

In the
**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 12-1334

UNITED STATES TELECOM ASSOCIATION, *ET AL.*,
PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,
RESPONDENTS.

**ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION**

**BRIEF FOR *AMICUS CURIAE* OPEN INTERNET
CIVIL RIGHTS COALITION FOR AFFIRMANCE
IN SUPPORT OF RESPONDENTS**

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September 21, 2015

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, and Rule 26.1 of this Court, the Open Internet Civil Rights Coalition (OICRC) respectfully submits this Corporate Disclosure Statement:

OICRC is an *ad hoc* coalition of civil rights organizations formed for the purpose of submitting a brief in this case. It is not incorporated and has no other formal legal status. Its members are as follows:

National Hispanic Media Coalition

18MillionRising.org

Presente.org

Center for Media Justice

Common Cause

Media Action Grassroots Network

All of the members of OICRC except Media Action Grassroots Network are 501(c)(3) corporations and have no parent companies. Media Action Grassroots Network is unincorporated. None of the members of OICRC have issued shares to

the public.

Respectfully submitted,

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

Parties

All parties are listed in the Brief for Petitioners

Ruling Under Review

Protecting and Promoting the Open Internet, 30 FCCRcd 5601 (2015)(JA___).

Related Cases

The ruling under review was issued in response to a remand from this Court in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014). *Amicus* is not aware of any other pending cases related to this one.

**CERTIFICATE OF COUNSEL REGARDING AUTHORITY
TO FILE AND SEPARATE BRIEFING**

All parties have consented to the filing of this brief. *Amicus curiae* Open Internet Civil Rights Coalition filed notice of its intent to participate on September 3, 2015.

Pursuant to Circuit Rule 29(d), counsel for *amicus curiae* Open Internet Civil Rights Coalition certifies that no other *amicus curiae* brief of which he is aware relates to the subjects addressed herein. In recognition of this Court's desire that parties should join in a single brief to the extent practicable, the six members of OICRC have determined that they have common interests and that they should file a single brief of no more than 4,000 words addressing the issues in these cases. However, given the nature of these cases and the large number of issues raised in the briefs of the Petitioners, Intervenors and the eleven *amici curiae* supporting Petitioners, there are a number of other parties with which counsel has been in contact which have different interests and are likely to file separate *amicus curiae* briefs. It is impracticable for all of these diverse parties to collaborate in a single brief, Moreover, in the circumstances of this case, the Court will benefit from the presentation of additional arguments on behalf of both

Petitioners and Respondents.

Respectfully submitted,

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AT&T Wireless Consumer Agreement, §6.2, available at <https://m.att.com/shopmobile/legal/terms.wirelessCustomerAgreement.html> . . . 14

Bergmayer, “Title II is Not Net Neutrality, and Net Neutrality is Not Utility Regulation,” available at <https://www.publicknowledge.org/news-blog/blogs/title-ii-is-not-net-neutrality-and-net-neutrality-is-not-utility-regulation> 18

Genachowski, Speech to the Brookings Institute (Sept. 21, 2009) at 6, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293568A1.pdf 13

*Authorities upon which *amicus curiae* chiefly relies are marked with asterisks.

Graeff, Stempeck and Zuckerman, *Mapping the Trayvon Martin Media Controversy*, First Monday - Peer Reviewed Journal on the Internet, Volume 19, Number 2, (February 3, 2014), available at <http://firstmonday.org/ojs/index.php/fm/article/view/4947/3821> 10,11

Maul, *African Americans and DIY: Using Etsy and Kickstarter to Boost a Business*, MadameNoire (Dec. 19, 2012), available at <http://madamenoire.com/240286/african-americans-and-diy-using-etsy-and-kickstarter-to-boost-a-business/> 8

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*Reed, “That Sneaky Exponential-Beyond Metcalfe's Law to the Power of Community Building,” Context Magazine 2, no. 1 (1999), available at <http://www.reed.com/dpr/locus/gfn/reedslaw.html> 7

Scurato, *Trends in Latino Mobile Phone Usage and What They Mean For U.S. Telecommunications Policy*, National Hispanic Media Coalition (Feb. 2012), available at http://www.nhmc.org/nhmcnew/wp-content/uploads/2013/03/mobile_policy_report.pdf 12

