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

FULL SERVICE NETWORK, *et al.*, *Petitioners*, v. FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA, *Respondents*.	No. 15-1151 (consolidated with Nos. 15-1063 *et al.*)

JOINT REPLY IN SUPPORT OF MOTIONS TO INTERVENE

Full Service Network, TruConnect Mobile, Sage Telecommunications, LLC, and Telescape Communications, Inc. (collectively, "Full Service Network") oppose the motions to intervene filed by the United States Telecom Assocation, the National Cable & Telecommunications Association, CTIA – The Wireless Association®, AT&T Inc., the American Cable Association, CenturyLink, and the Wireless Internet Service Providers Association (collectively, "Movant-Intervenors"). Movant-Intervenors seek to intervene in support of Respondents as to Full Service Network's specific petition for review of the Order.[1] For the

[1] Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC 15-24 (rel. Mar. 12, 2015) ("Order").

reasons set forth below, Movant-Intervenors are entitled to intervene as of right to oppose the relief Full Service Network seeks.

Unlike all of the other Petitioners in these consolidated cases, Full Service Network challenges the Order on the ground that the Federal Communications Commission ("FCC") did not go far enough in imposing new regulations on broadband Internet access service providers. Among the forms of relief Full Service Network seeks is that the Court "mandate the FCC apply statutory provisions" to broadband Internet access service providers that the agency decided *not* to apply and "vacate the FCC's forbearance decisions," which limited to some extent the FCC's application of Title II's common carrier regime to broadband Internet access service.[2]

Movant-Intervenors are all providers of broadband Internet access services or associations that represent such providers and participated in the proceedings before the FCC.[3] If the Court were to grant Full Service Network's petition and

[2] Full Service Network Concise Summary of the Case at 1, *Full Service Network v. FCC*, No. 15-2007 (3d Cir. filed May 8, 2015) (Exh. A). Full Service Network's petition was later transferred to this Court under 28 U.S.C. § 2112.

[3] Full Service Network complains that, before the FCC, Movant-Intervenors did not directly respond to arguments they raised in the last two weeks before the FCC adopted the Order. Yet Movant-Intervenors made filings during that time opposing proposals for greater regulation similar to Full Service Network's. *See, e.g.*, CenturyLink Ex Parte at 2-3, GN Docket No. 14-28 (Feb. 4, 2015) (opposing claims that FCC should apply more provisions of Title II to broadband Internet access service providers); AT&T Ex Parte at 11-12, GN Docket No. 14-28 (Feb.

the relief it seeks, those providers would be subject to greater regulation than under the Order as it now stands. Movant-Intervenors are therefore "part[ies] in interest in the proceeding before the agency whose interests will be affected" if Full Service Network prevails, and therefore "may appear" in this case as Intervenors "as of right." 28 U.S.C. § 2348.

Full Service Network contends that, because Movant-Intervenors are also Petitioners challenging the Order for unlawfully imposing regulations on broadband Internet access service providers, they have lost their statutory right to intervene to oppose Full Service Network's effort to subject them to even *greater* regulation. But this Court often hears cases in which some petitioners argue that the FCC or another federal agency went too far and others contend it did not go far enough. And the Court regularly grants those petitioners' motions to intervene in support of the agency and permits them to file an intervenors' brief opposing the other petitioners, along with their own opening and reply briefs in support of their challenges to the Order.[4]

18, 2015) (opposing claims that FCC should extend Title II to broadband Internet access service provided to large business, government, and institutional (*i.e.*, "enterprise") customers).

[4] *See, e.g.*, Order, *Howard Stirk Holdings, LLC v. FCC*, Nos. 14-1090 *et al.* (Feb. 20, 2015) (permitting petitioners NAB *et al.* to intervene and establishing briefing format authorizing them to file intervenors' brief in support of FCC and against arguments raised by petitioner Prometheus, and vice versa); Order, *In re Core Communications, Inc.*, Nos. 04-1368 *et al.* (D.C. Cir. May 23, 2005)

The one case Full Service Network cites does not support a departure from that precedent, as it arose on entirely inapposite facts. In that case, a group of defendants, who were sued in both their individual and official capacities, unsuccessfully sought to file two appellees' briefs: one in their individual capacity and one in their official capacity. *See Licari v. City of Chicago*, 262 F.3d 646, 647-48 (7th Cir. 2001) (Posner, J., in chambers). In contrast, Movant-Intervenors have interests on both sides of the case, as they challenge the regulations the FCC imposed and seek to defend against efforts to subject them to greater regulation.

Because Movant-Intervenors satisfy the statutory requirements for intervention as of right, the Court should grant the motions to intervene.

(permitting petitioner BellSouth to intervene and establishing briefing format authorizing it to file intervenor brief in support of FCC and against arguments raised by petitioner Core); Order, *United States Telecom Ass'n v. FCC*, Nos. 00-1012 *et al.* (D.C. Cir. Nov. 14, 2003) (permitting petitioning incumbent local telephone companies to intervene and establishing briefing format authorizing them to file intervenors brief in support of FCC and against arguments raised by petitioning competing local telephone companies, and vice versa).

