ORAL ARGUMENT NOT YET SCHEDULED

Nos. 11-1135 & 11-1136

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

CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS,

Appellant/Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee/Respondent.

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

BRIEF FOR *AMICI CURIAE* PUBLIC KNOWLEDGE, MEDIA ACCESS PROJECT, AND NEW AMERICAN FOUNDATION'S OPEN TECHNOLOGY INITIATIVE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1)(A), *amici* hereby certify the following:

A. Parties and Amici

All parties, intervenors, and *amici* appearing in this Court and before the Commission are listed in the Brief for Appellant/Petitioner Cellco Partnership d/b/a Verizon Wireless ("Verizon").

B. Ruling Under Review

Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, *Second Report and Order*, 26 FCC Rcd 5411 (2011) ("*Order*") (J.A.__), 76 Fed. Reg. 26199 (May 6, 2011).

C. Related Cases

Amici adopt the statement of Appellees/Respondents Federal Communications Commission and the United States. *See* Resp'ts' Br.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, *amici* state that they have no parent companies, nor do any publicly held companies own ten percent or more of their stock. *Amici* are non-profit organizations incorporated in the District of Columbia.

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GLOSSARY

Act	Communications Act of 1934, as amended
CMRS	Commercial mobile radio service
FCC	Federal Communications Commission

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

Public Knowledge ("PK") is a non-profit organization that promotes consumer interests in the wireless market by advocating for market conditions and regulatory actions that maintain competition, choice, and fairness. These conditions are critical to the continued growth and innovation of the wireless market and its ability to meet the public's needs. PK regularly comments on proceedings before the Federal Communications Commission ("FCC" or "Commission"), testifies before Congress on relevant policy issues, and participates in legal proceedings connected to areas of interest. PK has a strong interest in the future of the rules governing data roaming obligations as a means to foster competition and encourage a wireless data marketplace that is responsive to consumer needs.

The Media Access Project ("MAP") is a non-profit, public interest law firm and advocacy organization working in communications policy. For over thirty-nine years, MAP has promoted the public interest before the Federal Communications Commission and the U.S. Courts, fighting for an open and diverse communications system that protects freedom of expression, promotes universal and equitable access to media outlets and telecommunications services, and encourages vibrant public discourse on critical issues facing our society.

The New America Foundation's Open Technology Initiative ("OTI") formulates policy and regulatory reforms to support open architectures and open source innovations and facilitates the development and implementation of open technologies and communications networks. OTI promotes affordable, universal, and ubiquitous communications networks through partnerships with communities, researchers, industry, and public interest groups and is committed to maximizing the potentials of innovative open technologies by studying their social and economic impacts—particularly for poor, rural, and other underserved constituencies.

The Court has granted *amici*'s motion for leave to file an *amici curiae* brief in this case. *Cellco P'ship v. FCC*, No. 11-1135 (July 13, 2011) (order granting leave to participate as *amici curiae*). *See also* Fed. R. App. P. 29(a); D.C. Cir. Rule 29(b).

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. Fed. R. App. P. 29(c)(5)(A)-(B). No person or entity—other than *amici*, their members or their counsel—made a monetary contribution intended to fund this brief's preparation or submission. Fed. R. App. P. 29(c)(5)(C).

STATUTES AND REGULATIONS

Except for the following, all applicable statutes, etc., are contained in the Brief for Verizon.

47 U.S.C. § 151:

> "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter."

SUMMARY OF ARGUMENT

Amici believe that the FCC's decision should be affirmed for the reasons set forth in the Respondents' brief. Rather than repeat these arguments, *amici* wish to provide additional background on data roaming services and address Petitioner/Appellant's arguments with respect to how this Court should proceed in the event it does not affirm the decision below.

The Data Roaming Order provides a number of important benefits to consumers. By encouraging data roaming, the Order fosters competition between wireless carriers of all sizes. That competition ultimately increases choice, drives

down prices, and expands access to the Internet for consumers nationwide. Preventing implementation of the Order would harm all consumers, but especially those with low incomes and those who live in rural areas.

