
ORAL ARGUMENT SCHEDULED FOR DECEMBER 4, 2015

Nos. 15-1063 (and consolidated cases)

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

UNITED STATES TELECOM ASSOCIATION, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

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

**BRIEF OF *AMICUS CURIAE* TIM WU FOR
AFFIRMANCE IN SUPPORT OF RESPONDENTS**

Andrew Jay Schwartzman
600 New Jersey Avenue, NW
Room 312
Washington, DC 20001
AndySchwartzman@Gmail.com
(202) 662-9170
Counsel for Amicus Curiae

September 21, 2015

STATEMENT REGARDING CONSENT TO FILE, SEPARATE BRIEFING, AUTHORSHIP, AND MONETARY CONTRIBUTIONS

All parties have consented to the filing of this brief. *Amicus curiae* filed notice of intent to participate on September 9, 2015.

Pursuant to Circuit Rule 29(d), counsel for *amicus curiae* certifies that no other *amicus curiae* brief of which he is aware relates to the subjects addressed herein. Given the nature of these cases and the large number of issues raised in the briefs of the Petitioners, Intervenors and the eleven *amicus 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,

/s/ Andrew Jay Schwartzman

Andrew Jay Schwartzman
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9170
AndySchwartzman@gmail.com

September 21, 2015

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

A. Parties

All parties are listed in the Brief of Respondents.

B. Rulings Under Review

References to the ruling at issue appear in the Brief for Respondents.

C. Related Cases

Amici curiae adopt the statement of related cases presented in the Brief for Respondents.

TABLE OF AUTHORITIES

STATEMENT REGARDING CONSENT TO FILE, SEPARATE BRIEFING, AUTHORSHIP AND MONETARY CONTRIBUTIONS. i

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES. ii

TABLE OF AUTHORITIES. iv

GLOSSARY. vii

STATUTES AND REGULATIONS. 1

SUMMARY OF ARGUMENT. 1

ARGUMENT. 7

I. CLASSIFICATION OF INTERNET ACCESS SERVICES AS OF 1996. 7

II. THE “TELECOMMUNICATIONS SERVICE”/“INFORMATION SERVICE” CATEGORIES. 12

 A. Origins. 12

 B. Basic/Enhanced. 16

CONCLUSION. 22

TABLE OF AUTHORITIES

Cases

<i>AT&T v. City of Portland</i> , 216 F.3d 871 (9th Cir. 2000).....	3
* <i>Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984).....	1,4,5,6
<i>Computer and Communications Industry Assoc. v. FCC</i> , 693 F.2d 198 (D.C. Cir. 1982).....	6
* <i>Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.</i> , 545 U.S. 967 (2005).....	1,5
<i>United Church of Christ v. FCC</i> , 327 F.3d 1222 (D.C. Cir. 2003).....	2
<i>United States v. Western Elec. Co.</i> , 673 F.Supp 525 (D.D.C. 1987).....	14

Regulations

47 C.F.R. §64.702.....	16
------------------------	----

Administrative Decisions

* <i>Amendment of Section 64.702 of the Commission’s Rules and Regulations</i> , 61 F.C.C.2d 103 (1976).....	13
<i>Amendment of Section 64.702 of the Commission’s Rules and Regulations</i> , 77 F.C.C.2d 384 (1980).....	9,15,16

