

ORAL ARGUMENT NOT YET SCHEDULED

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

Case No. 11-1355

Consolidated with Nos. 11-1356, 11-1403, and 11-1404

**VERIZON,**

*Appellant,*

v.

**FEDERAL COMMUNICATIONS COMMISSION,**

*Appellee.*

ON APPEAL FROM AN ORDER OF THE  
FEDERAL COMMUNICATIONS COMMISSION

**BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF  
MANUFACTURERS IN SUPPORT OF PETITIONERS-APPELLANTS**

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July 23, 2012

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

### **A. Parties**

Except for the following, all parties, intervenors, and amici appearing in this Court and before the Commission are listed in the Verizon/MetroPCS Brief: Commonwealth of Virginia (amicus curiae); Cato Institute (amicus curiae); Competitive Enterprise Institute (amicus curiae); Free State Foundation (amicus curiae); and TechFreedom (amicus curiae).

### **B. Rulings Under Review**

References to the ruling at issue appear in the Brief of Petitioners-Appellants.

### **C. Related Cases**

Amicus curiae the National Association of Manufacturers (“NAM”) adopts the statement of Petitioners-Appellants Verizon and MetroPCS. *See* Verizon/MetroPCS Br. at xii-xiii.

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, amicus curiae the National Association of Manufacturers states that it is a nonprofit industrial trade association representing small and large manufacturers in every industrial sector and in all 50 states. The NAM is the preeminent U.S. manufacturers' association as well as the nation's largest industrial trade association. The NAM has no parent corporation, and no publicly held company has 10% or greater ownership in the NAM.

**CERTIFICATE OF COUNSEL REGARDING NECESSITY OF  
SEPARATE AMICUS CURIAE BRIEFS**

Pursuant to Circuit Rule 29(d), the NAM hereby certifies that it is submitting a separate brief from the other *amicus curiae* in this case due to the specialized nature of each *amici*'s distinct interests and expertise. The NAM expects that *amicus curiae* the Commonwealth of Virginia's brief will focus on the issues of importance to its citizens as consumers of broadband service, and that *amici* Cato Institute, Competitive Enterprise Institute, Free State Foundation, and TechFreedom will together focus on Constitutional issues raised by the case. In contrast, the NAM represents the interests of the nation's manufacturers, which both utilize and build broadband network infrastructure. This brief therefore addresses statutory issues of special concern to such manufacturers, particularly as they pertain to network infrastructure deployment. Given these divergent purposes, the NAM, though counsel, certifies that filing a joint brief would not be practicable.

/s/ Russell P. Hanser  
Russell P. Hanser

July 23, 2012

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**GLOSSARY**

<i>Comcast</i>	<i>Comcast Corp. v. FCC</i> , 600 F.3d 642 (D.C. Cir. 2010)
Communications Act or Act	Communications Act of 1934, as amended, 47 U.S.C. § 151 <i>et seq.</i>
DOJ	The United States Department of Justice
FCC or Commission	Federal Communications Commission
FTC	Federal Trade Commission
ISP	Internet Service Provider
JA	Joint Appendix
NAM	Amicus curiae the National Association of Manufacturers
NPRM	Notice of Proposed Rulemaking
<i>Order</i>	<i>Preserving the Open Internet</i> , 25 F.C.C.R. 17905 (2010)
Section 706	Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302
1996 Act	The Telecommunications Act of 1996, which amended the Communications Act

**STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF  
AUTHORITY TO FILE OF AMICUS CURIAE**

The NAM is a nonprofit industrial trade association representing small and large manufacturers in every industrial sector and in all 50 states. As the preeminent U.S. manufacturers' association as well as the nation's largest industrial trade association, the NAM has a significant interest in, and can offer a unique perspective on, the issues raised by the Petitioners-Appellants.

American manufacturers are the beneficiaries of a globally deployed broadband infrastructure, which has transformed the way they operate and offered them numerous opportunities to participate in the creation and deployment of next-generation services. Manufacturers have also become increasingly dependent on the Internet and advanced telecommunication services in their daily operations to connect with customers, employees, suppliers, and valued partners. Specifically, manufacturers use telecommunications services and related technology to track production and inventory, to provide online learning tools to employees, and to assist all aspects of customer service operations from ordering to final delivery of a product. For these services and the systems on which they run, networks need to be robust and reliable to benefit manufacturers and consumers alike.

Regulation of broadband Internet services has the potential to impose burdens on American manufacturers, harming American consumers, preventing the creation of new jobs, and stifling the rollout of high-speed services to unserved and

underserved areas where the NAM's members invest and grow their businesses. The NAM believes that its perspective on the issues raised will aid the Court in reaching an appropriate decision in this case.

All parties and intervenors have consented to the NAM's participation as *amicus curiae*.

## STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No counsel for a party authored this brief in whole or in part, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief.

## STATUTES AND REGULATIONS

Pertinent statutes are contained in the Verizon/MetroPCS brief.

## STATEMENT OF FACTS

The *Order* on review adopted a series of rules relating to the provision of Internet services by Internet Services Providers (“ISPs”). First, the FCC adopted *transparency* obligations requiring all ISPs to “publicly disclose accurate information” regarding their network management practices, performance, and commercial terms of service. Second, it adopted *no-blocking* obligations prohibiting fixed broadband providers from “block[ing] lawful content, applications, services, or non-harmful devices” and mobile broadband providers from “block[ing] consumers from accessing lawful Web sites,” or “block[ing] applications that compete with the provider’s voice or video telephony services,” all subject to “reasonable network management.” Third, it adopted *non-discrimination* requirements prohibiting fixed broadband providers from “unreasonably discriminat[ing] in transmitting lawful network traffic over a consumer’s broadband Internet access service,” again subject to reasonable network management. 47 C.F.R. §§ 8.3, 8.5, 8.7. As applied, these rules

constitute rate regulation, requiring ISPs to carry the Internet traffic of “edge” providers free of charge and effectively prohibiting paid prioritization of certain traffic streams. *Order* ¶¶ 67, 76. Such requirements are known colloquially as “network neutrality,” “net neutrality,” or “open Internet” mandates.

