FINAL BRIEF

ORAL ARGUMENT SCHEDULED FOR DECEMBER 4, 2015

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

No. 15-1063 (and consolidated cases)

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 PHOENIX CENTER FOR ADVANCED LEGAL AND ECONOMIC PUBLIC POLICY STUDIES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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October 13, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The undersigned attorney of record, in accordance with D.C. Cir. R. 28(a)(1), hereby certifies as follows:

A. Parties and Amici

Parties appearing in this Court and before the FCC are listed in the Joint Brief for Petitioners United States Telecom Association, National Cable & Telecommunications Association, CTIA – The Wireless Association®, American Cable Association, Wireless Internet Service Providers Association, AT&T Inc., and CenturyLink. Amici appearing before this Court are listed below:

Richard Bennett
Business Roundtable
Center for Boundless Innovation in Technology
Chamber of Commerce of the United States of America
Competitive Enterprise Institute
Harold Furchtgott-Roth
Georgetown Center for Business and Public Policy
International Center for Law and Economics and Affiliated Scholars
William J. Kirsch
Mobile Future
Multicultural Media, Telecom and Internet Council
National Association of Manufacturers
Phoenix Center for Advanced Legal and Economic Public Policy Studies
Telecommunications Industry Association
Washington Legal Foundation
Christopher S. Yoo

B. Ruling Under Review

The Phoenix Center for Advanced Legal and Economic Public Policy Studies files this brief as *amicus curiae* in support of the Petitioners seeking review of the final order of the Federal Communications Commission captioned *Protecting and Promoting the Open Internet*, REPORT AND ORDER ON REMAND, DECLARATORY RULING, AND ORDER, GN Docket No. 14-28, FCC 15-24, 80 Fed. Reg. 19738 (rel. Mar. 12, 2015) ("*Order*") (JA 3477 *et seq.*).

C. Related Cases

This case has been consolidated with Case Nos. 15-1078, 15-1086, 15-1090, 15-1091, 15-1092, 15-1095, 15-1099, 15-1117, 15-1128, 15-1151, and 15-1164.

There are no other related cases.

s/ *Lawrence J. Spiwak*

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CERTIFICATE OF COUNSEL REGARDING AUTHORITY TO FILE AND SEPARATE BRIEFING

On August 4, 2015, this Court granted the Phoenix Center's Motion for Leave to File Brief in Support of Petitioners as Amicus Curiae, authorizing submission of a brief up to 4,000 words. Pursuant to Circuit Rule 29(d), counsel for the Phoenix Center hereby certifies that no other non-government *amicus* brief of which they are aware relates to the subjects addressed herein. Accordingly, the Phoenix Center, through counsel, certifies that filing a joint brief would not be practicable.

s/ *Lawrence J. Spiwak*

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Local Rule 26.1, the Phoenix Center for Advanced Legal & Economic Public Policy Studies submits the following corporate disclosure statement. The Phoenix Center is a non-profit 501(c)(3) non-stock corporation organized under the laws of Maryland. As such, the Phoenix Center has no parent companies and no one holds an ownership interest in the Phoenix Center.

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CERTIFICATE REGARDING AUTHORSHIP

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), the Phoenix Center certifies that no party's counsel authored this brief, in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the Phoenix Center contributed money that was intended to fund preparing or submitting the brief.

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GLOSSARY:

2010 Open Internet Order	*In the Matter of Preserving the Open Internet, Broadband Industry Practices*, FCC 10-201, 25 FCC Rcd 17905, REPORT AND ORDER (rel. December 23, 2010).
2014 Open Internet NPRM	*In the Matter of Protecting and Promoting the Open Internet*, FCC 14-61, 29 FCC Rcd 5561, NOTICE OF PROPOSED RULEMAKING (rel. May 15, 2014).
BSP	Broadband Service Provider
Commission, FCC, or Respondent	Federal Communications Commission
Edge Provider or "Edge"	Any individual or entity who provides content, services, and applications over the Internet for consumption by end users (e.g., Google, Netflix).
Fully-Distributed Cost	A cost allocation approach where, in some cases, costs are allocated based on each service's share of output.
Order	*Protecting and Promoting the Open Internet,* GN Docket No. 14-28, FCC 15-24, 80 Fed. Reg. 19738, REPORT AND ORDER ON REMAND, DECLARATORY RULING, AND ORDER (rel. Mar. 12, 2015).