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

<i>Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities</i> , 20 FCCRcd 14853 (2005).....	10
<i>*Comsat Corporation</i> , 11 FCCRcd 22468 (1996).....	3,5,10,17
<i>Deployment of Wireline Services Offering Advanced Telecommunications Capacity</i> , 13 FCCRcd 24012 (1998).....	8
<i>Federal-State Joint Board on Universal Service</i> , 13 FCCRcd 11501 (1998)	17,
<i>GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148</i> , 13 FCCRcd 22466 (1998).....	4
<i>Independent Data Comm. Mfrs. Ass’n, Inc.</i> , 10 FCCRcd 13717 (1995)..	10
<i>Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities</i> , 17 FCCRcd 4798 (2002), <i>aff’d sub nom. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.</i> , 545 U.S. 967 (2005).....	4
<i>Local Competition First Report and Order</i> , 11 FCCRcd 15499 (1996).....	7
<i>North American Telecommunications Association Petition for Declaratory Ruling under Section 64.702 of the Commission’s Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment</i> , 101 F.C.C.2d 349 (1985)	17
<i>Regulatory and Policy Problems Presented Presented by the Interdependence of Computer and Comm. Servs. (Tentative Decision)</i> , 28 F.C.C.2d 291 (1970)	12,14
<i>Regulatory and Policy Problems Presented by the Interdependence of Computer and Comm. Servs.</i> , 28 F.C.C.2d 267 (1970).....	12
<i>Request for Declaratory Ruling and Investigation by Graphnet Systems, Incorporated Concerning a Proposed Offering of Electronic Computer Originated Mail (ECOM)</i> , 73 F.C.C.2d 283 (1979)	18

Other Authorities

Br. for FCC as <i>Amicus Curiae</i> in <i>AT&T Corp. v. Portland</i> , No. 99-35609 (1999).	3,8
Cannon, <i>The Legacy of the Federal Communications Commission’s Computer Inquiries</i> , 55 Fed. Comm. L.J. 167 (2003)	14
Narechania & Wu, <i>Sender Side Transmission Rules for the Internet</i> , 66 Fed. Comm. L.J. 467 (2014).....	13
Weinberg, <i>The Internet and “Telecommunications Services,” Universal Service Mechanisms, Access Charges, and Other Flotsam of the Regulatory System</i> , 16 Yale J. on Reg. 211 (1999).....	14
Wu, <i>The Master Switch: The Rise and Fall of Information Empires</i> (2011)	20

GLOSSARY

<i>Brand X</i>	<i>Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.</i> , 545 U.S. 967 (2005).
<i>Chevron</i>	<i>Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984).
<i>Comsat Order</i>	<i>Comsat Corporation</i> , 11 FCCRcd 22468 (1996)
<i>Computer II Order</i>	<i>Amendment of Section 64.702 of the Commission's Rules and Regulations</i> , 77 F.C.C.2d 384 (1980)
DSL	Digital Subscriber Line
ISDN	Integrated Services for Digital Network
<i>Stevens Report</i>	<i>Federal-State Joint Board on Universal Service</i> , 13 FCCRcd 11501 (1998)
US Telecom	Petitioners United States Telecom Association, National Cable & Telecommunications Association, CTIA-The Wireless Association®, AT&T Inc., and CenturyLink

STATUTES AND REGULATIONS

Applicable statutes and regulations are set forth in Respondents Brief.

STATEMENT OF INTEREST

Amicus Curiae Tim Wu is the Isidor and Seville Sulzbacher Professor of Law at Columbia University. He is the author of two books on the history of the Internet and earlier media technologies: *The Master Switch: The Rise and Fall of Information Empires* (2010) and *Who Controls the Internet* (2006) (with Jack Goldsmith). Professor Wu has written numerous articles on policies related to the matters at issue in this litigation and has testified on these questions before the Federal Communications Commission. He participated in the proceedings below.

SUMMARY OF ARGUMENT

Professor Wu submits this *amicus curiae* brief for one reason: to expose an important and serious misrepresentation contained in the telecommunications carriers'¹ challenge to the Federal Communications Commission's Open Internet Order, *Protecting and Promoting the Open*

¹ The seven Petitioners which filed a joint brief with the United States Telecom Association are collectively referred to as "USTelecom."

Internet, 30 FCCRcd 5601 (2015)(“*Order*”)(JA___), one with direct bearing on the question of appropriate deference under *Chevron* and *Brand X*. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). USTelecom argues that Congress, when it passed the Telecommunications Act of 1996, specifically and unambiguously intended that broadband Internet service be an “information service.” It bases that argument on the premise that there existed a “long-settled regulatory understanding” as to that effect. USTelecom Br. at 24.