Additionally, the Court should not indulge Petitioner's premature request for judicial review over questions that the Commission explicitly declined to answer when establishing its authority to adopt the Order. If the Court finds that the basis the Commission did specify for legal authority are inadequate and 47 U.S.C. § 332(d) (2006) must be addressed, the Court should remand the Order to the Commission. This will allow the Commission to make an initial determination on the issue, which would only then become subject to judicial review.

ARGUMENT[1]

I. The Data Roaming Order Provides Benefits to Consumers.

The FCC's Data Roaming Order was a great boon to consumers. Recent years have seen a massive increase in the public's demand for mobile data. *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd 5411, at ¶ 24 (2011) ("Order") (J.A.__), 76 Fed. Reg. 26,199. Members of the public use mobile data services for a wide range of purposes, from

[1] *Amici* agree with the government that this Court's jurisdiction is based on 47 U.S.C. § 402(a) (2006).

accessing information to communicating during emergencies. *Id.* at ¶ 14 (J.A.__). At the same time, competition among the carriers able to meet that public demand has decreased. By creating roaming obligations for carriers, the Commission helped to combat that trend and foster competition between carriers. At its core, the obligations allow smaller carriers to offer services that can compete with larger carriers. Millions of American consumers who might have lacked access to data services will benefit from this rule, which ultimately creates more choices for consumers, brings down prices, and brings broadband access within reach of slow-adopting communities. *Id.* at ¶ 29 (J.A.__).

The Order was necessary to make the benefits of data roaming available to the public. *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 25 FCC Rcd 4181, 4207 ¶ 50, 4211 ¶ 60 (2010). As the Commission found during the course of its carefully conducted, multiple-round, multi-year rulemaking on this issue, "providers have encountered significant difficulties obtaining data roaming arrangements on advanced '3G' data networks, particularly from the major nationwide providers." Order at ¶ 24 (J.A.__). For example, AT&T apparently did not enter into a single high-speed data roaming agreement for six years after launching its own service, *id.* at ¶ 25 (J.A.__), and Verizon has in some cases

categorically refused to negotiate with small providers simply because of their geographic locations. *Id.* at ¶ 26 (J.A.__). Moreover, nationwide providers recently negotiated agreements that may have been inspired in part by a desire to "defuse [the] issue" of data roaming, in the hopes of discrediting any rules that might be adopted. *Id.* at ¶ 27 (J.A.__). In light of the Commission's factual findings regarding the unfortunate state of the unregulated data roaming market, the rules are necessary to encourage beneficial data roaming. *Id*. at ¶ 13 (J.A.__).

Data roaming can encourage competitors to enter the wireless market and facilitate the expansion of existing providers. *Id*. at ¶ 11 (J.A.__). Currently there are many barriers to entry into the mobile data service market. A new or expanding entrant needs access to spectrum, locations to place facilities, and access to high-capacity backhaul connections to the wider Internet. These resources are finite, and can require massive upfront investments of time, money, and other resources. *See* Comments of Free Press at 4, WT Docket No. 05-265 (June 14, 2010) (J.A.__). This discourages experimentation with new, innovative business models and expanding into untested markets. Order at ¶ 17 (J.A.__).

Data roaming provides an avenue for competitors to enter a market without these capital-intensive commitments. *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Fourteenth Report, 25 FCC Rcd 11,407, 11,459 (2010) at ¶ 63. Entrants can test new pricing structures or

advertisements to see if a market responds before fully committing to acquiring local infrastructure. Rural areas can benefit from multiple providers sharing a single infrastructure. Order at ¶ 15 (J.A.__). Niche business models can take hold in urban areas. *Id*. at ¶ 18 (J.A.__). *See also*, *e.g.*, Comments of Cincinnati Bell Wireless LLC at 7, WT Docket No. 05-265 (June 14, 2010) (J.A.__) (asserting that, without data roaming, "[d]ue to the limited availability of nationwide roaming partners for 3G and 4G services, Cincinnati Bell is seeing a steady defection of its customers to the national carriers even though Cincinnati Bell offers a superior network in its operating area and attractive rate plans that are available without a long-term contract"); Reply Comments of Bend Cable Communications, LLC d/b/a BendBroadband at 2, WT Docket No. 05-265 (July 12, 2010) (J.A.__) ("Our mobile broadband product is not commercially viable for most consumers primarily because we cannot offer mobility outside of our service area"). With data roaming obligations, niche businesses can thrive because data roaming reduces the massive penalty for miscalculation imposed by the current high entrance costs in mobile services. Order at ¶ 18 (J.A.__).