Intercarrier Compensation	Charges that one telecommunications carrier pays to another telecommunications carrier to originate, transport, and terminate traffic.
Title II	Title II of the Communications Act of 1934.
Reciprocal Compensation	Intercarrier compensation where the traffic begins and ends in the same local calling area.
TELRIC	Total Element Long Run Incremental Cost. A variant of the Long Run Incremental Cost Standard adopted by the Federal Communications Commission where the increment is the total element and costs are measured on a forward-looking basis.
Verizon v. FCC or *Verizon*	740 F.3d 623 (D.C. Cir. 2014).

INTERESTS OF AMICUS CURIAE:

The Phoenix Center is a non-profit 501(c)(3) research organization that studies the law and economics of the digital age. Over the past ten years, the Phoenix Center has authored numerous pieces of scholarly research about the Open Internet debate, many of which have been published in leading academic journals.[1] In addition, the Phoenix Center has testified on this matter before Congress and, in the case at bar, was personally invited by the General Counsel of the Federal Communications Commission to present our research to the agency's staff. The Phoenix Center, therefore, has an established interest in the outcome of this proceeding and believes that its perspective on the issues will assist the Court in resolving this case.

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[1] For a full list of the Phoenix Center's extensive academic publications on this issue, *see:* http://www.phoenix-center.org/rt1.html.

SUMMARY OF ARGUMENT:

Under the plain terms of this Court's holding in *Verizon v. FCC*, edge providers are "customers" of Broadband Service Providers ("BSPs") because BSPs provide transmission of edge provider traffic to BSPs' end-users. According to this Court, the BSPs' provision of such terminating access for end-user traffic is a "valuable service" and is distinct from the retail service offered by BSPs to end-users. In the *Order*, the Commission acknowledges the Court's determination that a two-sided market exists with end users on one side and edge providers on the other. The *Order* then establishes that "Title II applies [] to the second side of the market" between broadband providers and edge providers or other third parties.

However, wanting to side-step the legal consequences of applying Title II to the second side of the market, the Commission held that it "need not reach the regulatory classification of the service that this Court in *Verizon* identified as being furnished to the edge" and chose instead to lump both the retail and second side of the market into a single service (now termed Broadband Internet Access Service or BIAS). Unfortunately, such maneuvering does not withstand scrutiny.

First, the Commission plainly states (on the same page as the "we need not reach" claim) that "Title II applies [] to the second side of the market." The service provided to the second side of the market is exactly that service this Court originally identified in *Verizon* as a distinct service and a Title I information service. If, on the one hand, the Commission failed to reclassify this service in the *Order*, then the service provided by BSPs to edge providers remains a Title I information service and the Commission's cloned "no blocking" and "no throttling" rules must be vacated for the exact same reasons these rules were vacated in *Verizon*—that is, the Commission is again applying Title II common carrier regulation (i.e., uniform application of zero price regulation to all comers) to a non-common carrier Title I information service.

If, on the other hand, the Commission has now reclassified the relationship between BSPs and edge providers as a common carrier "telecommunications service" so that "Title II applies", then the Commission has nakedly disregarded all pretense of basic ratemaking jurisprudence and the *Order* must be vacated. First, the Commission has arbitrarily set a price of zero for the service offered by BSPs to edge providers. Contrary to basic rate setting standards, the Commission provides no analysis that this zero price is "just and reasonable," and standard rate

setting practices would almost certainly deem a zero price confiscatory. Second, by requiring BSPs to apply this zero price uniformly to all customers—regardless of whether they are "similarly situated" or not—the Commission has failed to allow any form of *reasonable* discrimination as expressly permitted under Section 202 of the Communications Act. Accordingly, in its broad attempt to forbear from the tariffing requirements of Section 203, the Commission has not surrendered its control over price to the market, but rather has merely attempted to sidestep the formal requirements of Title II meant to constrain not only the conduct of the regulated but also of the regulator.