The premise is both incorrect and gives a misleading impression of the Commission’s historic practice. What Congress codified in its adoption of the “basic/enhanced” regime were evolving categories used by the Commission to make policy based on both technological and competitive considerations. Over the course of the decades from the FCC’s first “*Computer Proceeding*” onward the Commission routinely re-examined and reclassified services in light of changing market conditions and technical realities (e-mail, for example, was originally

classified as a “basic” service, but was subsequently classified as an information service).²

As this court has previously explained, Congress will not be considered to have adopted an agency definition where the agency itself applies determinations on a case-by-case basis. *See generally United Church of Christ v. FCC*, 327 F.3d 1222, 1226-27 (D.C. Cir. 2003). And since the FCC's definition of broadband was in flux, Congress cannot be said to have adopted a specific definition for the service. Rather, Congress blessed the FCC's methodology for classifying services, which it has now applied here.

More specifically, in 1996, when the Telecommunications Act of 1996 (1996 Act) was enacted, the regulatory treatment of broadband Internet carriage was *not*, as USTelecom maintains “long settled.” Instead, the matter remained most definitively unsettled, as the Commission itself made clear at the time. Speaking to the precise issue in 1996, it stated that “neither the Commission nor the Common Carrier Bureau has determined that all internet access services are enhanced services [*i.e.* information services].” *Comsat Corporation*, 11

² See chart at 19, *infra*.

FCCRcd 22468, 22470-71, ¶7 (1996)(“*Comsat Order*”). Even as late as 1999, the Commission wrote, in an *amicus curiae* brief:

To date, the Commission has not decided whether broadband capability offered over cable facilities is a “cable service” under the Communications Act, or instead should be classified as “telecommunications” or as an “information service.”

Brief *Amicus Curiae* for FCC, *AT&T Corp. v. City of Portland*, No. 99-35609, 1999 WL 33631595 (August 17, 1999). *See also AT&T v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 2000) (“We note at the outset that the FCC has declined, both in its regulatory capacity and as *amicus curiae*, to address the issue before us.”). The reality, which USTelecom is choosing to ignore in parts and distort in others, is that the “regulatory understanding” related to broadband Internet service in 1996 was a mixture of unmade decisions (cable broadband, DSL broadband), double classifications (dial-up Internet), suggestions (that pure packet Internet was “basic”) and future plans. Congress, in short, could not have fixed an understanding that did not exist.

That fact is relevant to the familiar “step one” of *Chevron*, which asks whether “Congress has directly spoken to the precise question at issue.” *Chevron*, 467 U.S. at 842. It is widely agreed that Congress, in the 1996 Act, codified existing Commission practice, yet the lack of any

fixed approach to broadband Internet services in the mid-1990s makes the premise that Congress “directly spoke” to the issues not only implausible, but borderline delusional.

In any case, once the Commission did first address broadband it reached a conclusion completely inconsistent with what USTelecom posits was the “settled understanding.” Soon after the 1996 Act was passed, the Commission classified DSL (Digital Subscriber Line) broadband as a “telecommunications service” (a fact that USTelecom conspicuously fails to mention.) *See GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, 13 FCCRcd 22466 (1998). Meanwhile, cable broadband, today’s market leader, was unclassified, and so remained until 2002. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCCRcd 4798 (2002), *aff’d sub nom. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). Indeed, the argument over statutory ambiguity was at the center of the *Brand X* litigation which decided the issue in a manner contrary to what USTelecom here urges. *See Brand X*, 545 U.S. at 975-979. Finally, before cable or DSL broadband became widely available, the Commission had also

suggested, without deciding, that “pure” Internet transmission would be a “basic,” or “telecommunications” service. *Comsat Order*, 11 FCCRcd at 22470-1, ¶7 (1996). These historic facts directly refute the theory that FCC had, in fact, “settled” or “consistently held” that broadband Internet service was an “information service” back in 1996.