Because they facilitate new entrants and increase competition, data roaming agreements also drive down prices. *Id*. at ¶ 31 (J.A.__). Without the Order, incumbent carriers have little reason to offer roaming to potential competitors. *Id*. at ¶ 28 (J.A.__). With the Order, those same competitors can enter a local market

and compete on price. Reply Comments of Leap Wireless International, Inc. and Cricket Communications, Inc. at 5, WT Docket No. 05-265 (July 12, 2010) (J.A.__) ("Without roaming, carriers, in order to offer service in new areas, would need to invest in building extensive networks before offering service. Roaming enables carriers to continue their investments while serving their customers in the interim."). In the short term, this will increase the number of low-cost mobile data options available to the public. In the longer term, it will force incumbents to reduce prices and therefore drive down prices for everyone.

By increasing the number and diversity of offerings while driving down prices, data roaming expands the number of people who have access to the Internet. Low-income families cite cost, lack of familiarity with technology, and lack of availability of technology as three of the major barriers to broadband access. John B. Horrigan, *Broadband Adoption and Use in America* (FCC, OBI Working Paper Series No. 1, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296442A1.pdf. Combining low-cost data access with familiar mobile phone technology addresses those barriers. Consumers can access mobile data services on devices they may already own.

Rural consumers also benefit when their rural provider can offer nationwide data roaming. In addition to the benefits of full mobile data service, studies find

that increased broadband deployment could substantially increase jobs in rural America. *See, e.g.*, "Economic Impact of Wireless Broadband in Rural America" by Raul Katz et al., attachment to Letter from Rebecca Murphy Thomas, General Counsel, RCA, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265 (Feb. 24, 2011) (J.A.__). These rural providers often provide locally competitive service, but lose customers who are afraid the service will not work when they leave the area. Reply Comments of Bend Cable Communications, LLC d/b/a BendBroadband at 2, WT Docket No. 05-265 (July 12, 2010) (J.A.__). Data roaming facilitates the combination of local carrier expertise and confidence that networks can be accessed anywhere, making those locally-based offering all the more competitive. Order at ¶ 20 (J.A.__).

II. If the Court Rejects the Commission's Finding of Legal Authority, It Should Remand the Question to the FCC.

In the Order the Commission explicitly did not rely upon 47 U.S.C. § 332(d) or its authority to implement data roaming rules. Instead, the Commission relied upon other provisions of Title III of the Act to set rules for the services at issue. If the Court decides that a determination on § 332(d) is essential to the Order, the Court should then remand the question to the Commission. In the absence of an initial determination by the agency, the Court should not indulge Petitioner's request to review a decision that was never made. It would be inappropriate for the Court to consider the substance of the Order on the merits or address any potential

basis for the Order not specifically relied upon before the Commission has had an opportunity to reconsider its justification.

Importantly, a premature decision by the Court here will have unintended consequences for other current and future issues in telecommunications law. If the Court decides this question before the expert agency has had a chance to consider all of the jurisdictional arguments for its authority, the decision could have widespread implications for consumer protection. If the FCC lacks jurisdiction in this area, it may have difficulty establishing jurisdiction for other consumer protection actions, such as "bill shock" regulations or outage reporting rules. *See The Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers*, Notice of Proposed Rulemaking, 26 FCC Rcd 7166 (2011); *Empowering Consumers to Avoid Bill Shock*; *Consumer Information and Disclosure*, Notice of Proposed Rulemaking, 25 FCC Rcd 14625 (2010).[2] Prudence as well as established canons of administrative law dictate the Court refrain from ruling on an issue with such serious ramifications until the

[2] The FCC Enforcement Bureau has entered into a voluntary settlement and consent decree with Verizon Wireless regarding unexpected data charges on Verizon Wireless customers' bills, but the bill shock rulemaking remains open. *Verizon Wireless Data Usage Charges*, Consent Decree, 25 FCC Rcd 15105 (Enf. Bur. 2010).

agency has had a thorough opportunity to examine its jurisdiction in the first instance.