The *Order* was the FCC’s second attempt to impose net neutrality requirements. In *Comcast*, this Court struck down its first effort, finding that the FCC had not established its legal authority to enforce such principles.<sup>1</sup> The instant *Order* again cited a broad array of statutory provisions that it claimed afforded it such authority, but relied principally on Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302.<sup>2</sup> Section 706(a) directs the FCC to “encourage the deployment on a reasonable and timely basis of [broadband] capability to all Americans ... by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”<sup>3</sup> Section 706(b) directs the FCC to assess regularly whether broadband service “is being deployed to all Americans in a reasonable and timely fashion,” and, if not, to

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<sup>1</sup> *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (“*Comcast*”).

<sup>2</sup> Other provisions cited by the *Order* fail to afford authority for the rules adopted here, as Verizon and MetroPCS explain. Verizon/MetroPCS Br. 27-42.

<sup>3</sup> 47 U.S.C. § 1302(a).

“compile a list of geographical areas that are not served” and “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”<sup>4</sup> Although it is impossible to tell from the *Order*’s text whether the FCC purported to exercise direct or ancillary authority, the agency seemed to conclude that these provisions vested it with sweeping authority to regulate the Internet. *See Order* ¶¶117-23 (JA \_\_-\_\_).

### SUMMARY OF ARGUMENT

The FCC lacked authority to adopt net neutrality rules. First, Congress did not intend Section 706 to vest the FCC with broad independent authority to regulate the Internet. That provision’s text only authorizes the FCC to exercise preexisting statutory powers, and other provisions adopted alongside Section 706 reflect Congress’s intention to safeguard Internet services from regulation. Moreover, the actions of subsequent Congresses – which have afforded the FCC and other entities discrete authority over certain aspects of the Internet but have repeatedly declined to adopt net neutrality legislation – confirm that Congress does not view the FCC as enjoying plenary authority to adopt the type of rules at issue here. Indeed, in the months before the *Order* was adopted, the Chairman of the

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<sup>4</sup> *Id.* § 1302(b), (c). *See generally Order* ¶123 n.384 (claiming that Section 706(b) authority had been triggered by prior FCC finding).

House Commerce Committee tried and failed to win support for legislation nearly identical to the regime the FCC adopted here.

Second, any action undertaken pursuant to Section 706 must *promote* the deployment of broadband, and the Commission's rules do not satisfy this test. The FCC relied on an unsupported, contorted theory, speculating that net neutrality mandates would lead to adoption of broadband by new users, which would in turn promote the statutorily required broadband network deployment. The evidence before the FCC, however, showed that net neutrality does not affect adoption, and overwhelmingly demonstrated that net neutrality regulations would *inhibit* deployment. The FCC failed to address that evidence, much less refute it. The agency may not rely on speculation, and may not simply ignore evidence undermining its view.

The Court should reject the FCC's sweeping assertion of jurisdiction here, and reverse the *Order*.

## ARGUMENT

### I. CONGRESS HAS NOT AFFORDED THE FCC PLENARY AUTHORITY TO REGULATE THE INTERNET

The *Order* improperly relies on the FCC's conclusion that Section 706 affords it independent authority to regulate the Internet. But “[t]he FCC ... ‘literally has no power to act ... unless and until Congress confers power upon it,’” *Am. Library Ass’n v. FCC*, 406 F.3d 689, 708 (D.C. Cir. 2005), *quoting La. Pub.*

*Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986), and a reviewing Court must reject claims that are “inconsistent with the intent that Congress has expressed in the ... overall regulatory scheme and in the [subject-matter-specific] legislation that it has enacted....” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 1226 (2000). Congress manifestly did not intend Section 706 to vest the FCC with broad and independent authority to regulate the Internet.

**A. The Statutory Text Demonstrates that Congress Did Not Intend Section 706 to Vest the FCC with Independent Authority to Regulate the Internet**

Although it is impossible to tell from the *Order*'s text whether the FCC purported to exercise direct or ancillary jurisdiction, the agency apparently found that Sections 706(a) and 706(b) endowed it with sweeping authority to regulate the Internet. *See Order* ¶¶117-23 (JA \_\_ - \_\_). The statutory text makes clear, however, that Section 706 mandates exercise of the FCC's *preexisting* statutory powers, and does not confer independent authority to regulate. As noted above, Section 706(a) directs the FCC to take action “by utilizing ... price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”<sup>5</sup> Based on this text, the FCC in 1998 concluded that

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<sup>5</sup> 47 U.S.C. § 1302(a).

“section 706(a) does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods,” but rather “directs the Commission to use the authority granted in other provisions.”<sup>6</sup> *See* Verizon/MetroPCS Br. 28-30. The FCC explained that it would have made no sense for Congress to have adopted detailed standards for the exercise of forbearance elsewhere in the Act, 47 U.S.C. § 160, while contemporaneously providing separate forbearance authority unhinged from those standards in Section 706.<sup>7</sup> Thus, in concluding that the FCC had exceeded its authority in its last effort to regulate the Internet, this Court in 2010 cited to the FCC’s concession that it “has no express statutory authority” over ISPs’ network management practices. *Comcast*, 600 F.3d at 654. The FCC’s 1998 conclusion was correct at the time, and remains correct today.

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<sup>6</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 F.C.C.R. 24011, 24044 (1998) (“*Advanced Services Order*”). In *Comcast*, this Court rejected the FCC’s claim that the *Advanced Services Order* had addressed only forbearance, and found the FCC “bound by” its prior conclusion that Section 706(a) afforded it no independent authority to employ other methods. *Comcast Corp. v. FCC*, 600 F.3d 642, 659 (D.C. Cir. 2010). Yet the *Order* on review here – issued nearly eight months after the *Comcast* decision – still insists that the *Advanced Services Order* addressed only forbearance, noting only grudgingly that “[t]o the extent the *Advanced Services Order* can be construed as having read Section 706(a) differently, we reject that reading of the statute for the reasons discussed in the text.” *Order* ¶119 n.370 (JA \_\_).