This leaves open the question of what Congress did intend when it created the categories of “telecommunications” and “information” service based on existing FCC practice. A look at the practical history of classification, using the “enhanced” and “basic” labels from the 1970s and 1980s, shows something very different than USTelecom’s theory of fixed meanings. Those categories reflected an evolutionary and dynamic regime that was used to make telecom policy, a practice that continues to this day, as this very rulemaking demonstrates. The history of the “enhanced/basic” regime shows that it was characterized by a series of policy decisions, driven by factors like market structure and the conditions of competition as much as technological abstractions. *See Computer and Communications Industry Assoc. v. FCC*, 693 F.2d 198, 210 (D.C. Cir. 1982)(FCC’s decision on classification of “enhanced” services upheld because “[t]he Commission's finding was based upon

intensive study of a rapidly changing and highly technical field and was informed by the comments of a large number of participants in the communications and data processing industries.”). It is such policy choices that USTelecom ultimately disagrees with here, but “[w]hen a challenge to an agency construction of a statutory provision...really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.” *Chevron*, 467 U.S. at 866.

ARGUMENT

I. CLASSIFICATION OF INTERNET ACCESS SERVICES AS OF 1996

It is widely accepted that Congress codified the FCC’s categories of “basic” and “enhanced” services when it created the categories of “telecommunications” and “information” service in the 1996 Act. Yet that fact does not tell much about how Congress intended broadband Internet carriage to be classified. Contrary to USTelecom’s view that there existed a “settled understanding,” the matter was in fact undecided, and therefore necessarily ambiguous. By 1996, the Commission simply had not yet made up its mind as to how the many ways of delivering Internet service, some in their infancy, ought be

classified. There was no fixed understanding for Congress to adopt, indicating that Congress could not have “directly spoken” to the issue in 1996. The Commission, in fact, said so itself that very year, in response to similar argument, when it said that “[n]either the Commission nor the Common Carrier Bureau has determined that all internet access services are enhanced services.” *Comsat Order*, 11 FCCRcd at 22468, ¶7. The Commission’s own testimony is far better evidence of its thinking as of 1996 than the Petitioners’ somewhat desperate projections.

The first FCC classification of an actual broadband Internet service came during the FCC’s consideration of DSL service, the first such offerings broadly sold to the public, which it classified as a “telecommunications service.” *See Local Competition First Report and Order*, 11 FCCRcd 15499 (1996). As the Commission later explained, “[w]e conclude that advanced services [i.e., DSL] are telecommunications services” based on the fact that “the Commission has repeatedly held that specific packet-switched services are ‘basic services....’” *Deployment of Wireline Services Offering Advanced Telecommunications Capacity*, 13 FCCRcd 24012, 24029, ¶35 (1998).

When DSL broadband was bundled with Internet access, the Commission concluded that “we treat the two services separately: the first service is a telecommunications service (*e.g.*, the xDSL-enabled transmission path), and the second service is an information service.” *Id.* at 24030, ¶36.

This might suggest that, to the extent the FCC had an understanding of broadband in the late 1990s, it might have been that it was comprised of two services, and was subject to dual classification. But that conclusion is muddied by the fact that the FCC had yet to classify the other new broadband modality of the 1990s, cable broadband. In an *amicus curiae* brief written in 1999, the Commission wrote:

To date, the Commission has not decided whether broadband capability offered over cable facilities is a “cable service” under the Communications Act, or instead should be classified as “telecommunications” or as an “information service.”

Brief *Amicus Curiae* for FCC, *AT&T Corp. v. City of Portland*, No. 99-35609 at 19, 1999 WL 33631595 (August 17, 1999).

What USTelecom has done is seize just one of the various classifications extant in the 1990s and try to elevate it to the status of established FCC practice for anything related to the Internet, including

broadband. In the 1980s and 1990s, companies like Compuserve, AOL, Earthlink and Prodigy- the consumer equivalents to the “data processing” industry, offered dial-up access to their own online worlds, complete with chatrooms, email and similar features. The FCC, in its *Computer II Order*, had classified companies like Compuserve as offering an “enhanced service” offered over a “telecommunications service.” *Amendment of Section 64.702 of the Commission’s Rules and Regulations*, 77 F.C.C.2d 384 (1980)(“*Computer II Order*”). When the same companies began adding access to the Internet and world-wide web to their portfolio of offerings, joined by companies like Earthlink, which were offering only dial-up Internet, they maintained their status as “enhanced” services.