It is a fundamental principle of administrative law that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("*Chenery I*"). One corollary of this principle is that, "[i]f a reviewing court [determines] that the agency misinterpreted the law, it will set aside the agency's action and remand the case—even though the agency . . . might later, in the exercise of its lawful discretion, reach the same result for a different reason." *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998); *see People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17, 23 n.7 (D.C. Cir. 1999) ("[W]e do not sustain a 'right-result, wrong-reason' decision of an agency."). "[I]t is on an agency's own justifications that the validity of its regulations must stand or fall." *Mova Pharma. Corp. v. Shalala*, 140 F. 3d 1060, 1067 (D.C. Cir. 1998) (citing *Chenery I*, 318 U.S. 80).

Remand of an agency decision based on flawed reasoning or legal analysis is thus the appropriate action for a reviewing court "except in rare circumstances," *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985), such as when "remand would be futile," *Fogg v. Ashcroft*, 254 F.3d 103, 111 (D.C. Cir. 2001). Here, should the Court find that the FCC misapprehended or misapplied the law on

common carriage in promulgating the Data Roaming Order, remand would be appropriate.

A. The Court Should Not Decide Whether Section 332(d) of the Act Prohibits Common Carriage Obligations in this Case.

The FCC did not determine whether § 332(d) prohibits common carriage obligations in the Order. Instead, the FCC relied upon its Title III authority to regulate "radio communications" and "transmission of energy by radio." Order at ¶ 66 (J.A.__) (citing 47 U.S.C. §§ 301 et seq.). This Court should not rule on this question in the absence of an initial determination by the FCC. Rather, if the Court concludes that the resolution of this question is essential to the resolution of the case, the Court should remand the issue to the FCC to make an initial determination. Once that determination is made, then parties may seek judicial review of the determination.

Petitioner poses this question as appropriate for judicial review, relying upon its assertion that the services at issue are neither commercial mobile services nor the functional equivalent of such services under 47 U.S.C. § 332(d), and that the Order "made no serious effort to show otherwise." Pet'r's Br. 24–27. In fact, the FCC explicitly declined to answer the question Verizon paints as already decided and ripe for judicial review. In the Order, the FCC specifically acknowledged Petitioner's argument regarding the services' classification under 47 U.S.C. § 332(d), Order at ¶ 60 (J.A.__), but concluded that it "do[es] not need to determine

that a mobile service should be classified as CMRS [commercial mobile radio service]" to implement a data roaming rule. *Id.* at ¶ 66 (J.A.__). Additionally, the Commission stated that "we need not decide whether data roaming services provisioned in this manner are or are not telecommunications services," *id.* at ¶ 70 (J.A.__), and explicitly declined to consider the question of "interconnected service" in the Order. *Id.* at ¶ 6 n.11 (J.A.__). Instead, the Commission relied upon its statutory authority to regulate "radio communications" and "transmission of energy by radio," classify radio stations, impose operating conditions on licensees, and grant, revoke, or modify radio licenses. *Id.* (citing 47 U.S.C. §§ 301–303, 307–309, 312, 316).

If the Court finds the Commission's stated statutory justification lacking, it may not address alternative rationales not expressly relied upon, such as the classification of data roaming as a commercial mobile service or a telecommunications service. Only the reasoning explicitly set forth by the agency may be considered on appeal; reviewing courts "may not accept . . . *post hoc* rationalizations for agency action," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983), and "will not be expected to scrutinize the record to uncover and formulate a rationale explaining an action, when the agency in the first instance has failed to articulate such rationale." *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 n.73 (1981).

The Supreme Court's own restatement of *Chenery I* supports this approach: "We held no more and no less than that the Commission's first order was unsupportable *for the reasons supplied by that agency*." *SEC v. Chenery Corp.*, 332 U.S. 194, 200 (1947) ("*Chenery II*") (emphasis added) (citing *Chenery I*, 318 U.S. 80). In particular, matters that "require[] determining the facts and deciding whether the facts as found fall within a statutory term" should not be addressed by a reviewing court before the agency weighs in. *Gonzales v. Thomas*, 547 U.S. 183, 186–87 (2007) (per curiam).