<sup>7</sup> *Advanced Services Order*, 13 F.C.C.R. at 24046.

Section 706(b) fares no better. That provision authorizes the FCC to act only “by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.” 47 U.S.C. § 1302(b). Like Section 706(a), it nowhere affords the FCC independent regulatory authority. And even the authority it *does* confer applies only in geographic areas where deployment has been deemed inadequate, not nationwide. *See Verizon/MetroPCS Br.* at 33.

**B. Other Provisions Adopted Alongside Section 706 Further Demonstrate that Congress Did Not Intend to Confer Broad Independent Powers to Regulate the Internet**

The FCC’s new view of its authority is also refuted by other provisions adopted in the 1996 Act alongside Section 706. “In reading a statute [a court] must not look merely to a particular clause, but consider in connection with it the whole statute.” *Dada v. Mukasey*, 554 U.S. 1, 16 (2008) (internal quotation marks omitted). It is a “cardinal rule that a statute is to be read as a whole, ... since the meaning of statutory language, plain or not, depends on context.” *King v. St. Vincent’s Hospital*, 502 U.S. 215, 221 (1991). *See also Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995) (court must interpret a statute “as a symmetrical and coherent regulatory scheme”).

The 1996 Act’s other provisions disprove any claim that Congress intended to vest the FCC with broad powers to regulate the Internet. For example, Section

230 states that “[i]t is the policy of the United States... to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation....*” 47 U.S.C.

§ 230(b)(2) (emphasis added). This statement of national policy is impossible to square with the view that the simultaneously adopted Section 706 granted the FCC apparently limitless authority to regulate the Internet.

Other provisions confirm the 1996 Act’s deregulatory approach: The Act’s preamble stated that its purpose was “[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”<sup>8</sup> Section 10, 47 U.S.C. § 160, required the FCC to “forbear” from applying regulatory mandates where they were no longer necessary to protect the public interest, and section 11, 47 U.S.C. § 161, required the agency to review all its regulations every two years and to “repeal or modify any regulation it determines to be no longer necessary in the public interest.”

Indeed, the entire structure of the 1996 Act highlights Congress’s intention to immunize the Internet from regulations such as those adopted below. That Act specifically differentiated between “telecommunications services” (defined to mean pure transmission offered on a common-carrier basis) and “information

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<sup>8</sup> Pub L. No. 104-104, Preamble.

services” (defined to mean the offering of transmission combined with processing, storage, or retrieval of information). 47 U.S.C. § 153(24), (50), (53).

“Telecommunications services” were subjected to extensive mandates under Title II of the Communications Act, 47 U.S.C. §§ 201-276, whereas “information services” – a class the FCC has repeatedly held to include the broadband Internet services at issue here<sup>9</sup> – were not expressly subjected to *any* mandates. *See generally NCTA v. Brand X Internet Services, Inc.*, 545 U.S. 967, 975 (2005) (the Communications Act “regulates telecommunications carriers, but not information-service providers, as common carriers”). The 1996 Act further specified that information services could not be subject to common-carriage requirements simply because they were offered by entities that also provided telecommunications services. *See* 47 U.S.C. § 153(51). Here, the FCC suggests that the same Congress that so carefully *proscribed* application of common-carrier requirements to information services simultaneously allowed the agency to compel information service providers to carry all lawful traffic indifferently – *i.e.*, to act as common carriers. This claim is untenable.

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<sup>9</sup> *See, e.g., High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798 (2002); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 F.C.C.R. 14853 (2005).

### **C. The Actions of Post-1996 Congresses Further Confirm the FCC's Lack of Authority**

The FCC's assertion of jurisdiction to impose net neutrality mandates is further undercut by the actions of post-1996 Congresses. As the Supreme Court has held, a pattern in which Congress enacts topic-specific legislation revealing a limited conception of an agency's authority, and repeatedly considers but rejects legislation that would expand that authority, "preclude[s] an interpretation" of the governing statutes that grants the agency the very powers Congress has declined to confer. *See Brown*, 529 U.S. at 143-56. Yet this is precisely the interpretation the FCC advocates.

On several occasions, Congress has found it necessary to grant the FCC and/or other entities discrete and limited authority over the Internet, demonstrating its view that the FCC does *not* enjoy the powers asserted by the *Order*. For example:

- In 1998's Children's Online Privacy Protection Act, Congress gave the FTC authority to adopt and enforce rules to ensure children's Internet privacy.<sup>10</sup>
- In 2003's CAN-SPAM Act, Congress directed the FCC and FTC to take action to stem the delivery of unsolicited email.<sup>11</sup>
- In 2008's Broadband Data Improvement Act, Congress directed the FCC and other governmental entities to take steps to improve data

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<sup>10</sup> Pub. L. No. 105-277, §§ 1301-1308.

<sup>11</sup> Pub. L. No. 108-187.

regarding broadband deployment, the impact of broadband speeds on small businesses, and online safety.<sup>12</sup>

- In 2008's New and Emerging Technologies 911 Improvement Act, Congress directed the National E-911 Implementation Coordination Office to develop "a national plan for migrating to a national [Internet Protocol]-enabled emergency network capable of receiving and responding to all citizen-activated emergency communications and improving information sharing among all emergency response entities."<sup>13</sup>
- In 2009's American Recovery and Reinvestment Act, Congress allocated approximately \$8 billion in stimulus funding for broadband deployment and related activities, and directed the Department of Commerce and the FCC to establish "non-discrimination and network interconnection obligations" as contractual preconditions for grants.<sup>14</sup>
- In 2010's Twenty-First Century Communications and Video Accessibility Act, Congress imposed accessibility requirements with respect to mobile Internet browsers, voice over Internet protocol, and Internet-delivered video content, and authorized the FCC to implement those requirements via rulemaking.<sup>15</sup>

These pieces of legislation "have effectively ratified" the view that the FCC lacked plenary jurisdiction under Section 706 to regulate the Internet. *Brown*, 529 U.S. at 144. To find otherwise would be to "ignore the plain implication" of Congress's post-1996 Internet-specific legislation. *Id.* at 160.