ARGUMENT:

I. The Commission Acknowledges that Broadband Services Providers Operate in a Two-Sided Market with End-Users on One Side and Edge Providers on the Second Side of the Market But Then Improperly Lumps the Two Services Together to Avoid the Requirements of Title II

Broadband providers operate in what economists refer to as a two-sided market. Glen E. Weyl, *A Price Theory of Multi-sided Platforms*, 100(4) AMERICAN ECONOMIC REVIEW 1642-72 (2010). On one side of the market, the broadband providers offer connectivity to the Internet in the form of a mass-market retail service subscribed to by end-users. On the second-side of the market, broadband providers offer edge providers—the purveyors of content—a service whereby their content reaches end users.[2] Broadband service is a platform bringing together two distinct *customer* types: end users and edge providers.

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[2] The service provided to edge providers is distinct from the exchange of traffic between the BSP and the networks that carry the edge provider's traffic. For example, the edge provider may seek to compensate the BSP directly for excluding its traffic from customers' data cap or monthly data allotment that is part of the BSP's end-user service. The edge provider's carrier plays no role in this direct transaction between the edge provider and the BSP. Also, transmission networks carry the traffic of many edge providers, and net neutrality addresses the picking out of a particular edge provider's traffic, perhaps using deep-packet inspection, for differential treatment.

The Commission recognizes the two-sided nature of the broadband service, describing the service to edge providers as "the second side of the market—between broadband providers and edge providers or other third parties" (*see 2014 Open Internet NPRM* at ¶ 37) and "agree[ing] that a two-sided market exists." *Order* ¶ 338 (JA 2623).

Indeed, the two-sided nature of the market is fundamental to the Commission's goal of regulating the Internet. As this Court recognized in *Verizon,* the Commission's Open Internet rules focus primarily on the second side of the market by regulating "broadband providers' economic relationships with edge providers." *Verizon v. FCC*, 740 F.3d 623, 643 (D.C. Cir. 2014). The focus on this relationship is based on a "fear that broadband providers might prevent their end-user subscribers from accessing certain edge providers altogether, or might degrade the quality of their end-user subscribers' access to certain edge providers, [] or to enable them *to collect fees from certain edge providers*." *Id.* at 629 (Emphasis supplied).[3] Without ambiguity, this Court concluded in *Verizon* that

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[3] Given the economic logic underlying the Commission's "virtuous circle" theory, this fear is unjustified. The theory driving the Commission's Open Internet rules is not the "virtual circle" it touts in its *Order* but an

(Footnote Continued….)

"broadband providers furnish a service to edge providers, thus undoubtedly functioning as edge providers' 'carriers'". *Verizon*, 740 F.3d at 653. This conclusion countered the expedient yet "flawed argument" that broadband providers are not carriers for edge providers made by the Commission in defense of its prior *2010 Open Internet Order*. *Id.*

However, the Commission states that "we need not reach the regulatory classification of the service that the *Verizon* court identified as being furnished to the edge." *Order* ¶ 339 (JA 3624). The Commission's position that it need not reclassify the second side of the market to apply Title II rests on its claim that the end-user, mass market retail service (now termed Broadband Internet Access Service or BIAS) "encompasses this [termination] service to edge providers." *Order* ¶ 27 (JA 3486). By lumping together the distinct services provided to edge providers on the one side and end users on the other, the Commission has conspicuously ignored the Court's conclusion in *Verizon* that "broadband providers furnish a service to edge providers". *Verizon*, 740 F.3d at 653.

"unvirtuous circle" for which it provides no analysis. *See* George S. Ford, *Bait-and-Switch—Or Why the FCC's "Virtuous Circle" Theory is Nonsense*, BLOOMBERG BNA (May 18, 2015).

Unfortunately, the Commission cannot have its cake and eat it too.

The Commission plainly states (on the same page as the "we need not reach" claim) that "Title II applies [] to the second side of the market." *Order* ¶ 338 (JA 3623-24). The service provided to the second side of the market is exactly that service this Court originally identified in *Verizon* as a Title I information service. If, on the one hand, the Court accepts the argument that because the Commission refused to address the classification question and, therefore, the service provided by BSPs to edge providers remains a Title I information service, then the Commission's redone "no blocking" and "no throttling" rules must be vacated for the exact same reasons the similar rules were vacated in *Verizon*[4]—that is, the Commission is again applying Title II common carrier regulation (i.e., uniform application of zero price regulation to all comers) to a non-common carrier Title I information service. On the other hand, if this service is now a Title II common carrier service, then this service must be subject to basic ratemaking requirements under Sections 201 and 202. As we show next, if the Court accepts this line of logic, then the Commission has violated basic

[4] This same argument appears in Petitioners' Consolidated Brief at pp. 75-8.

precepts of ratemaking jurisprudence. Either way, the Commission's zero-price rule is unlawful.