The Court should not decide this question in absence of FCC determination on the issue. If the Court concludes that this question is essential to the disposition of the case, it should remand the question for an initial determination by the FCC.

B. Had the FCC Decided to Address Section 332(d), the Record Contains a Number of Legal Bases for Upholding the FCC's Authority.

In addition to its stated justification for the rules, Order at ¶¶ 62–64 (J.A.__), the Commission has identified a number of potential alternative rationales that it opted not to explore at this stage. *Id.* at ¶¶ 66, 70 (J.A.__). The Commission could, for example, have decided whether to consider data roaming a "commercial mobile service" or the functional equivalent, *id.* at ¶ 66 (J.A.__), *see* 47 U.S.C. § 332(c), (d)); or whether to classify it as a "telecommunications service" subject to common carrier regulation under Title II of the Communications Act. Order at ¶

70 (J.A.__); *see* 47 U.S.C. § 153(46) (2006). In choosing to look to Title III as the basis of the Commission's authority, the Commission did not reject—or even meaningfully discuss—these alternative theories of authority. *Id.* at ¶ 61–70 (J.A.__).

Had the FCC decided to address § 332(d), it could have justified exercising its authority under § 332 in a number of ways. As Public Knowledge, Free Press, Media Access Project, and Consumers Union argued, § 332(c)(2) preserves the FCC's discretion to treat private mobile radio services as common carrier services. *See* Letter from Rashmi Rangnath, Staff Attorney, Public Knowledge, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265 (Nov. 16, 2010) (J.A.__). As demonstrated in the functional equivalence provision of § 332(d)(3) and the FCC's forbearance authority under § 332(c)(1)), Congress intended to give the FCC broad discretionary authority in this area. Additionally, the legislative history of § 332(d) states that Congress intended the section to merely clarify that any service that was not a commercial mobile radio service (or the functional equivalent thereof) should retain its traditional classification as a private mobile radio service, and that § 332(d) was not intended to preclude any regulation the Commission could have legally adopted prior to Congress enacting § 332(d). *See* Letter from Harold Feld, Legal Director, Public Knowledge, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265 (Mar. 25, 2011) (J.A.__).

The FCC could also implement wireless data roaming rules under the functional equivalence test of § 332(d)(3), under which the FCC extended roaming rules to non-interconnected functionally equivalent services like non-switched Short Message Service and push-to-talk. *See* Letter from Daniel Brenner, Partner, Hogan Lovells US LLP, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265 (Nov. 22, 2010) (J.A.__) (citing *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, Report and Order and Further Notice of Proposed Rulemaking (2007)). The fact that the Commission has the explicit statutory authority to expand the scope of common carriage by defining "the functional equivalent of a commercial mobile service," 47 U.S.C. § 332(d)(3), belies Petitioner's argument that "Congress made an express determination as to which services governed by Title III should be subject to the requirements of Title II." Pet'r's Br. 44. Indeed, Congress "expressly recognize[d] the Commission's authority to define the terms used" in deciding what services should be subject to what regulations. H.R. Conf. Rep. 103-213, at 496 (1993), *reprinted at* 1993 U.S.C.C.A.N. 1088, 1185. Congress introduced the functional equivalence test to give the FCC flexibility and authority to regulate similar services in a similar manner. *See* Letter from Shirley Fujimoto and David Rines, SouthernLINC Wireless, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265 (Nov. 16, 2010) ("SouthernLINC Letter") (J.A.__). Here, the FCC

could determine the services at issue are the functional equivalent of CMRS services because the functions are similar to facilitating voice roaming and the services are increasingly economic substitutes for voice services. *See* Letter from Carl Northrop, Paul, Hastings, Janofsky & Walker LLP to Marlene Dortch, Secretary, FCC, at 4, WT Docket No. 05-265 (Nov. 11, 2010) (J.A.__).

Even if the FCC decides to classify data roaming services as private mobile radio services, such a determination does not make those services immune from any agency action. *See* SouthernLINC Letter at 8 (J.A.__). Or, as MetroPCS Communications reasoned, the phrase "treated as a common carrier" in § 332(c)(2)) is best interpreted as "subjecting a provider directly to common carrier regulations under Title II," leaving ample authority to regulate under Title III to achieve the statute's purposes. Letter from Carl Northrop, Paul, Hastings, Janofsky & Walker LLP to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265 (Nov. 22, 2010) (J.A.__).