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<sup>12</sup> Pub. L. No. 110-385.

<sup>13</sup> Pub. L. No. 110-283.

<sup>14</sup> Pub. L. No. 111-5.

<sup>15</sup> Pub. L. No. 111-260.

Indeed, Congress has “squarely rejected proposals to give the [FCC]” authority to enact net neutrality regulation *more than ten times* since 2006 (including once *after* the *Order* on review was issued). *Id.* at 159-60.<sup>16</sup> Each of these bills would have imposed network neutrality mandates or empowered the FCC to do so. Each, however, either failed to win the support of the relevant committee or was defeated in the relevant house of Congress.

In addition to these bills, in the months leading up to the *Order*’s adoption, Representative Henry Waxman (then Chairman of the House Energy and Commerce Committee) sought from his colleagues support for draft legislation bearing striking similarities to the rules ultimately adopted by the FCC. *See* Proposed Net Neutrality Legislative Framework, appended hereto as Exhibit 1. Like the *Order* on review, that framework would have (1) prohibited wireline ISPs from “block[ing] lawful content, applications, or services, or prohibit[ing] the use of non-harmful devices, subject to reasonable network management”; (2) barred them from “unjustly or unreasonably discriminat[ing] in transmitting lawful traffic” (again subject to “reasonable network management”); and (3) required them to “disclose accurate and relevant information in plain language regarding ...

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<sup>16</sup> *See* H.R. 5252, 109th Cong. (2006); H.R. 5273, 109th Cong. (2006); H.R. 5417, 109th Cong. (2006); S. 2360, 109th Cong. (2006); S. 2686, 109th Cong. (2006); S. 2917, 109th Cong. (2006); S. 215, 110th Cong. (2007); H.R. 5353, 110th Cong. (2008); H.R. 5994, 110th Cong. (2008); H.R. 3458, 111th Cong. (2009); S. 74, 112th Cong. (2011).

price, performance, and network management practices.” *Id.* Wireless ISPs would have been prevented from blocking access to “lawful Internet websites” and “lawful applications that compete with the provider’s voice or video communications services in which the provider has an attributable interest,” both subject to reasonable network management. *Id.* Ultimately, however, Chairman Waxman declined to introduce the legislation after “[k]ey House Republicans refused to give their support to [the] draft proposal.”<sup>17</sup> At the time, Chairman Waxman stated that “[i]f Congress can’t act, the FCC must.” *Id.* Three months later, FCC Chairman Julius Genachowski acknowledged that the order being drafted by FCC staff “would build upon the strong and balanced framework developed by Chairman Henry Waxman.”<sup>18</sup> The *Order* ultimately adopted replicated that framework.

As FCC Commissioner Meredith Attwell Baker stated in her dissent to the *Order*, this approach was not permissible:

The Commission adopts rules that are almost word-for-word a draft bill under consideration in Congress. We are a creature of Congress, not Congress itself. Using a legislative proposal to base our action underscores that the majority acts beyond the appropriate role of an

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<sup>17</sup> See Kim Hart, *Net Neutrality Bill Stillborn*, POLITICO (Sep. 29, 2010), <http://www.politico.com/news/stories/0910/42919.html>.

<sup>18</sup> Chairman Julius Genachowski, *Remarks on Preserving Internet Freedom and Openness* (Dec. 1, 2010), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-303136A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-303136A1.pdf).

independent agency. The majority does what Congress could not, or would not do.... By definition, the majority does much more than the proposed draft bill by exercising its own discretion and judgment. The draft bill would have given the Commission very specific responsibilities and powers. In contrast, by doing it themselves, the majority has created a sweeping Internet policy without any jurisdictional limits.<sup>19</sup>

Commissioner Robert McDowell, also dissenting, expressed similar concerns:

“We cannot make laws. Legislating is the sole domain of the directly *elected* representatives of the American people. Yet the majority is determined to ignore the growing chorus of voices emanating from Capitol Hill in what appears to some as an obsessive quest to regulate at all costs.”<sup>20</sup>

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In the text of Section 706 itself, the other provisions of the 1996 Act, subsequent Internet-specific legislation, and its repeated failure to adopt net neutrality legislation, Congress has made clear its view that the FCC does not enjoy the powers it asserts here. This Court therefore should reverse the *Order*.

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<sup>19</sup> *Order*, Dissenting Statement of Commissioner Meredith Attwell Baker, at 18096 (JA \_\_\_).

<sup>20</sup> *Id.*, Dissenting Statement of Commissioner Robert M. McDowell, at 18049 (JA \_\_\_).

## II. THE *ORDER* FALLS OUTSIDE THE SCOPE OF ANY PURPORTED SECTION 706 AUTHORITY

At most, Section 706 permits the FCC to take actions that have the effect of *promoting* broadband deployment. Section 706(a) only authorizes the FCC to “encourage the deployment” of broadband services “by utilizing ... regulating methods that remove barriers to infrastructure investment.”<sup>21</sup> Section 706(b) directs the FCC, upon finding that broadband is not “being deployed to all Americans in a reasonable and timely fashion,” to “take immediate action to accelerate deployment of such capability” in areas lacking deployment.<sup>22</sup> The *Order* mentions the “deployment” limitation on Section 706’s scope in every one of its seven paragraphs addressing the FCC’s jurisdiction under that provision. *Order* ¶¶117-23 (JA \_\_-\_\_).