T-Mobile Terms & Conditions, effective October 20, 2013, §18, available at http://www.t-mobile.com/Templates/Popup.aspx?PAsset=Ftr_Ftr_TermsAndConditionsOct2013&print=true 14

GLOSSARY

FCC	Federal Communications Commission
MMTC	Multicultural Media, Telecom And Internet Council
OICRC	Open Internet Civil Rights Coalition
<i>Order</i>	<i>Protecting and Promoting the Open Internet</i> , 30 FCCRcd 5601 (2015)(JA___)
Section 706	Section 706 of the 1996 Telecommunications Act, Pub. L. 104-104, §706, 110 Stat. 153, codified at 47 U.S.C. § 1302

STATUTES AND REGULATIONS

Applicable statutes and regulations are set forth in Respondents Brief.

STATEMENT OF INTEREST

OICRC is an ad hoc coalition of the six civil rights organizations named below formed for the purpose of filing this brief. Its members have advocated the adoption of strong open Internet rules. They were among scores of civil rights groups which filed joint comments supporting strong open Internet rules under Title II.¹

18MillionRising.org uses new media and technology to help Asian

¹These groups included Voices for Internet Freedom, ColorofChange.org, Free Press, AimHigh LA, Appalshop, Art Is Change, Chicago Media Action, Clarisel Media, Common Frequency, Dignity and Power Now, Easton Community Access Television, Families For Freedom, Inc., Generation Justice, Hispanic Association of Colleges and Universities, Iguana Films, Institute for Intellectual Property and Social Justice, Iraq Veterans Against the War, Latino Rebels, Librotraficante Movement, Line Break Media, Main Street Project, Martinez Street Women's Center, May First/People Link, Media Alliance, Media Literacy Project, Media Mobilizing Project, Message Media Education, Mexican American Opportunity Foundation, MujerLatinaToday.com, National Association of Hispanic Journalists, National Association of Latino Independent Producers, National Consumer Law Center (on behalf of its low income clients), National Institute for Latino Policy, National Latina Institute for Reproductive Health, News Taco, Organizing Apprenticeship Project, Paper Tiger TV, Radio Bilingüe, Ruth Livier, St. Paul Neighborhood Network, The Greenlining Institute, The People's Press Project, TURN, Women In Media & News, Women, Action & the Media, Working Films, Working Narratives, and Young Women United. Comments of Internet Freedom Supporters, July 18, 2014, App. A (JA____-____).

American and Pacific Islander communities build power for social change. It has over 80 partners and over 80,000 members in all 50 states.

The Center for Media Justice is a Black-led, multiracial, national, next-generation organization dedicated to achieving racial equity through communication rights, access, and representation.

Common Cause is a nonpartisan, nationwide grassroots network of 400,000 members and supporters that has advocated open, honest, and accountable government for over 45 years.

The Media Action Grassroots Network is a local-to-local advocacy network of over 100 grassroots organizations across the country working together for media change to end poverty, eliminate racism, and ensure human rights. MAG-Net works with historically marginalized communities in building a public voice to shape the future of our media system.

The National Hispanic Media Coalition is a non-partisan, non-profit, media advocacy and civil rights organization. Its mission includes advocacy on media and telecommunications policy issues.

Presente.org, the largest national Latino online membership organization advancing social justice through technology, media, and culture, has more than 300,000 members. Its mission includes amplifying Latino voices and expanding

the political imagination and traditional boundaries.

SUMMARY OF ARGUMENT

The open Internet has been a particular boon to historically underserved communities. Through the Internet, people of color can bypass traditional entry barriers to interact with each other and the larger community. This benefits everyone in society. The open Internet has reduced the cost of starting a business. People of color are among those who can access capital via crowdfunding and access retail platforms like Etsy. It also facilitates artistic expression by eliminating intermediaries so artists can interact directly with their audiences.

The open Internet has been a particularly powerful tool for organizations that serve people of color to promote social change. So, too, does the open Internet provide a platform for political and social expression by shedding light on issues and events that have typically gone unnoticed by traditional mass media outlets. The MIT Center for Civic Media found that initial coverage of the Trayvon Martin shooting was local and limited, but that activist outlets and social media generated attention that ultimately brought significant national media coverage.