II. If "Terminating Access" Is A Separate Title II Service, Then The Commission Has Arbitrarily Established A Rate Of "Zero" And Set A Confiscatory Rate In Violation Of The "Just And Reasonable" Standard Of Section 201

In the *Order*, the Commission has declared end-user broadband service to be "a Title II service" and has determined that "Title II applies, as well, to the second side of the market." *Order* ¶ 338 (JA 3623-24). In that same *Order*, the Commission imposes a "rule [that] prohibits broadband providers from charging edge providers a fee…" *Order* ¶ 113 (JA 3524-25). As with its predecessor, this new rule is intended to "bar providers from charging edge providers for using their service, thus forcing them to sell this service to all who ask at a price of $0." *Verizon*, 740 F.3d at 657. With intent, the Commission's rule establishes "a regulated price of zero." *Verizon,* Silberman J. Dissenting, 740 F.3d at 668. Accordingly, if edge providers are "customers" of BSPs as this Court found in *Verizon*, then this regulation, just as the Commission's last incarnation of the zero-price rule, has the unambiguous effect of requiring BSPs to provide carriage to edge providers without any compensation. *See Verizon,* 740 F.3d at 654 (Commission seeks to "compel[] an entity to continue furnishing service at no cost.")

The current rule is fundamentally no different than that vacated by this Court in *Verizon*; only the legal foundation of the rule has been (presumably) altered. In the Commission's new approach, "Title II applies [] to the second side of the market." Yet, Title II offers the Commission no shelter for its zero-price rule. Under the plain terms of the Communications Act, if edge providers are in fact customers of a BSP and Title II applies to this service as the *Order* plainly states, then a BSP must be allowed to charge a positive "fee" for this termination service because a common carrier is "for hire." 47 U.S.C. § 153(11); *see also* 47 U.S.C. §151(53). Indeed, the statute defines a service regulated under Title II as an "offering [] *for a fee* directly to the public." (*Id.*, emphasis supplied.) This positive fee must satisfy the "just and reasonable" ratemaking standard contained in Section 201. 47 U.S.C. § 201. However, as recognized by this Court in *Farmers Union Central Exchange v. FERC,* 734 F.2d 1486, 1504 (D.C. Cir.), *cert denied sub nom.,* 469 U.S. 1034 (1984), the phrase "just and reasonable" is not "a mere vessel into which meaning must be poured." Rather, a "just and reasonable" rate must fall within a "zone of reasonableness—i.e., a rate cannot be "confiscatory" (i.e., "below cost") on the bottom-end and "excessive" on the high-end. *See Id*. at 1502.

The United States Supreme Court, this Court, and the Commission have all recognized that ratemaking is "far from an exact science". *See, e.g., Fed. Power Comm'n. v. Conway Corp.,* 426 U.S. 271, 278 (1976*); WorldCom v. FCC,* 238 F.3d 449, 457 (D.C. Cir. 2001); *Sw. Bell Telephone Co. v. FCC,* 168 F.3d 1344, 1352 (D.C. Cir. 1999); *Time Warner Entm't Co. v. FCC,* 56 F.3d 151, 163 (D.C. Cir. 1995); *United States v. FCC,* 707 F.2d 610, 618 (D.C. Cir. 1983); *see also Fifth Access Charge Reform Order* at ¶¶ 96, 144). Even so, the Commission may not set a rate arbitrarily. Instead, the Commission must provide its whys and wherefores on how it derived the rate. *See, e.g. Century Communications Corp. v. Federal Communications Comm'n,* 835 F.2d 292, 300–02 (D.C. Cir. 1987) (rejecting FCC's judgment where supported by "scant" evidence), *cert. denied,* 486 U.S. 1032, 108 S.Ct. 2014, 2015, 100 L.Ed.2d 602 (1988); *Cincinnati Bell Telephone Company v. FCC*, 69 F.3d 752, 760, (6th Cir. 1995) (overturning Commission's judgment when FCC "provide[d] to this Court nothing, no statistical data or even a general economic theory, to support its argument."); *but c.f. Verizon v. FCC*, 535 U.S. 467 (2002) (finding FCC had provided sufficient detail in establishing TELRIC rate for unbundled network elements). The Commission provided no such analysis in the *Order*.