The record, however, contained virtually no evidence supporting the FCC’s theory that net neutrality rules would promote deployment. The FCC relied instead on speculation that such rules would promote adoption of broadband by non-users, which in turn would foster new deployments. *Order* ¶¶14, 53. In so concluding, the FCC ignored the relevant studies – studies cited elsewhere in the *Order*, one of which was authored by the FCC’s own staff – showing that net neutrality requirements are likely to have no impact on broadband adoption. It also ignored

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<sup>21</sup> 47 U.S.C. § 1302(a).

<sup>22</sup> *Id.* § 1302(b).

overwhelming evidence – including declarations submitted by distinguished economists and numerous economic studies – showing that the rules would *inhibit* deployment, saying only that it “disagree[d].” *Order* ¶40 (JA \_\_). The FCC’s failure to address the multitude of evidence before it eviscerates its legal theory and thus invalidates the *Order*.

**A. The *Order* Ignored Extensive Record Evidence Contradicting Its Speculative Theory That Net Neutrality Regulation Would Promote Broadband Adoption and Thus Deployment**

The FCC’s theory linking its net neutrality mandates to broadband deployment directly contradicted the record evidence. Specifically, the *Order* asserts that “the Internet’s openness ... enables a virtuous circle of innovation in which new uses of the network – including new content, applications, services, and devices – lead to increased end-user demand for broadband, which drives network improvements, which in turn lead to further innovative network uses,” *Order* ¶14 (JA \_\_), and contends (without citing any support) that “as end users’ confidence in ISPs’ practices increases, so too should end users’ adoption of broadband services – leading in turn to additional investment in Internet infrastructure as contemplated by Section 706,” *id.* ¶53 (JA \_\_). This claim was entirely unsupported.<sup>23</sup>

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<sup>23</sup> That the FCC could cite no support for its theory is particularly damning given that, just several days before the comment period closed, its Wireline Competition

(continued on next page)

The only evidence in the record undercuts the FCC's theory. A Working Paper authored by the Commission's own staff, and cited elsewhere in the *Order*, set out results of a survey that "sought to determine with as much specificity as possible why people without broadband choose not to have the service at home."<sup>24</sup> That 51-page Report never even used the terms "neutrality," "open," "openness," "blocking," or "discrimination," nor did it otherwise suggest that the absence of net neutrality rules bore any relationship to broadband adoption. Rather, the Report found "three primary reasons why the 35 percent of non-adopting Americans do not have broadband: cost, lack of digital literacy and [the belief that] broadband is not sufficiently relevant for them to purchase it." Horrigan Working Paper at 5, 26-31.

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(footnote continued)

Bureau entered about 2,000 pages of new documents into the record. *See* CFIF 12/13/10 Letter (criticizing entry of evidence not subject to adequate public review and comment). The *Order* cited those materials liberally with respect to other points, but the FCC apparently could find no support even there for its position that net neutrality rules would encourage adoption and further deployment.

<sup>24</sup> John B. Horrigan, Broadband Adoption & Use in America, OBI Working Paper No. 1 (Mar. 2010), at 26, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-296442A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296442A1.pdf) ("Horrigan Working Paper"); *see* John B. Horrigan, FCC Survey: Broadband Adoption & Use in America (Mar. 2010), [www.fcc.gov/DiversityFAC/032410/consumer-survey-horrigan.pdf](http://www.fcc.gov/DiversityFAC/032410/consumer-survey-horrigan.pdf) (providing an overview of the findings of the Horrigan Working Paper), cited in *Order* ¶53 n.166 (JA \_\_).

Another study mentioned in the *Order*, published by the Pew Internet & American Life Project, reported similar findings.<sup>25</sup> “When asked why they do not have the internet or broadband at home, non-users (either dialup subscribers or non-internet users) cite factors related to the Internet’s relevance, availability, usability, and price.”<sup>26</sup> Pew’s Report, like the FCC’s, never used any of the terms above, or otherwise suggested that *any* survey respondents had cited net neutrality concerns among reasons for not adopting broadband.<sup>27</sup>

As noted, both of these Reports were cited in the *Order*. They were also cited and discussed by numerous commenters.<sup>28</sup> Yet the *Order* does not *mention* them, much less *refute* them, in asserting that net neutrality requirements would lead to increased adoption and increased deployment. *Order* ¶53 (JA \_\_\_).

“[S]peculation is an inadequate replacement for the agency’s duty to undertake an

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<sup>25</sup> Pew Internet & American Life Project, Home Broadband Adoption 2009 (June 2009), cited in *Order* ¶18 n.43 (JA \_\_\_).

<sup>26</sup> *Id.* at 7.

<sup>27</sup> *See generally id.* at 7-8 (listing factors mentioned by survey respondents, including disinterest, lack of access to broadband, expense of service, belief that Internet use was too difficult, lack of a home computer, lack of time for Internet use, and the belief that the Internet “is a waste of time”).

<sup>28</sup> *See, e.g.*, National Coalition on Black Civic Participation-Black Women’s Roundtable 2/24/10 Letter, Attachment at 7; Internet Innovation Alliance 1/12/2010 Comments at 1, 6; Rehabilitation Engineering Research Centers on Universal Interface & Information Technology Access (RERC-IC) Telecommunications Access (RERC-TA) 4/23/2010 Comments at 2-3. *See also* Verizon 10/12/2010 Comments at 51-52 (citing Pew’s 2010 adoption study).

examination of the relevant data and reasoned analysis....”<sup>29</sup> Nor can the FCC save its *Order* by reframing its speculation as prediction; this Court “cannot overlook the absence of record evidence” supporting the FCC’s theory “simply because the Commission cast its analysis as a prediction of future trends.”<sup>30</sup> Rather, the FCC’s refusal to contend with overwhelming evidence refuting its theory is a “danger signal[.]” suggesting that “the agency has not really taken a ‘hard look’ at the salient problems, and has not genuinely engaged in reasoned decision-making.” *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (footnote omitted).