But the Commission’s view of AOL or Earthlink can hardly be said to reflect Congress’s definitive take on broadband. Companies like AOL or Compuserve were in a competitive market, and owned no wires. Unlike the cable or telephone companies they were in no position to offer broadband internet services like those offered today by companies like AT&T, Comcast and Verizon. To further add to the confusion, the Commission had also in 1996 suggested, without deciding, that a pure

Internet service, not bundled with any “enhanced” services, would be considered a “basic” service. *Comsat Order*, 11 FCCRcd at 22468, ¶7. Calling pure Internet service “basic” was consistent with earlier decisions that categorized services technologically similar to the Internet protocol, like frame relay, as “basic.” See *Independent Data Comm. Mfrs. Ass’n, Inc.*, 10 FCCRcd 13717 (1995).

The fact that broadband Internet was unclassified in some areas, and inconsistently classified in others when the 1996 Act passed shows that the FCC’s approach was clearly in some state of flux. The subsequent history, including the FCC’s reclassification of DSL in 2005, *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCCRcd 14853 (2005), only reinforces the conclusion that there was no “long settled regulatory understanding.” It is more accurate to say that the classification of both narrowband and broadband Internet reflected the reality of the Commission’s practice with respect to “basic” and “enhanced” services, which itself has always reflected of judgment calls and policy-making since the 1970s. And it is to that history that we now turn.

II. THE “TELECOMMUNICATIONS SERVICE”/“INFORMATION SERVICE” CATEGORIES

Congress, as stated above, is widely agreed to have codified the Commission’s existing practice with respect to “basic” and “enhanced” services when it created the categories of “telecommunications” and “information” service in the 1996 Act. But just what was the understanding it put in the statute? While USTelecom suggests that the terms came with a meaning frozen in time, like an ant trapped in amber, the actual history suggests something different. It suggests that the regulatory distinction that the FCC created in the 1970s was a dynamic and evolving regime -- one that adapted to factors like conditions of competition, industry history, and the nature of the underlying technologies, and one where the FCC was sometimes inconsistent and willing to change its mind.

A. Origins

In the late 1960s, the FCC first became interested in the businesses that ran “on over the top” of AT&T’s nationwide, regulated communications network. At issue were a series of newly formed companies, like Tymshare, National CSS, Comuserve, Dial Data, which offered computer services “over” the network to businesses and

some consumers. These were the ancestors of today's "over the top" firms like Netflix, Google, Facebook, and so on. At the time, in the jargon of the day, the companies were described not as "Apps," "Over-the-top" or "Internet companies" but as the providers of "data processing services." Prophetically, the Commission declared in 1971 that "the data processing industry has become a major force in the American economy, and that its importance to the economy will increase in both absolute and relative terms in the years ahead."

Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities, 28 F.C.C.2d 267, 268-69, ¶7 (1971).

What the Commission noticed was that the "over the top" industry was dynamic, growing fast, and highly competitive. *Regulatory and Policy Problems Presented by the Interdependence of Computer and Comm. Servs. (Tentative Decision)*, 28 F.C.C.2d 291, 297-298, ¶20-23 (1970). ("Computer I Tentative Decision"). As such, it was quite unlike the markets dominated by the underlying communications provider, the AT&T monopoly; suggesting a different regulatory treatment was called for. But behind that instinct lay more than simply a fear of over-

regulation; for the Commission was also greatly concerned that AT&T would use its power over the underlying network to either destroy the over-the-top industry or discriminate against it in favor of its own offerings. (This is why the regime first created in 1970 *Computer Inquiry* has sometimes been described as the “first” Net Neutrality rule or its direct ancestor.)³ As the Commission stated,

“[W]e were concerned about the possibility that common carriers might favor their own data processing activities by discriminatory services, cross subsidization, improper pricing of common carrier services, and related anticompetitive practices and activities.”