Formulating termination rates is likely to be a complex and arduous task, but drudgery is no excuse for the Commission's avoidance of the requirements of its own choice to apply Title II to the second side of the market. Unquestionably, the cost of a service is not zero—there are no free lunches. In fact, it could be argued that most of the costs of the broadband network are attributable to edge providers, since the bulk of traffic is downstream rather than upstream (a ratio of about 6:1). *Global Internet Phenomena Report*, 1H 2014, SANDVINE (2014) at p. 5. Under a fully-distributed cost formula, it is feasible that much of the costs would be assigned to the edge providers. Stephen Brown and David Sibley, THE THEORY OF PUBLIC UTILITY PRICING (1986) at pp. 44-9. As such, it may be that the revenues from edge providers eventually make up a lion's share of BSP revenue from the sale of broadband service. In such a world, the consumer would benefit greatly. Economic theory predicts that as the edge providers' price rises, the end-users' price falls. A more balanced rate structure across the two sides of the market may be beneficial to both network deployment and service adoption. *See* Glen E. Weyl, *The Price Theory of Two-sided Markets* (2006) at p. 17-8; Jay Pil Choi & Byung-Cheol Kim, *Net Neutrality and Investment Incentives*, 41 RAND J. OF ECONOMICS 446-465 (2010) at pp. 453-7.

Unfortunately, the Commission has failed to even consider such inquiry in the case at bar. In fact, it has done nothing. What cost standard was used to establish this zero price? Historical cost? Forward-looking cost? Marginal cost? Average cost? Total Element Long Run Incremental Cost? We cannot know, because the Commission does not know. The Commission set a price of zero without a shred of analysis. In so doing, and in applying "Title II [] to the second side of the market," the Commission has arbitrarily established a "confiscatory" rate for the service offered to edge providers. *See generally*, George S. Ford and Lawrence J. Spiwak, *Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service,* 67 FEDERAL COMMUNICATIONS LAW JOURNAL 1 (2015) (JA 3361-79).

The Commission may argue that in fact it can impose a zero rate for the service offered to edge providers based on its adoption of bill-and-keep regulations for terminating voice traffic. The exchange of voice traffic *among carriers*, a service also subject to Sections 201 and 202, is arguably priced at zero under bill-and-keep. This argument holds no water. Bill-and-keep is based on the Commission's authority over reciprocal compensation under Sections 251(b)(5) (47 U.S.C. § 251(b)(5)) and 252(d)(2) (47 U.S.C. § 252(d)(2)) of the Act. That is, the bill-and-keep regime only applies to

parties seeking to impose rates by tariff or in the context of a Section 252 agreement between carriers. Parties are otherwise free to contract for different rates.

More importantly, carrier-to-carrier relationships, governed by Sections 251 and 252 of the Communications Act, are not "customer" relationships, and edge providers are not, today, carriers; they are *customers*. *See Connect America Fund Order*, 26 FCC Rcd 17,663 (rel. November 18, 2011). The Commission has not purported to classify edge providers as common carriers. As observed by the 10th Circuit Court of Appeals in *In Re FCC 11-161,* 753 F.3d 1015 (10th Cir. 2014), when ruling on the FCC's *Connect America Fund Order*, carrier-to-carrier relationships involve the "recovery of costs through the offsetting of reciprocal obligations". 753 F.3d at 1128. Bill-and-keep is not *per se* "zero-price" regulation since there is consideration in the form of "reciprocal obligations," and the "recovery of costs" is a direct consideration. Besides, the Commission has expressly forborne from Sections 251 and 252 in the *Order* (*Order* ¶¶ 513-14 (JA 3725-28)), and thus must rely on its authority under Sections 201 and 202 when applying "Title II [] to the second side of the market." We are aware of no precedent that would support a rate of zero for a service regulated under those provisions of the Act.