**B. The *Order* Also Ignored Extensive Record Evidence that Net Neutrality Regulation Would Deter Investment and Thus Deployment**

Contrary to the FCC’s baseless theory, the record that the FCC ignored made clear that net neutrality requirements would *undercut* network investment and hamstring deployment. The NAM itself argued that net neutrality requirements “would impose burdens on American manufacturers, stifle the rollout of high-speed services to unserved and underserved areas, harm American consumers and

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<sup>29</sup> “*Complex*” *Horsehead Resource Development Co., Inc. v. Browner*, 16 F.3d 1246, 1269 (D.C. Cir. 1994). *See also NRDC v. EPA*, 859 F.2d 156, 210 (D.C. Cir. 1988) (speculation does not constitute “adequate grounds upon which to sustain an agency’s action”).

<sup>30</sup> *BellSouth Telecomms, Inc. v. FCC*, 469 F.3d 1052, 1060 (D.C. Cir. 2006).

prevent the creation of new jobs.”<sup>31</sup> Cisco Systems, the world’s largest manufacturer of networking equipment, explained:

The business rationale for [broadband] investment rests in no small part on the expectation that providers will be permitted to develop innovative business plans and technological offerings that differentiate their networks from those of their competitors. These expectations have fueled network deployment thus far, and will likely continue to do so. A Commission rule barring “discrimination,” however, would deeply undermine the prospects for such differentiation, and would in turn frustrate investment and innovation.... Without any opportunity for product differentiation, providers would be denied any measure of confidence in their ability to recoup such investment, fundamentally altering the business case for new deployment. In short, the construction of next-generation broadband networks would be characterized by extremely high cost and risk, and limited opportunities for recoupment.<sup>32</sup>

This view received widespread support in the record: Worries regarding the likelihood that net neutrality requirements would undermine broadband deployment were articulated by ISPs,<sup>33</sup> the makers of broadband network

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<sup>31</sup> NAM 4/26/2010 Reply Comments at 1.

<sup>32</sup> Cisco 1/14/2010 Comments at 6.

<sup>33</sup> *See, e.g.*, Verizon 1/14/2010 Comments at 43; Independent Telephone & Telecommunications Alliance 1/14/2010 Comments at 10; National Telecommunications Cooperative Association 1/14/2010 Comments at 9; General Communications Inc. 11/4/2010 Reply Comments at 3; WCAI 1/14/2010 Comments at 4.

components,<sup>34</sup> and coalitions representing racial and ethnic minorities and other groups.<sup>35</sup> In a related docket, the United States Department of Justice cautioned that excessive regulation could “stifl[e] the infrastructure investments needed to expand broadband access.”<sup>36</sup>

Even more significant were the many declarations and economic studies submitted into and/or discussed in the record confirming what manufacturers and service providers knew from experience – namely, that net neutrality regulation would deter deployment. These included the following:

- A Declaration by Nobel Prize-winning economist Gary Becker and former DOJ Chief Economist Dennis Carlton stating that “[i]mposition of net neutrality rules that limit experimentation with new business models and network management practices will prevent network operators from enhancing the functionality of the their networks and will undermine the business case for investing in higher capacity broadband networks.”<sup>37</sup>
- A Declaration by former FCC Chief Economist Michael Katz explaining that “public policies that reduce the financial returns to investment weaken private investment incentives” and concluding that, among other things, imposition of net neutrality rules of the sort

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<sup>34</sup> Telecommunications Industry Association 1/14/2010 Comments at 25-26; Telecom Manufacturer Coalition 1/14/2010 Comments at 2-3.

<sup>35</sup> See Coalition of Minority Chambers 1/13/10 Letter; National Organizations 1/14/10 Comments at 19.

<sup>36</sup> DOJ 1/4/2010 Letter in FCC Docket No. 09-51 at 28, quoted in Verizon 12/3/2010 Letter, Attachment at 16.

<sup>37</sup> Becker/Carlton Decl. ¶66, appended as Attach. A to Verizon 1/14/2010 Comments. See also Becker/Carlton Reply Decl., appended as Attach. A to Verizon 4/26/2010 Reply Comments.

the FCC was considering “would be expected to attenuate investment incentives, harming competition and consumers.”<sup>38</sup>

- A Declaration by Dr. Marius Schwartz, who is now Chief Economist of the FCC’s Wireline Competition Bureau, concluding that net neutrality requirements “would discourage broadband deployment and use.”<sup>39</sup>
- A Declaration by economist Michael Topper concluding that “[n]etwork neutrality regulations would ... have the adverse consequence of deterring network investment by broadband access providers.”<sup>40</sup>
- A Declaration by the Chief Corporate Chief Technology Officer of leading telecommunications component manufacturer Alcatel-Lucent explaining that “[n]etwork operators’ network investment decisions are naturally tied to their expectations with respect to returns on that investment,” and that net neutrality rules “are likely to have a significant effect on investment decisions going forward.”<sup>41</sup>
- An article coauthored by economist Robert Crandall and computer scientist David Farber concluding that net neutrality requirements “would certainly result in reducing ISP incentives to invest or innovate in performance-enhancing network capabilities.”<sup>42</sup>

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<sup>38</sup> Katz Decl. ¶¶30, 98, appended as Attach. B to Verizon 1/14/2010 Comments. *See also* Katz Reply Decl., appended as Attach. B to Verizon 4/26/2010 Reply Comments.

<sup>39</sup> Schwartz Decl. ¶¶24-25, appended as Exhibit 3 to AT&T 1/14/2010 Comments.

<sup>40</sup> Topper Decl. ¶123, appended as Attach. C to Verizon 1/14/2010 Comments. *See also* Topper Reply Decl., appended as Attach. C to Verizon 4/26/2010 Reply Comments.

<sup>41</sup> Weldon Decl. at 9, appended to Telecommunications Industry Association 1/14/2010 Comments.

