts any of FSN's challenges to the forbearance decisions, that ruling would only provide an additional reason why the *entire Order* must be vacated. Sustaining reclassification but vacating forbearance would yield a regime that, as the *Order* makes clear, the FCC never intended and that the FCC in fact recognized would have devastating consequences for innovation and investment in one of the nation's most significant industries.

An unlawful aspect of an order cannot be severed if the remaining parts of an agency decision could not "sensibly serve the goals for which [they were] designed." *MD/DC/DE Broadcasters*, 253 F.3d at 734. Where an invalid part of an agency order is "intertwined" with other aspects of that order, the proper resolution is to vacate the order as a whole. *Appalachian Power*, 208 F.3d at 1028. More generally, the relevant issue is whether there is "substantial doubt that the agency would have adopted" the severed portion on its own. *North Carolina v. FERC*, 730 F.2d 790, 796 (D.C. Cir. 1984) (Scalia, J.).

The *Order* leaves no doubt that reclassification without broad forbearance is inconsistent with the FCC's intent. Rather, it repeatedly establishes that, in the FCC's view, reclassification and forbearance are intertwined and that the FCC would not have adopted reclassification without tempering it through forbearance. The FCC asserted that forbearance was "*part* of an overall regulatory approach

designed to promote infrastructure investment," *Order* ¶ 501 (JA___) (emphasis added), and that only by taking *both* steps could the FCC create the "Title II tailored for the 21st Century" that the *Order* touts. *Id.* ¶ 38 (JA___). Although intervenors have explained that Title II reclassification is unlawful and that the forbearance granted by the FCC does not come close to undoing the harmful effects of applying Title II to broadband, *see* USTelecom Pet'rs Br. 30-55; TechFreedom Br. 13-29, the FCC plainly understood forbearance to be integral to the regulatory regime it sought to create and recognized the significant harms that would be created by wholesale application of Title II to broadband, *see Order* ¶ 434 (JA___) (FCC was granting "substantial forbearance" in order to "strike the right balance at this time of minimizing the burdens on broadband providers while still adequately protecting the public").

Indeed, the FCC repeatedly emphasized that forbearance was necessary to avoid undermining the core statutory policy of promoting broadband access and deployment. *See* 47 U.S.C. § 1302(a) (requiring the agency to "encourage the deployment . . . of advanced telecommunications capability to all Americans"). Over and over, the *Order* justifies forbearance by highlighting the need to avoid the "undesired detrimental effects on broadband deployment" that would exist if broadband providers were subject to an "untailored" Title II. *Order* ¶ 495 (JA___); *see also id.* ¶¶ 500-501, 514 (JA___-__, ___-__). The FCC indicated,

moreover, that adopting full-blown reclassification without forbearance would upset the reliance interests that had led large and small companies to invest hundreds of billions of dollars to deploy broadband. *See id.* ¶ 360 (JA___).

Applying Title II without forbearance thus would fundamentally alter the regime the FCC believed it was adopting. It would undermine the agency's claim that it was not adopting the same Title II that applied "in the 20th Century" but instead a new "light-touch" approach more "focused" than any prior Title II regime. *Id.* ¶¶ 37-38 (JA___). Thus, there is, at a minimum, a "substantial doubt" whether the FCC would have reclassified without forbearance. *North Carolina*, 730 F.2d at 796.

This conclusion is not altered by the general language in the *Order* indicating that the FCC understood that "the rules, requirements, classifications, definitions, and other provisions that we establish in [the *Order*] operate independently." *Order* ¶ 574 (JA___). The FCC's severability discussion in the *Order* addressed solely why the invalidation of one of the Open Internet rules should not lead to vacatur of the others and why the reclassifications of fixed and mobile broadband should be understood to be independent. *Id.* ¶¶ 575-576 (JA___). The FCC did not assert in the *Order* (or in its brief to this Court) that its forbearance decisions were severable from its reclassification decisions. In any event, even where the agency has "expressed . . . a general preference for

severance," this Court will reject that course of action where, as here, the result would not "sensibly serve" the intended policy result. *MD/DC/DE Broadcasters*, 253 F.3d at 734.[7]

[7] In the past, FCC Commissioners have been more forthright about the connection between reclassification and forbearance. As Commissioner Clyburn once explained, "without forbearance there is no reclassification. . . . Think peanut butter and jelly. Salt and pepper. Batman and Robin." *Broadband Authority and the Illusion of Regulatory Certainty* 2, Prepared Remarks of Commissioner Mignon L. Clyburn, Media Institute Luncheon (June 3, 2010).

CONCLUSION

For the foregoing reasons, the Court should dismiss FSN's petition for lack of standing or, alternatively, deny the petition.

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Respectfully submitted,

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CIRCUIT RULE 32(a)(2) ATTESTATION

In accordance with D.C. Circuit Rule 32(a)(2), I hereby attest that all other parties on whose behalf this joint brief is submitted concur in the brief's content.

/s/ *Michael K. Kellogg*
Michael K. Kellogg

September 21, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(e), as modified by the Court's June 29, 2015 briefing order granting intervenors 5,625 words, the undersigned certifies that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(e)(1), this brief contains 5,374 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2013) used to prepare this brief.

/s/ *Michael K. Kellogg*
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September 21, 2015

CERTIFICATE OF SERVICE

I hereby certify that, on September 21, 2015, I electronically filed the foregoing joint brief 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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