OICRC supports the FCC's legal decision as well as its policy choice to reclassify mobile broadband Internet access as a telecommunications service. There is no serious dispute about the importance of mobile Internet access or, in

particular the fact that people of color, lower income consumers, and rural Americans are disproportionately reliant on mobile access. Absent full application of open Internet rules to mobile services, communities of color will be less able to rely on mobile devices to make childcare arrangements, receive health advice, access social services, participate in political debate, find employment, and engage with friends and family.

There is a broad consensus among civil rights groups about the importance of open Internet rules. Although one group, MMTC, has submitted an *amicus curiae* brief in support of Petitioners, MMTC does not disagree with the need for open Internet rules, including rules addressing paid prioritization, and did not dispute below that the FCC had the power to reclassify broadband Internet service under Title II. Instead it argued only that would have been a wiser policy choice to adopt such rules under the authority of Section 706 of the Telecommunications Act. However, no party before this Court, including MMTC, has attempted to show that the rules MMTC supported could be adopted without employing Title II powers. To the extent that MMTC believes that open Internet rules will deter capital investment, the FCC has reasonably determined otherwise. MMTC is simply wrong in claiming that reclassification leads to “price regulation,” and ignores the fact that the Commission has forborne from such rules. Its policy

concerns about extending Title II to mobile broadband are similarly unfounded. They are also inconsistent, as MMTC cannot reconcile its belief of the benefits of open Internet rules for fixed broadband (albeit under Section 706) with its opposition to such rules for wireless.

ARGUMENT

INTRODUCTION

Section 1 of the Communications Act sets forth the broad thematic basis for creation of the FCC and implementation of the Act.² Recognizing historical shortcomings in deployment of media and telecommunications, in Section 104 of the Telecommunications Act of 1996,³ Congress added the italicized phrase to Section 1:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, *without discrimination on the basis of race, color, religion, national origin, or sex*, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service...there is created a commission to be known as the “Federal Communications Commission”, which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

OICRC supports Respondents’ legal arguments as well as its policy choices

²47 U.S.C. §151.

³P.L. 104-104 (1996).

to reclassify both fixed and wireless Internet access as Title II services. This brief discusses how the FCC's decision⁴ advances the goals articulated in Section 1, as amended.

I. THE FCC PROPERLY FOUND THAT OPEN INTERNET RULES WILL FULFILL THE OBJECTIVES OF THE COMMUNICATIONS ACT.

An open Internet not only enables people of color and their businesses to reach the larger community, it also enables the people and businesses in the larger community to reach people of color. Under Metcalfe's Law,⁵ the value of an expanding network benefits everyone on the network. Indeed, David Reed, who co-authored the conceptual paper defining the "end to end" principle underlining Internet policy,⁶ posits that Metcalfe's Law understates the importance of the Internet for "Group Forming Networks," which "directly enable[] and support[] affiliations (such as interest groups, clubs, meetings, communities) among subsets

⁴*Protecting and Promoting the Open Internet*, 30 FCCRcd 5601 (2015)("Order")(JA___).

⁵Metcalfe's Law states that a network's impact is the square of the number of nodes in the network. "Metcalfe's Law," *available at* <https://www.techopedia.com/definition/29066/metcalfes-law>

⁶*Order*, 30 FCCRcd at 5702 n.570 (quoting Reed).

of [their] customers.”⁷

The advent and expansion of the open Internet has been a particular boon to historically underserved communities. On the Internet, opportunities are infinite, barriers to entry are low, and communities, including people of color, are able to bypass broken legacy systems replete with individual, institutional, and structural discrimination and insurmountable barriers. It enables them to embrace new opportunities for self-expression, entrepreneurship, political participation, education, employment, housing, healthcare, and other important human needs. Creators and independent content producers can tell their own stories to defy stereotypes and create positive portrayals of their communities without needing buy-in from a major media conglomerate. People of color can engage in the political process, bringing their voices directly to those in power.

A. An Open Internet Facilitates Economic Growth by Empowering Startups and Small Businesses.

The open nature of the Internet has reduced the cost of setting up a business and minimized the need for startups to have an office or other infrastructure.