Dated: June 8, 2015

Respectfully submitted,

/s/ *Michael K. Kellogg*

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RULE ECF-3(B) ATTESTATION

In accordance with D.C. Circuit Rule ECF-3(B), I hereby attest that all other parties on whose behalf this joint reply is submitted concur in its content.

/s/ *Michael K. Kellogg*
Michael K. Kellogg

June 8, 2015

CERTIFICATE OF SERVICE

I hereby certify that, on June 8, 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.

/s/ *Michael K. Kellogg*
Michael K. Kellogg

EXHIBIT A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CONCISE SUMMARY OF THE CASE

SHORT CAPTION:	Full Service Network et. al v. Federal Communications Comm.
USCA NO:	15 – 2007
AGENCY / DOCKET NO,	Federal Communications Commission / FCC 15-24
NATURE OF ACTION	Appeal of agency order.
PARTIES	Full Service Network LP; TruConnect Mobile LLC; Sage Telecom Communications LLC; Telescape Communications Inc.; Federal Communications Commission and the United States of America.
AGENCY ORDER	*In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket 14-28, FCC 15-24 (rel. Mar. 12, 2015), 80 Fed. Reg. 19378 (the order is attached to the Petition for Review as Exhibit A)
RELIEF SOUGHT	That the Court affirm the FCC's reclassification decision, mandate the FCC apply statutory provisions, vacate the FCC's forbearance decisions in the Order, rule unlawful the FCC's assertion of independent authority under section 706 (47 U.S.C. § 1302), and provide such other relief as the Court deems appropriate.

FACTUAL AND PROCEDURAL BACKGROUND

Pursuant to the Communications Act, communications transmission services offered to the public were regulated as common carriage from 1934 to 2002. In 1980, the FCC adopted a rule that permitted regulated common carrier transmission services to be purchased by competitors on regulated terms and conditions and then resold to the public in combination with computer processing on an unregulated basis. The combined "information service" offering was not regulated because the public was protected by common carrier regulation of the underlying transmission service. In 1996, Congress enacted the Telecommunications Act to update the Communications Act for the 21st Century and ensure universal access to the "information superhighway." The 1996 Act reaffirmed common carrier regulation of transmission services (defined by Congress as "telecommunications service"), specified that such regulation applied "regardless of the facilities used," removed prohibitions on network operators offering different services, and added provisions to open local transmission networks to competition, ensure universal service, allow forbearance when specific criteria are met, prohibit Internet pornography and protect speech on the Internet. The 1996 Act also adopted the FCC's 1980 rule by prohibiting common carrier regulation of information services offered by a regulated telecommunications carrier.

In 2002, the FCC reversed their 1980 rule and decided that public offerings of high-speed transmission services using a digital transmission protocol – the Internet Protocol ("IP") – would be exempt from common carrier regulation because the use of IP made the underlying transmission offering an information service. In 2010, the FCC adopted rules on the provision of those information services to protect Internet consumers. Those requirements were mostly vacated in *Verizon v FCC*, 740 F.3d 623 (D.C. Cir. 2014). On remand, the FCC adopted the order on appeal. The order reverses the FCC's 2002 decision by determining that transmission services offered to the public for a fee using IP are in fact telecommunications services subject to common carrier regulation. The order also forbears from applying almost all of the provisions Congress adopted in the 1996 Act to promote competition and asserts independent authority to act under section 706.

ISSUES TO BE RAISED ON APPEAL

1. Whether the FCC's interpretation that section 706 of the Telecommunications Act (47 U.S.C. § 1302) grants it independent rulemaking, forbearance, and enforcement authority is contrary to the plain language of the Telecommunications Act or is based on an unreasonable interpretation of the statute, is arbitrary and capricious, or is otherwise not in accordance with law.

2. Whether the FCC's interpretation that section 4(i) of the Communications Act (47 U.S.C. § 154(i)) grants it the authority to use provisions of the Communications Act to implement and enforce other Acts of Congress is contrary to the plain language of the Communications Act or is based on an unreasonable interpretation of the statute, is arbitrary or capricious, or is otherwise not in accordance with law.

3. Whether the FCC's definition of broadband Internet access service and refusal to apply statutory provisions to communications services being offered to the public for a fee, including broadband Internet access service, is contrary to the plain language of the Communications Act or is based on an unreasonable interpretation of the statute, is arbitrary and capricious, or is otherwise not in accordance with law.

4. Whether the FCC's determinations pursuant to section 10 of the Communications Act (47 U.S.C. § 160) to forbear from applying provisions of the Communications Act adopted by Congress to promote competition or protect consumers are contrary to the plain language of the FCC's regulations, the Administrative Procedure Act or the Communications Act or are based on an unreasonable interpretation of the statute, are arbitrary and capricious, or are otherwise not in accordance with law.

This is to certify that this Concise Summary of the Case was electronically filed with the Clerk of the U.S. Court of Appeals for the Third Circuit and a copy hereof served to each party or their counsel of record on this 8th day of May, 2015.

/s/ Michael A. Graziano
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