The bill-and-keep regime also includes two backstops unavailable to BSPs. First, the 10th Circuit recognized that to the extent costs are not recovered from such compensation, "[s]tates are free to set end-user rates, and the Order does not prevent states from raising end-user rates to allow a fair recovery of termination costs." 753 F.3d at 1130. In the case at bar, however, retail broadband prices are not regulated so there is no mechanism by which to ensure that costs are recovered. Second, if intercarrier compensation is insufficient to cover costs, the Courts have noted that "the FCC reforms include funds for carriers that would otherwise lose revenues." *Id.*; *see also Ace Tel. Ass'n v. Koppendrayer*, 432 F.3d 876, 880 (8th Cir. 2005). The *Order* does not create or even consider a subsidy scheme designed to broadly support BSPs impacted by the uniform zero-price rule. Cost recovery is not merely hypothetical. The Commission has observed elsewhere that the "financial incentives for private deployment of competitive networks are sometimes insufficient." *Chattanooga Preemption Order* at ¶ 3. Moreover, the economic theory of two-sided markets affirms that a regulated price cut on one side of a two-sided market will not be fully offset by price increases on other side of that market. (Weyl (2006), *supra*.)

At a minimum, if the carrier-to-carrier bill-and-keep type regime is created for edge provider termination service to BSPs, then edge providers

must become telecommunications carriers, a formal classification that likewise will subject edge providers to Title II regulation. The *Order* does not classify edge providers as common carriers.

The Commission may also argue it has not regulated the rate between BSPs and edge providers. Indeed, the Commission used its authority under Section 10 (47 U.S.C. § 160) to forbear from the tariffing requirements of Section 203 (47 U.S.C. § 203) for broadband Internet service.[5] *Order* ¶¶ 497-505 (JA 3717-21.) Such an argument is specious; the *Order* clearly sets a specific rate—*zero*—on the second side of the market without any form of analysis to back it up. The Commission has not surrendered to the market the pricing of the service offered to edge providers. *See Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003), *cert. denied,* 542 U.S. 937 (2004) (In the case of Section 203 forbearance, "[r]ates are determined by the market, not the Commission, as are the level of profits.") In detariffing, the

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[5] Oddly, the Commission has chosen to forbear from tariff despite the fact it concedes that "the record [does not] reveal that we can rely on competitive constraints to help ensure the justness and reasonableness of tariff filings." *Order* ¶ 504 (JA 3720). For a detailed examination of the Commission's Section 10 forbearance authority, *see* George S. Ford and Lawrence J. Spiwak, *Section 10 Forbearance: Asking The Right Questions To Get The Right Answers*, 23 COMMLAW CONSPECTUS 126 (2014) (JA 3380-411).

Commission has not forborne from rate setting; what the Commission has done, or more accurately is attempting to do, is to ignore the explicit requirements of Title II of the Communications Act for setting a rate. The Commission apparently does not wish to sleep in the bed it has made.

III. If "Terminating Access" Is A Separate Title II Service, Then The Commission Has Prevented BSPs From Engaging In Reasonable Discrimination As Expressly Permitted By Section 202

Under the express terms of Section 202(a), carriers are allowed to engage in *reasonable* discrimination. (47 U.S.C. § 202(a).) The Commission has conceded this point before this very Court. *Orloff,* 352 F.3d at 420 ("the Commission emphasizes that § 202 prohibits only *unjust* and *unreasonable* discrimination in charges and service.") (Emphasis in original.) Thus, according to well-established case law, any charge that a carrier has unreasonably discriminated must satisfy a three-step inquiry (in sequence): (1) whether the services offered are "like"; (2) if they are "like," whether there is a price difference among the offered services; and (3) if there is a price difference, whether it is reasonable. *See, e.g., MCI Telecommunications Corp. v. FCC,* 917 F.2d 30, 39 (D.C. Cir. 1990) and citations therein. If the services are not "like," or not "functionally equivalent" in the legal parlance, then discrimination is not an issue and the

investigation ends. There is no valid discrimination claim for *different* prices or price-cost ratios for *different* goods.