Gatekeepers are virtually non-existent, so speakers and entrepreneurs can directly

⁷Reed, “That Sneaky Exponential-Beyond Metcalfe's Law to the Power of Community Building,” *Context Magazine* 2, no. 1 (1999), *available at* <http://www.reed.com/dpr/locus/gfn/reedslaw.html>

address audiences.

While the openness of the Internet benefits everyone, it has been of particular value to people of color, who have often had restricted access to credit markets and investors. Innovative ways to access capital, such as crowdfunding sites like KickStarter, have made it much to connect with individual investors.⁸ Innovative online marketplaces like Etsy have allowed many people of color to operate successful small businesses online.⁹ Since 2008, Etsy has had a vibrant community called Etsy Artists of Color, which now boasts more than 1600 members.¹⁰

Rosa Alonso, the founder and President of Foraché Productions LLC, a marketing, mobile/digital, multimedia, and business consulting firm, and Co-Chair of the Board of the 10,000 member National Association of Latino Independent Producers told the FCC that the open Internet put her on equal footing with large

⁸Maul, *African Americans and DIY: Using Etsy and Kickstarter to Boost a Business*, MadameNoire (Dec. 19, 2012), available at <http://madamenoire.com/240286/african-americans-and-diy-using-etsy-and-kickstarter-to-boost-a-business/>

⁹Comments of Etsy, July 8, 2014, at 2 (JA).

¹⁰*Artists of Color Members*, available at <https://www.etsy.com/teams/6303/etsy-artists-of-color/members>

incumbents.¹¹ She also explained how traditional media companies discovered her online content and exposed her technology literacy products to larger audiences.

B. An Open Internet Promotes Artistic Expression.

People of color have especially benefitted from the Internet's ability to allow artists to reach audiences directly through webcasts, online music stores, and other platforms. Mexican-American actress, writer, and producer Ruth Livier has bypassed traditional gatekeepers to deliver *Ylse*, a bilingual, stereotype-defying web series. This enabled her to become the first writer to join the Writers Guild of America-West based exclusively on work in digital content. With her union production, many other people of color earn union credits, an important step that gives them access to additional job opportunities. Meeting with Commissioner Rosenworcel, Ms. Livier recounted her experience meeting with executives of traditional media companies, including one who initially doubted whether anyone would want to hear her story.¹²

¹¹*Ex Parte* Notice, National Hispanic Media Coalition, *et al.*, April 18, 2014, at 1-2 (JA ___ - ___).

¹²*Ex Parte* Notice, National Hispanic Media Coalition *et al.*, July 11, 2014, at 1-2 (JA ___ - ___).

C. An Open Internet Maximizes Social and Political Expression.

In becoming a platform for the exchange of political and social expression, the open Internet has given all people in this country access to the viewpoints of others and facilitated an unprecedented expansion of civic discourse. Interest groups of all kinds have been able to use the Internet to organize and mobilize to advance their various causes. Indeed, in this very case, there was unprecedented public participation mobilized and generated on the open Internet.¹³

The open Internet has provided a particularly powerful tool for organizations that serve people of color to promote social change, shedding light on events that have typically gone unnoticed by traditional mass media. The February, 2012 shooting of a boy named Trayvon Martin ultimately generated a robust national discussion on issues of racial profiling and unequal treatment of young men and boys of color. However, this would not have happened without the use of the Internet by people of color. The MIT Center for Civic Media determined that, after limited local coverage in the days following the shooting, the news cycle had appeared to move on.¹⁴ However, ten days after the shooting, the story began

¹³*Order*, 30 FCCRcd at 5606 (citation omitted).

¹⁴Graeff, Stempeck and Zuckerman, *Mapping the Trayvon Martin Media Controversy*, First Monday - Peer Reviewed Journal on the Internet, Volume 19, Number 2, (February 3, 2014), *available at*

receiving attention once again. According to the MIT analysis:

Race-based media led by *Global Grind*, and to a lesser extent activist outlets ColorOfChange and the Black Youth Project, played key roles during this act....“Trayvon Martin” appeared on Google Trends on March 8th for the first time.