<sup>42</sup> Faulhaber/Farber Decl. at 19, appended as Ex. 1 to AT&T 1/14/2010 Comments.

- A white paper issued by the Phoenix Center for Advanced Legal & Economic Policy Studies using economic modeling to demonstrate that net neutrality requirements “will unquestionably result in lower broadband network construction across the board,” and that “deployment in high-cost areas will be harmed disproportionately by any such cost-increasing mandate.”<sup>43</sup>
- An empirical study by economists Thomas Hazlett and Anil Caliskan examining “evidence from the U.S. residential broadband market” and concluding that prior instances of broadband regulation have undermined deployment of new network facilities.<sup>44</sup>
- An paper by economists Larry Darby and Joseph Fuhr, Jr., explaining that “investors have a big stake in the resolution of net neutrality issues and particularly in the outcome of the debate over who can be charged, by what principles and by whom,” and stating that “[t]he importance of investor attitudes about the broadband build-out can scarcely be overemphasized....”<sup>45</sup>
- A paper authored by communications economists Robert Crandall and Hal Singer observing that “both the initial establishment of the network and its ongoing management require significant investment,”

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<sup>43</sup> George Ford et al., *The Burden of Network Neutrality Mandates on Rural Broadband Deployment*, Phoenix Center Policy Paper No. 25 at 18 (2006), discussed and linked in Independent Telephone & Telecommunications Alliance 4/26/2010 Reply Comments at 7.

<sup>44</sup> Thomas Hazlett and Anil Caliskan, *Natural Experiments in U.S. Broadband Regulation*, 7 REVIEW OF NETWORK ECONOMICS 460, 477-78 (2008), cited in Verizon 4/26/2010 Reply Comments at 43 n.41.

<sup>45</sup> Larry Darby and Joseph Fuhr, Jr., *Consumer Welfare, Capital Formation and Net Neutrality: Paying for Next Generation Broadband Network*, 16 MEDIA L. & POL’Y 141 (2007), cited in National Organizations 1/14/2010 Comments at 19-20 n.72.

and concluding that “[n]et neutrality regulation is ... likely to reduce innovation in ... the development of network infrastructure....”<sup>46</sup>

In the face of such voluminous record evidence demonstrating that net neutrality requirements would inhibit investment and deployment (and thus could not be adopted under the auspices of Section 706), the *Order* stated simply that the FCC “disagree[d].” It then offered a *single-sentence* rejoinder, claiming (without any analysis) that “[t]here is no evidence that prior open Internet obligations have discouraged investment” and citing arguments that “by preserving the virtuous circle of innovation, open Internet rules will increase incentives to invest in broadband infrastructure.” *Order* ¶40 (JA \_\_). Its purported sources for these propositions, moreover, were off-point. For example, the FCC cited comments stating that a *non-binding* FCC policy statement had not deterred investment.<sup>47</sup> Other cited comments expressly *disclaimed* any suggestion of “causality” between net neutrality mandates and investment.”<sup>48</sup> The *Order* cited repeatedly to comments filed by Google on this point, but its comments expressly *acknowledged* that net neutrality rules would deter broadband network investment.<sup>49</sup>

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<sup>46</sup> Robert Crandall and Hal Singer, *The Economic Impact of Broadband Investment* at 52-53 (2010), cited and linked in Swanson 4/26/2010 Reply Comments at 11 n.2.

<sup>47</sup> See Google 1/14/2010 Comments at 38-39; XO 1/14/2010 Comments at 12.

<sup>48</sup> See Free Press 1/14/2010 Comments at 26.

<sup>49</sup> See Google 1/14/2010 Comments at 41 (graphic).

Of course, the *Order* would be unlawful even if the sources it cited supported its view. The FCC may not brush aside voluminous evidence going to the heart of its legal authority by asserting its mere “disagree[ment]” and invoking comments favoring its position. In refusing to acknowledge or address the plentiful evidence discussed above, the FCC has “entirely failed to consider an important aspect of the problem,” adopting a view of broadband deployment that “runs counter to the evidence before the agency.” *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). This Court “should not attempt itself to make up for such deficiencies,” *id.*, but rather must strike down the FCC’s unlawful arrogation of power.

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The FCC’s central claim to legal authority relies on assertions regarding the linkage between net neutrality requirements and broadband deployment that were comprehensively refuted by record evidence that the *Order* simply refused to address. This failure to contend with key evidence speaking to the very basis for the agency’s purported authority constitutes reversible error.

## CONCLUSION

For the reasons stated herein and in the Verizon/MetroPCS brief, the Court should reverse and vacate the *Order*.

Respectfully submitted,

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**EXHIBIT 1**

Proposed Net Neutrality Framework

## **Proposed Net Neutrality Legislative Framework**

**SEC. 1 SHORT TITLE.**—This Act may be cited as the “\_\_\_\_\_ Act of 2010.”

### **SEC. 2 INTERNET OPENNESS.**

Title I of the Communications Act of 1934 (47 U.S.C. 151 et seq.) is amended by adding at the end thereof the following new section:

#### **“SEC. 12 INTERNET OPENNESS.**

“(a) **DUTIES OF WIRELINE PROVIDERS.**—A person engaged in the provision of broadband Internet access service by wire, insofar as such person is so engaged—

“(1) shall not block lawful content, applications, or services, or prohibit the use of non-harmful devices, subject to reasonable network management;

“(2) shall not unjustly or unreasonably discriminate in transmitting lawful traffic over a consumer’s wireline broadband Internet access service. For purposes of this subparagraph, reasonable network management practices shall not be construed to be unjustly or unreasonably discriminatory.

“(3) shall disclose accurate and relevant information in plain language regarding the price, performance, and network management practices of its wireline broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop and market new Internet offerings. The Commission shall not require public disclosure of competitively sensitive information or information that could compromise network security or undermine the efficacy of reasonable network management practices]. In promulgating rules implementing this subparagraph, the Commission shall at minimum require providers to display or provide links to the required information on an Internet website and to update such information in a timely fashion to reflect material changes in the information subject to this paragraph.