Notably, any of these approaches would have involved the construction of a statutory term and its application to the facts of data roaming, which the Commission explicitly declined to pursue. The FCC found that it "[did] not need to determine" the question of data roaming's classification as a CMRS and "need[ed] not decide" the issue of classification as a telecommunications service. Order at ¶¶ 66, 70 (J.A.__). The general rule that a court should only review an

agency's explicitly stated rationale is even stronger when, as here, the court would be taking away the agency's "opportunity to consider the matter" of statutory construction in the first instance. *Gonzales v. Thomas*, 547 U.S. at 186.

Contrary to the assertions of Appellant Verizon, Pet'r's Br. 41, if the Court finds that the Commission erred in its assertion of authority it should not invalidate the entire order. Instead, if the Court rejects the Commission's theory of legal authority the Court should remand the order back to the Commission. That will give the Commission the opportunity to consider alternate theories of authority for the order.

C. Remand Would Permit the Commission to Perform Its Statutory Duty.

Applying administrative and statutory considerations to the facts is "a function which belongs exclusively to [an agency] in the first instance." *Chenery II*, 332 U.S. at 200. Accordingly, "[u]nder settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." *PPG Indus., Inc. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995).

Indeed, when an appellate court proceeds to the merits of an agency action rather than remanding after identifying a flaw in its legal reasoning, "it erroneously deprive[s] the agency of its usual administrative avenue for" making and

explaining decisions. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 657–58 (2007). "The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Fla. Power & Light*, 470 U.S. at 744. Rather, a court must give the agency an opportunity to reconsider its actions once its errors have been brought to light.

The FCC was established to "execute and enforce the provisions of" the Communications Act. 47 U.S.C. § 151 (2006). Accordingly, the Commission is "the authoritative interpreter (within the limits of reason) of" the Act, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005), and has "express and expansive authority to regulate . . . radio transmissions, including . . . cellular telephony." *Comcast Corp. v. FCC*, 600 F.3d 642, 645 (D.C. Cir. 2010).[3] If that expansive authority is exceeded, remand is proper because it allows the agency "to deal with the problem afresh, performing the function delegated to it by Congress." *Chenery II*, 332 U.S. at 201.

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[3] *Comcast* is further distinguishable because it dealt with an adjudication, and addressed whether the Commission had jurisdiction to hear the complaint. Because the *Comcast* court found the Commission had failed to justify its authority over Comcast's conduct and therefore lacked jurisdiction, it vacated the judgment against Comcast. *Comcast Corp. v. FCC*, 600 F.3d at 644. Here, the question is not whether the Commission has jurisdiction to conduct a general rulemaking, but what preclusive effect, if any, § 332(d) has on the Commission's general Title III rulemaking authority. Accordingly, the usual rule of remand, rather than the extraordinary remedy of vacatur, should apply.

D. Remand Is Not Futile Because the Commission Has Several Plausible Alternatives Open to It.

Remand is proper except when it "would be an idle and useless formality," "convert[ing] judicial review of agency action into a ping-pong game." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality opinion). Remand is idle and futile when there is no "significant chance that but for the error, the agency might have reached a different result." *NLRB v. Am. Geri-Care, Inc.*, 697 F.2d 56, 64 (2d. Cir. 1982); *Fed. Express Corp. v. Mineta*, 373 F.3d 112, 118 (D.C. Cir. 2004) ("No principle of administrative law or common sense requires us to remand a case in quest of a perfect opinion unless there is reason to believe that the remand might lead to a different result." (quoting *Fisher v. Bowen*, 869 F.2d 1055, 1057 (7th Cir. 1989))).

There are thus two typical scenarios where remand would be futile: when "only one disposition is possible as a matter of law," *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1539 (D.C. Cir. 1992); and "when a mistake of the administrative body is one that clearly had no bearing on . . . the substance of decision reached" or "is without legal significance." *Mass. Trustees of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 248 (1964). Here, neither scenario applies and remand would not be futile because the Commission has many alternative legal theories it may depend upon and an error regarding the common carrier status of data roaming would have critical significance.