* * * *

On 14 March, while other media channels were still relatively quiet on the story, there was a strong increase in signatures on the Change.org petition (116,391)....Using Change.org’s petition traffic data, we were able to link this surge of interest back to supportive tweets from a number of celebrities. Starting around 14 March, Change.org employee Timothy Newman brought the Trayvon petition to the attention of a cadre of targeted celebrities with potential for interest in the story and asked them to share the petition with their fans....[This] creat[ed] a 900 percent spike in social media traffic to the petition between 12 March and 15 March....¹⁵

II. OPEN INTERNET RULES ARE ESPECIALLY IMPORTANT FOR MOBILE BROADBAND INTERNET ACCESS.

OICRC supports the FCC’s reclassification of mobile broadband Internet access as a telecommunications service. Here, OICRC addresses the importance of the FCC’s policy decision to exercise this authority.

There is no serious dispute about the importance of mobile Internet access or, in particular, the fact that people of color, lower income consumers, and residents of rural America are disproportionately reliant on mobile access. As the Commission determined, “[E]vidence shows that consumers in certain

<http://firstmonday.org/ojs/index.php/fm/article/view/4947/3821>.

¹⁵*Id.*

demographic groups, including low income and rural consumers and communities of color, are more likely to rely on mobile as their only access to the Internet.”¹⁶

Mobile technology is critical to address the digital divide. Arbitrarily treating mobile connections differently than fixed connections would frustrate the stated goals of Congress and the FCC to close that divide. Despite recent efforts to improve broadband adoption rates, a digital divide remains between people of color and whites, poor and wealthy, and rural and urban populations. Though mobile devices and networks still have some limitations compared to their wired counterparts, communities of color often rely on mobile devices to complete a growing variety of tasks, including making childcare arrangements, receiving health advice, accessing social services, participating in political issues, finding employment, and engaging with friends and family.¹⁷

Open Internet rules, no matter how robust, are futile without parity between treatment of mobile and fixed networks, particularly for communities of color. For

¹⁶*Order*, 30 FCCRcd at 5636 (footnote omitted)(JA___). *See also* Comments of Internet Freedom Supporters, July 18, 2014, at 21-30 (JA___-___).

¹⁷*See Scurato, Trends in Latino Mobile Phone Usage and What They Mean For U.S. Telecommunications Policy*, National Hispanic Media Coalition (Feb. 2012), available at http://www.nhmc.org/nhmcnew/wp-content/uploads/2013/03/mobile_policy_report.pdf.

many, mobile networks help bridge the digital divide and provide an onramp to the Internet. In the words of former FCC Chairman Genachowski, “[e]ven though each form of Internet access has unique technological characteristics, they are all different roads to the same place” and that “the Internet itself [must] remain open, however users reach it.”¹⁸

Absent full application of open Internet rules to mobile services, users in underserved communities who rely exclusively or primarily on mobile broadband for Internet access could be disproportionately affected by conduct which have been deemed harmful to users of wireline products. Notwithstanding the limitations of mobile devices, communities of color often rely on them to make childcare arrangements, receive health advice, access social services, participate in political debate, find employment, and engage with friends and family.¹⁹

There is evidence that major mobile carriers have engaged in blocking and

¹⁸Genachowski, Speech to the Brookings Institute (Sept. 21, 2009) at 6, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293568A1.pdf.

¹⁹Comments of Internet Freedom Supporters, July 18, 2014 at 22-23 (*citing* Michael Scurato, *Trends in Latino Mobile Phone Usage and What They Mean For U.S. Telecommunications Policy*, National Hispanic Media Coalition (Feb. 2012), *available at* http://www.nhmc.org/nhmcnew/wp-content/uploads/2013/03/mobile_policy_report.pdf)(JA __-__).

other discriminatory behavior. For example, AT&T has blocked Apple's FaceTime service²⁰ and has prohibited users from accessing peer-to-peer file sharing applications or maintaining network connections (such as through webcams) without an active user on the other end.²¹ T-Mobile has forbidden users from using webcams and peer-to-peer file sharing applications.²² Verizon attempted to block tethering, *i.e.*, connecting a phone to other devices, such as a tablet or laptop, until the FCC required them to allow tethering to continue.²³ Given these behaviors, it is clear that the risk of blocking and discrimination by mobile carriers is real, and strong Open Internet rules are necessary to allow mobile users, who are disproportionately people of color, unencumbered, open access to the entire Internet.