Notably, a determination of whether services are "like" is based upon neither cost differences nor competitive necessity. Cost differentials are excluded from the likeness determination and introduced only to determine "whether the discrimination is unreasonable or unjust." Likeness is based solely on functional equivalence. *MCI v. FCC, id.* If the services are determined to be "like" or "functionally equivalent," then the carrier offering them has the burden of justifying any price disparity as reasonable, such as a difference in cost. *Id.* If a price difference is not justified, then the price difference is deemed unlawful. A price difference cannot be arbitrarily presumed unlawful, yet the Commission has done so.

One usual measure to determine reasonableness is an inquiry as to whether the different rates are offered to "similarly situated" customers. *See, e.g., IXC Competition NPRM* at ¶ 131-139 (*citing Associated Gas Distributors v. FERC,* 824 F. 2d 981, 1007-1013 (D.C. Cir. 1987); *but c.f. Orloff, supra* (allowing a mobile CMRS carrier to charge different promotional rates to similarly situated retail customers under *competitive* market conditions in the absence of tariffs). That is, are the customers

roughly the same size and exchange similar levels of traffic, or, for example, is one customer a wholesale customer while the other only buys at retail? In the standard course of regulating telecommunications rates, such distinctions permit different rates. A prioritized termination service is not the functional equivalent of the typical termination service so there is no claim of unreasonable discrimination under Section 202 across the two services. Nor does Netflix.com place the same demands on the network as does phoenix-center.org. To the extent the Open Internet is about slow-and-fast lanes and Title II about "just and reasonable" and "not unreasonably discriminatory" rates, Title II offers no barrier to different services with different rates. In fact, it seems more likely that Title II facilitates rather than impedes the creation of prioritized termination. *See* Ford and Spiwak, *Tariffing Internet Termination, supra* p. 13.

No doubt recognizing this established case law, the Commission attempts to side-step the issue by promulgating its "no paid prioritization" rule—not under Section 202(a), the statute which is eponymously charged with regulating all issues of discrimination—but under the "public interest" catchall of Section 201(b) (47 U.S.C. §201(b)) and Section 706 (47 U.S.C. § 1302). *See Order* ¶ 292 (JA 3604). This they may not do. While the Commission certainly has great latitude to interpret the Communications

Act, the Agency must nonetheless operate "within the bounds of reasonable interpretation" (*see, e.g., Utility Air Regulatory Group v. Environmental Protection Agency*, __ U.S. __; 134 S.Ct. 2427, 2431 (2014); *City Of Arlington, Texas v. Federal Communications Commission*, __ U.S. __, 133 S.Ct. 1863, 1864 (2013)) and it is not at liberty to pick and choose select provisions of the statute to govern for the sake of expediency.[6] The *Order*'s "zero-price" rule for terminating access should be vacated on the grounds it is incompatible with Section 202 of the Act.

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[6] Recognizing the constraints of Title II, this Court in *Verizon* gave the Commission a clear roadmap on how to write legally defensible rules under Section 706, a path the Commission originally sought to follow in its *2014 Open Internet NPRM*. *See* Lawrence J. Spiwak, *What Are the Bounds of the FCC's Authority over Broadband Service Providers?—A Review of the Recent Case Law,* 18 JOURNAL OF INTERNET LAW 1 (2015) (JA 3344-60). The fact that the Commission ultimately rejected this path does not entitle them to ignore established precepts of Title II.

CONCLUSION:

Perhaps the Commission can devise a scheme by which to support a uniform zero price as being "just and reasonable" and "not unreasonably discriminatory," but it has not yet done so, and it is not the responsibility of this Court to compensate for the Commission's lack of effort. The *Order*'s zero-price rule is both confiscatory and chosen in an arbitrary and capricious manner contrary to law.

For the reasons set forth herein, the Phoenix Center joins Petitioners in urging this Court to find unlawful and, therefore, to vacate the Commission's *Order*.

Respectfully submitted,

s/ *Lawrence J. Spiwak*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(e), as modified by the Court's June 29, 2015 briefing order granting the Phoenix Center 4,000 words, the undersigned certifies that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(e)(1), this brief contains 3,980 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2007) used to prepare this brief.

/s/ *Lawrence J. Spiwak*

Lawrence J. Spiwak
October 13, 2015

CERTIFICATE OF SERVICE

I hereby certify that, on October 13, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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