“(b) **DUTIES OF WIRELESS PROVIDERS.**— A person engaged in the provision of broadband Internet access service by radio, insofar as such person is so engaged—

“(1) shall not block consumers from accessing lawful Internet websites, subject to reasonable network management;

“(2) shall not block lawful applications that compete with the provider’s voice or video communications services in which the provider has an attributable interest, subject to reasonable network management; and

“(3) shall disclose with regard to its wireless broadband Internet access services the same information required of wireline broadband Internet access service by paragraph

12(a)(3).

“Paragraph (2) shall not apply to wireless broadband Internet access service providers to the extent they are engaged in the operation of application stores or their functional equivalent.

“(c) ENFORCEMENT—

“(1) COMMISSION AUTHORITY.—The Commission shall enforce the duties established in subparagraphs 12(a)(1), (a)(2), (b)(1) and (b)(2), through adjudication of complaints alleging a service or services violate such subparagraphs. Nothing in this section limits the Commission’s authority to adopt procedures for the adjudication of complaints, to adopt orders requiring compliance from an entity subject to a complaint or enforcement actions, or to issue declaratory rulings or guidance.

“(2) INJUNCTIVE RELIEF AND PENALTIES.— If the Commission finds that a provider of broadband Internet access service has violated paragraphs (a) or (b), the Commission may issue an order enjoining such violation, including interim injunctive relief. If the Commission finds that a provider of broadband Internet access service has engaged in a willful and knowing violation of paragraphs (a) or (b), the Commission may issue a fine or forfeiture of no more than \$2,000,000 for any practice found to violate paragraphs (a) or (b), consistent with the procedures in Section 503 of the Communications Act. The Commission may not order the payment of damages for any violation of paragraphs (a) or (b).

“(3) NO ADDITIONAL PRIVATE RIGHTS AUTHORIZED.—Nothing in this section shall be construed to authorize any private right of action.

“(d) RELATIONSHIP TO OTHER TITLES AND LAWS —

“(1) THE COMMISSION.— The Commission may not impose regulations on broadband Internet access service or any component thereof under Title II of the Communications Act, except in the event that a provider of broadband Internet access service elects to provide the transmission component of such service as a telecommunications service under Title II of the Communications Act. Except as expressly provided in this section, nothing in this section shall increase, reduce, or otherwise alter the Commission’s authority.

“(2) PROVIDERS.— Nothing in this section supersedes any obligation or authorization a provider of broadband Internet access service may have to address the needs of emergency communication, law enforcement, public safety, or national security, consistent with applicable law, or limits the provider's ability to do so. Nothing in this section shall prohibit reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity.

“(e) REPORT TO CONGRESS—No later than December 31, 2011, the Commission shall deliver to the Committee on Energy and Commerce of the House of Representatives and U.S. Senate Committee on Commerce, Science, & Transportation recommendations with regard to

additional authority needed by the Commission to implement the National Broadband Plan and to ensure further the protection of consumers in their use of Internet services.

“(f) TERM OF AUTHORITY—This section shall expire on December 31, 2012, provided that the Commission may continue to adjudicate cases regarding violations that occurred prior to January 1, 2013, that are filed at the Commission no later than March 1, 2013.

“(g) DEFINITIONS—For purposes of this section:

“(1) BROADBAND INTERNET ACCESS SERVICE –The term ‘broadband Internet access service’ means:

“(A) A mass market retail service, by wire or radio, that provides high-speed capability to transmit data to and receive data from all or substantially all Internet endpoints, including any associated information-processing capabilities; or

“(B) A service that the Commission finds provides consumers a functional equivalent to the service described in subparagraph (A) or and evades the consumer protections set forth in this section.

“(2) HIGH-SPEED.—The term ‘high-speed’ shall have the meaning given to it in the Commission’s Fifth Report on the Deployment of Advanced Telecommunications Capability to All Americans, FCC 08-88 (rel. June 12, 2008).

“(3) REASONABLE NETWORK MANAGEMENT. – The term “reasonable network management” means a network management practice that is appropriate and tailored to achieving a legitimate network management function, taking into account the particular network architecture or technology of the provider. It includes appropriate and tailored practices to reduce or mitigate the effects of congestion on a broadband Internet access provider’s network; to ensure network security or integrity; to address traffic that is harmful to or unwanted by users, including premise operators, or to the provider’s network, or the Internet; to meet the needs of public safety; and to provide services or capabilities to effectuate a consumer’s choices, including parental controls or security capabilities. In determining whether a network management practice is reasonable, the Commission shall consider technical requirements, standards, or best practices adopted by one or more independent, widely-recognized Internet community governance initiative or standard-setting organization. In determining whether a network management practice for wireless broadband Internet access service is reasonable, the Commission shall also consider the technical, operational, and other differences between wireless and other broadband Internet access platforms, including the need to ensure the efficient use of spectrum.

The FCC shall determine the treatment of fixed wireless and satellite services for the purposes of this section.

## CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32(a)(7)(C) and D.C. Cir. R. 32(a)(2)(C), I hereby certify that the foregoing brief complies with the type-volume limitation of D.C. Cir. R. 32(a)(2)(B)(i), F.R.A.P. 29(d), and the May 25, 2012 Order in this docket because this brief contains 5922 words, excluding the parts of the brief exempted by F.R.A.P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(1). This certification is made in reliance on the word count function of the word processing system used to prepare this brief (Microsoft Word 2010).

Further, I certify that the foregoing brief complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type style requirements of F.R.A.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (14-point Times New Roman).

/s/ Russell P. Hanser

Russell P. Hanser

July 23, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that on July 23, 2012, I caused copies of the foregoing **BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS-APPELLANTS** to be filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users. Other counsel, marked with an asterisk below, will receive service by mail.

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