²⁰*See Order*, 30 FCCRcd at 5639 (JA___).

²¹AT&T Wireless Consumer Agreement, §6.2, *available at* <https://m.att.com/shopmobile/legal/terms.wirelessCustomerAgreement.html>

²²T-Mobile Terms & Conditions, effective October 20, 2013, §18, *available at* http://www.t-mobile.com/Templates/Popup.aspx?PAsset=Ftr_Ftr_TermsAndConditionsOct2013&print=true

²³*Cellco Partnership d/b/a Verizon Wireless*, 27 FCCRcd 8932 (2012).

III. THERE IS A BROAD CONSENSUS AMONG CIVIL RIGHTS ORGANIZATIONS ABOUT THE IMPORTANCE OF OPEN INTERNET RULES.

The Multicultural Media, Telecom and Internet Council (MMTC) has submitted an *amicus curiae* brief in support of Petitioners.²⁴ It is critical in this regard to stress that MMTC and some other organizations with which it filed comments at the FCC do not disagree with the fundamental policy need for open Internet rules.²⁵ Significantly, although it now says in its brief that it supports Petitioners' legal positions,²⁶ MMTC never disputed below that the Commission that had the power to reclassify broadband Internet service under Title II, but instead argued only that the FCC that it could better address these policy objectives by utilizing the authority of Section 706 of the Telecommunications Act.²⁷

²⁴Counsel for OICRC is a member of the Board of Directors of MMTC, but has recused himself from matters pertaining to this litigation.

²⁵MMTC complains that the Commission failed to take into account the concerns that it and its allies presented to the Commission about the importance of an open Internet to communities of color. MMTC Brief at 9. In fact, as discussed in Sections I and II *supra*, the Commission thoroughly examined those questions. MMTC's real objection, then, is that it disagrees with the legal authority the Commission employed to address these problems.

²⁶MMTC Brief at 1.

²⁷*See, e.g.*, Comments of MMTC and National Minority Organizations ("MMTC"), July 18, 2014, at 9 ("Section 706 is far better suited to meeting the goals of the commission and communities of color than Title II reclassification.")(JA___); Reply Comments MMTC, September 15, 2014 at 9

A. Section 706 Is Inadequate Authority for the Rules That MMTC Says Are Necessary.

MMTC urged the Commission to “us[e] its Section 706 authority” to adopt a prohibition on blocking and a “rebuttable presumption” against discrimination in the form of “paid prioritization.”²⁸ While it cited *Verizon v. FCC* in its comments one time, without a jump citation to any passage in the decision,²⁹ MMTC did not otherwise explain why that decision would support the imposition of the rules it advocates. None of any other filings MMTC made to the Commission even attempted to explain how Section 706 could justify the rules it had advocated.³⁰ Indeed, No party before this Court, including MMTC, has attempted to show that the rules MMTC advocated could be adopted without employing Title II powers.

OICRC believes that this Court’s *Verizon v. FCC* decision conclusively ruled that the FCC cannot adopt no-blocking and non-discrimination rules under Section 706 because these are common carrier requirements. With respect to non-discrimination, it said that

(“[E]lecting to use Title II to implement open Internet rules would likely prove disadvantageous to consumers in to the broadband ecosystem.”)(JA___).

²⁸MMTC Comments at 11 (JA___).

²⁹*Id.*, n.34.

³⁰Significantly, MMTC’s brief does not even cite *Verizon v. FCC*.

We have little hesitation in concluding that the anti-discrimination obligation imposed on fixed broadband providers has “relegated [those providers], *pro tanto*, to common carrier status.” *Midwest Video II*, 440 U.S. [689,700–01 [(1979)]. In requiring broadband providers to serve all edge providers without “unreasonable discrimination,” this rule by its very terms compels those providers to hold themselves out “to serve the public indiscriminately.” *NARUC I*, 525 F.2d [630,] 642 [D.C. Cir. 1976)].³¹

In considering the anti-blocking rule, the Court said

The anti-blocking rules establish a minimum level of service that broadband providers must furnish to all edge providers: edge providers’ “content, applications [and] services” must be “effectively []usable. The *Order* also expressly prohibits broadband providers from charging edge providers any fees for this minimum level of service.³²

B. MMTC’s Expressed Concerns About Title II Are Unfounded.

MMTC expresses three objections to the Commission’s policy choice to adopt open Internet rules using its Title II authority. Each is unfounded.