Amendment of Section 64.702 of the Commission’s Rules and

Regulations, 61 F.C.C.2d 103, 104, ¶5 (1976). In the words of Judge

Greene:

That the ability for abuse exists as does the incentive, of that there can also be no doubt. As stated above, information services are fragile, and because of their fragility, time-sensitivity, and their negative reactions to even small degradations in transmission quality and speed, they are most easily subject to destruction by those who control their transmission.

United States v. Western Elec. Co., 673 F.Supp. 525, 566 (D.D.C. 1987).

³ Narechania & Wu, *Sender Side Transmission Rules for the Internet*, 66 Fed. Comm. L.J. 467, 470-471 (2014).

Based on these considerations, in 1970, the FCC came up with the two regulatory categories central to this litigation. In their original form they were named “pure communications” and “pure data processing,” which was meant to capture the distinction between the carriers on the one hand, and the “over the top services” on the other.⁴ As Robert Cannon put it, this reflected the distinction “between those computers that ran the communications network and those computers at the ends of the telephone lines with which people interacted.” Cannon, *The Legacy of the Federal Communications Commission’s Computer Inquiries*, 55 Fed. Comm. L.J. 167, 173 (2003).

The distinction was wise,⁵ for it retains its importance today. If in 1970 the distinction was between “network communications,” mainly provided by AT&T, and activities taking place “over” the network,

⁴ There was also a third category, “hybrid service” which is partially what lead to a subsequent effort to reduce the number of categories to two. *Computer I Tentative Decision*, 28 F.C.C.2d at 295-296, ¶15.

⁵ Weinberg, *The Internet and “Telecommunications Services,” Universal Service Mechanisms, Access Charges, and Other Flotsam of the Regulatory System*, 16 Yale J. on Reg. 211, 222 (1999) (“That approach was wildly successful in spurring innovation and competition....”).

provided by Dial Data or Compuserve, today's equivalents are the broadband carriage (as provided by Verizon, Comcast, AT&T etc.), and over the top applications (Facebook, Google, etc.).

B. Basic/Enhanced

The FCC's "communications/data processing" distinction was groundbreaking, but the Commission over the 1970s sought to make the distinction clearer by creating sharper definitions designed to automatically put most services into one of the two regulatory buckets. In the process, "pure communications" became "basic services" and "data processing" became "enhanced services." To help itself distinguish between the two, the FCC created a test that remains the basis for the statutory categories in the 1996 Act. In its original form, the "basic services" were eventually defined in 1980 as those that created "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." *Computer II Order*, 77 F.C.C.2d at 420, ¶96. As the Commission explained, even if there might be computer processing (such as packet-switching) involved, that did not make the service enhanced if the point remained delivering the information from one

place to another, without changing it. *Id.* at 419-420, ¶ 94-95.

Meanwhile, the enhanced category, in its 1976 definition, was now defined to include all services that

employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.

47 C.F.R. §64.702(a).

The new categories, announced in 1976 and 1980, as *Computer Inquiries II*, were supposed to be clearer than the 1970 version, and they were, but they were still only relatively so, as the reader can probably tell by reading the definitions. Hence, the FCC continued to remain in the business of deciding, in hard cases, and as technologies changed, just what was a “basic service” and what was “enhanced.” Over the 1970s, 80s and 90s, the FCC itself frequently made judgment calls as to what belonged in each category. And so, for example, it decided that “voice mail” was an “enhanced” service, but call forwarding was “basic.” *Computer II Order*, 77 F.C.C.2d at 421, ¶ 98. “Call answering” services were enhanced, but “call blocking” and “tracing” were basic. *North American Telecommunications Association Petition*

for Declaratory Ruling under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment, 101 F.C.C.2d 349, 359-361 (1985). Early text messaging was a "basic" service, but "email" was an enhanced service, as was "paging." *Federal-State Joint Board on Universal Service*, 13 FCCRcd 11501, ¶¶78, 98 (1998) ("Stevens Report"). Sometimes, the Commission would classify one commercial offering as offering a combined "basic" and "enhanced" service, such as early Internet services provided over the copper wires of the telephone company over its copper wires (DSL service). Sometimes the Commission reversed itself; "email" was originally classified as "basic," *Request for Declaratory Ruling and Investigation by Graphnet Systems, Incorporated Concerning a Proposed Offering of Electronic Computer Originated Mail (ECOM)*, 73 F.C.C.2d 283, 289, ¶18 (1979), but later became "enhanced." *Stevens Report*, 13 FCCRcd at 11538-39, ¶78. In addition, the FCC suggested that Internet service would be a "basic service" but only when not bundled with any "enhanced" services. *Comsat Order*, 11 FCCRcd at 22470-71, ¶7 (1996). This graphic demonstrates the fluidity of the FCC's decision

