

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

MOTION FOR LEAVE TO FILE AND BRIEF OF
AMICUS CURIAE
WILLIAM J. KIRSCH
IN SUPPORT OF AFFIRMANCE IN PART AND REVERSAL IN PART

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BRIEF OF *AMICUS CURIAE*

Summary of Interest

Amicus curiae authored this brief without funding from any other party with the hope that this Court's actions will assist in obtaining any and all writs necessary or other actions to vindicate constitutional, statutory and common law rights for relief.

SUMMARY OF ARGUMENT

The FCC is entitled to deference for a Title II Court-guided classification, but should be subject to a *de novo* review for a quasi-judicial standard in place of the rules based approach that should be required of a so-called expert agency.

STANDING

Petitioners have standing to address the foreseeable harm associated with the potential existential threat to their businesses and the right to correct, without retaliation, the longstanding problems associated with the United States Trade Representative (USTR) ceding the U.S. comparative advantage in telecommunications in the World Trade Organization (WTO) Agreement on Basic Telecommunications (ABT) to U.S. trading

partners, including the People's Republic of China (State FOIA-2014-21465), by failing to obtain ANY market access commitments from half the WTO Member States and obtaining only minimal trade concessions from the rest (USTR No. 13082776).

Intervenors have standing to address the harm from privileged "gatekeeper" access at home and abroad that may result from "an unjust or unreasonably discriminatory" denial of "adequate facilities" at "reasonable rates" and denial of standing would risk loss of information critical to them.

ARGUMENT

A. *Chevron* deference

The FCC Order continues the regulatory tradition dating back at least to the railroad barons of common carrier regulation as a *quid pro quo* for privileged access to rights-of-way or other special privileges. It is fully consistent with the Court's direction in *Verizon v. FCC*. Monopoly, duopoly and oligopoly "gatekeepers" do not have the right to engage in "unjust and unreasonable discrimination" or to charge "unjust and unreasonable rates." The Order is an essential first step in obtaining the "same footing as regards privileges" for U.S. providers under the Cable Landing License Act, 47 U.S.C. 34-39,

and 47 U.S.C. 310 See also Western Union Telegraph Permit, Nov. 20, 1920, Cable Landing Licenses, Hearing Before a Subcommittee on the Committee on Interstate Commerce, United States Senate, Sixty-Sixth Congress.

B. *DE NOVO STANDARD*

The antitrust authorities do a superior job of promoting domestic competition despite the absence of rulemaking authority. If the FCC wishes to be a supplementary rather than a complementary body to the antitrust authorities, then perhaps a "*general conduct*" case by case standard might make some sense. Except that the FCC provided little, if any justification for this truncated responsibility, particularly given the FCC forbearance associated with its essential responsibility of ensuring "adequate facilities." The FCC "*general conduct*" standard fails to address the foreseeable (indeed current) harm from foreign protectionism and mercantilism. The FCC failure to establish reasonable rules builds upon its unlawful denial of FOIA requests by ignoring President Kennedy's eloquent statement at the Waldorf-Astoria in April 1961 that the "very word 'secrecy' is repugnant in a free and open society; we are as a people inherently and historically opposed to secret societies, to secret oaths, and to secret proceedings." This Court should address Madison's concern of a farce becoming a tragedy by

preventing the FCC inaction from making foreseeable harm into a reality. See August 4, 1822 Letter of James Madison to W.J. Barry, cited in A Citizen's Guide on Using the Freedom of Information Act and Privacy Act, House of Representatives, 109th Congress, 1st Session (Sept. 20, 2005). The attempted application of fees to deny FOIA requests and to pad the FCC's budget is just the sort of roadblock and technicality that led Congress to liberalize the fee waiver provisions given the failure of the Nixon-era attempt at open government. See 132 Cong. Rec. 31, 415 (1986). Now more administrative documents are withheld from public release than the Library of Congress makes available to the public. Reversal and remand of the FCC "*general conduct*" standard and replacement by a rules-based approach that establishes a measurable metric for network security is necessary to prevent the FCC from making the FOIA exception the rule and mimicking the Official Secrets Act of 1889 (52 & 53 Victoria C. 52) which was "not there to protect secrets but to protect officials." News on Sunday, 9 May 2014. The Court should follow President Reagan's admonition to trust but verify and reverse and remand the "*general conduct*" case by case standard for proceedings to establish rules for a global open internet under 47 U.S.C. 34-39, 201, 202, 205, 214, 251 and 310.

CERTIFICATE OF SERVICE

I hereby certify service of my amicus motion and brief by normal mail to:

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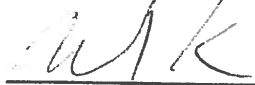
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