1. Open Internet rules will not deter capital investment.

MMTC argues that the Commission failed to consider the purportedly adverse effect of Title II reclassification on broadband investment.³³ However, the Commission thoroughly examined broadband investment and concluded that, especially in light of its extensive forbearance from obsolete provisions, “History

³¹*Verizon v. FCC*, 740 F.3d 623, 655-656 (D.C. Cir. 2014).

³²*Verizon v. FCC*, 740 F.3d at 658 (citations omitted).

³³MMTC Brief at 10-12.

demonstrates that this careful approach to the use of Title II will not impede investment.”³⁴

2. The Commission has not adopted “price regulation.”

MMTC warns about the adverse effect that “price regulation and other Title II public utility regulations will have on broadband investment and deployment.”³⁵

However, the Commission repeatedly made clear that it is forbearing from rate regulation and other elements of traditional utility regulation.³⁶ It said that

Today, our forbearance approach results in over 700 codified rules being inapplicable, a “light-touch” approach for the use of Title II. This includes no unbundling of last-mile facilities, no tariffing, no rate regulation, and no cost accounting rules, which results in a carefully tailored application of only those Title II provisions found to directly further the public interest in an open Internet and more, better, and open broadband.³⁷

3. MMTC’s opposition to Title II regulation of mobile broadband service is unfounded and inconsistent.

MMTC argues that application of Title II regulation to mobile broadband is

³⁴*Order*, 30 FCCRcd at 5612 (JA____); Respondents Brief at 81-84.

³⁵MMTC Brief at 11.

³⁶*See, e.g., Order*, 30 FCCRcd at 5603, 5775, 5809 (JA____,____,____).

³⁷*Order*, 30 FCCRcd 5612. *See also* Bergmayer, “Title II is Not Net Neutrality, and Net Neutrality is Not Utility Regulation,” *available at* <https://www.publicknowledge.org/news-blog/blogs/title-ii-is-not-net-neutrality-and-net-neutrality-is-not-utility-regulation>

counterproductive because it will impede investment and innovation.³⁸ However, as discussed *supra*, the Commission reasonably considered and rejected the argument that Title II will discourage investment, including for mobile broadband. In particular, MMTC does not challenge, much less rebut, the reasonableness of the FCC's findings that open Internet rules will not have such an effect.³⁹

MMTC complains that “innovative offerings” such as zero rating will be restricted under the Commission's rules.⁴⁰ It does not explain or justify the contradictory position it takes that the benefits of non-discrimination rules it supports (albeit under Section 706) are not needed for wireless. It also fails to acknowledge that the Commission did not prohibit zero rating,⁴¹ and that it provided for waivers where needed to promote innovation.⁴²

CONCLUSION

This Court should affirm the FCC's decision.

³⁸MMTC Brief at 13-15.

³⁹*Order*, 30 FCCRcd at 5639 (“Contrary to provider arguments that applying a broader set of openness requirements will stifle innovation and chill investment, we find that the rules we adopt today for all providers of services will promote innovation, investment, and competition.”)(JA___).

⁴⁰MMTC Brief at 14.

⁴¹*Order*, 30 FCCRcd at 5668 (JA___).

⁴²*Order*, 30 FCCRcd at 5658 (JA___).

Respectfully submitted,

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September 21, 2015

CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 3980 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(3);
2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using WordPerfect X3 in 14-point Times New Roman type.

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CERTIFICATE OF SERVICE

I, Andrew Jay Schwartzman, hereby certify that I have this day of 21st day of September, 2015, electronically filed the foregoing *Brief of Open Internet Civil Rights Coalition* with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system, which served a copy on all counsel of record in these cases.

/s/ Andrew Jay Schwartzman