Sample FCC Classifications from 1970 through 1990s

Basic	Enhanced	Multiple or Reclassifications
ADA; OSD; TTY	Call Answering	Internet services
Bandwidth	Newsgroups	Email
Compression	Dial-up Internet	Directory services
Call Blocking; Forwarding; Return; Tracing; Caller ID	Voice Mail; Voice Storage	Text Messaging, paging
Error Control; Correction	World Wide Web	
DSL carriage		

The fairest reading of the history of the “enhanced” and “basic” classifications suggests, in other words, an ongoing, highly context dependent series of policy judgments, that clearly depended on more than merely the abstract nature of the technology. In practice, the FCC has always, and continues to consider who was offering the service as much as what was being offered. It considered, in other words, matters like underlying market structure, the presence of market power or a terminating monopoly, the innovativeness of the service or company, and whether the service was being offered by a traditional incumbent carrier. If, then, Congress codified existing FCC practice in 1996, when it created the “telecommunications”/“information” service distinction, it

codified a practice of ongoing, FCC judgment and policy-making, based on multiple factors, that has continued to this day.

This understanding helps make sense of the classification of Internet services in the 1990s. Companies like AOL, Compuserve and Earthlink, which offered access to the Internet “over the top” of the telephone network in the 1990s, were quite different than the broadband service industry today. Those providers offered access first to their own networks, and later to the Internet as well, in an “over the top” manner, relying on existing telephone lines through a dial-up modem. The offering of such services bore most if not all of the indicia of the “over the top” industries that the Commission had been trying to protect since 1970s: they were highly competitive, innovative, and also vulnerable to disruption and abuse by the local carriers. Hence, in its historic context, the Commission’s classification of providers like AOL as offering an “enhanced service” over the telephone company’s “basic service” makes sense.

In contrast, today’s broadband services, the subject of this dispute, were new in 1996; whether they would more resemble the competitive “over the top” markets, or the less-competitive carrier markets

remained unclear, which helps explain their shifting classification.

There was some hope that broadband Internet services would turn out to be as competitive as, say, the world-wide-web. Wu, *The Master Switch: The Rise and Fall of Information Empires* ch. 17 (2011). That turned out not to be the case, as the Commission pointed out this year. *Order*, 30 FCCRcd at 5604, ¶8 (JA___). But in 1996 none of this was known; the history of broadband was yet unwritten, the FCC's full thinking unformed. Ultimately Congress, in the 1996 Act, gave the Commission the authority to make hard policy choices respecting broadband, and that is exactly what the Commission, for the last twenty years, has been doing, for better or worse. "The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest," as the *Chevron* court wrote, "are not judicial ones." *Chevron*, 467 U.S. at 866.

CONCLUSION

Wherefore, this Court should affirm the Order and grant all such

other relief as may be just and proper.

Respectfully submitted,

/s/ Andrew Jay Schwartzman

Andrew Jay Schwartzman
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9170
AndySchwartzman@gmail.com

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 3908 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 MS Word in 14-point Century Schoolbook type.

Respectfully submitted,

/s/ Andrew Jay Schwartzman

Andrew Jay Schwartzman

Room 312

600 New Jersey Avenue, NW

Washington, DC 20001

202 662-9170

AndySchwartzman@gmail.com

September 21, 2015

CERTIFICATE OF SERVICE

I, Andrew Jay Schwartzman, hereby certify that I have this day of 21st day of September, 2015, electronically filed the foregoing *Notice of Intent to Response in Support of Joint Motion for a Stay Pending Judicial Review* 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