Even if the FCC's interpretation of current law is mistaken, one cannot argue that there is only one possible disposition as a matter of law. Multiple dispositions are available if for no other reason than that the Commission has statutory authority to specify that wireless broadband is not a "private mobile service," 47 U.S.C. § 332(d)(3), or more generally to adopt a statutory interpretation that would reclassify broadband as a "telecommunications service" subject to Title II regulation. *See Brand X*, 545 U.S. at 980–82.[4] The Commission could take one of these alternate approaches, adopt some yet-unidentified statutory construction, or even simply abandon the issue of data roaming requirements altogether. Accordingly, remand would not be futile on this basis.

Moreover, if the Commission has in fact made an error of law regarding common carriage, such error would clearly be central to the reasoning in its Order, which is predicated on the conclusion that data roaming is not common carriage. *See* Order at ¶ 68 (J.A.__). Faced with this error, the Commission would have no choice but to amend its reasoning in one way or another; this would not be a futile "remand in quest of a perfect opinion" because remand *must* produce a different

[4] Verizon implicitly recognizes the Commission's authority to make such changes in regulatory classification by arguing, for example, that "agencies may not . . . depart from a prior policy *sub silentio*." Pet'r's Br. at 35 (quoting *Comcast*, 600 F.3d at 659) (internal quotation marks omitted).

result if a key premise of an agency's reasoning is invalidated. *Cf. Fed. Express v. Mineta*, 373 F.3d at 118.

It is far from a foregone conclusion that the FCC would take any particular approach upon remand—and, importantly, the choice of path to follow after a clarification in the law is the agency's to make. As noted above, Congress has granted the Commission broad discretion in enforcing the Communications Act. The question of how to proceed should be made by the Commission, not by this Court.

E. Vacatur Would Be Inappropriate.

Contrary to Verizon's assertions, Pet'r's Br. at 59, *Allied-Signal* does not counsel for vacatur in this case. Instead, that case held that even "[a]n inadequately supported rule . . . need not necessarily be vacated." *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993). Vacating is inappropriate not only when it would have disruptive results, but where "there is at least a serious possibility that the Commission will be able to substantiate its decision on remand." *Id.* at 151. Indeed, this Court "ha[s] commonly remanded without vacating an agency's rule or order" where the record indicates that despite acting in error initially, the agency might well rectify its errors on remand. *Int'l Union, UMW v. FMSHA*, 920 F.2d 960, 966–67 (D.C. Cir. 1990).

Verizon argues that vacatur would not be disruptive "because data roaming agreements occurred frequently without regulation." Pet'r's Br. at 59. However, in promulgating the Order, the Commission made a factual finding "that providers have encountered significant difficulties obtaining data roaming arrangements on advanced '3G' data networks, particularly from the major nationwide providers," in part precisely because there was no data roaming obligation in place. Order at ¶ 24 (J.A.__). The months that have passed since the Order was adopted have given ample opportunity for mobile broadband providers to apply the rules in their roaming negotiations. Thus, to the extent that providers have actually relied on the Order to facilitate the negotiation of data roaming agreements they would otherwise have been unable to obtain, vacatur would be extremely disruptive.

Vacatur would also be inappropriate for the further reason that the FCC has every possibility of substantiating the Order on remand. As noted above, even if data roaming is properly considered a common carriage obligation, the Commission has the statutory authority to adopt a regulatory framework that would permit the imposition of such an obligation on wireless broadband providers. Both of these factors weigh against vacatur in this case.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court uphold the Order, or alternatively remand the proceeding to the FCC should the Court reject the FCC's finding of legal authority.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(a), the undersigned certifies that this brief complies with the applicable type-volume limitations of Fed. R. App. P. 32 and D.C. Circuit Rule 32. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Pursuant to Fed. R. App. P. 29(d) and D.C. Circuit Rule 32(a)(3) and exclusive of the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 5,295 words.

/s/ Harold Feld
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CERTIFICATE OF SERVICE

I, Harold Feld, hereby certify that on January 23, 2012, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. I further certify that six copies of the foregoing will be filed by hand with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit within two business days. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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