ORAL ARGUMENT NOT SET

No. 18-1051 (and consolidated cases)

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

MOZILLA CORPORATION et al.,
Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION, and
THE UNITED STATES OF AMERICA,
Respondents.

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

BRIEF OF *AMICUS CURIAE* CONSUMERS UNION

Of Counsel:
Jonathan Schwantes
Senior Policy Counsel
George P. Slover
Senior Policy Counsel
Consumers Union
1101 17th St NW, Suite 500
Washington, DC 20036
101 Truman Avenue
Yonkers, NY 10703

Andrew Jay Schwartzman
James T. Graves
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue NW
Washington, DC 20001
(202) 662-9170
andyschwartzman@gmail.com
Counsel for Consumers Union

August 27, 2018

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

With the exception of the following, all parties, intervenors, and *amici* are listed in the Joint Brief for Petitioners Mozilla Corporation, *et al*. Since the filing of that brief, the following entities have filed notices of intent to participate as *amici*: eBay, Inc., City of New York, Electronic Frontier Foundation, Engine Advocacy, Members of Congress, Professors of Communications Law, Professors Scott Jordan and Jon Peha, and Twilio, Inc.

B. Rulings Under Review

References to the ruling at issue appear in the Joint Brief for Petitioners Mozilla Corporation, *et al*.

C. Related Cases

Amicus curiae adopt the statement of related cases presented in the Joint Brief for Petitioners Mozilla Corporation, *et al*.

Respectfully submitted,

/s/ James T. Graves
James T. Graves
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue NW
Washington, DC 20001
(202) 662-9545
James.Graves@law.georgetown.edu

August 27, 2018

Counsel for Consumers Union

CORPORATE DISCLOSURE STATEMENT

Pursuant to the United States Court of Appeals for the District of Columbia Rule 26.1 and Federal Rule of Appellate Procedure 26.1, Consumers Union states that it is the advocacy division of Consumer Reports, Inc., a non-profit, non-stock New York corporation. Consumer Reports has no parent corporation and, because it issues no stock, no publicly held corporation owns 10% or more of its stock.

CERTIFICATE REGARDING NECESSITY OF SEPARATE *AMICUS CURIAE* BRIEFS

All parties have either consented to the filing of Consumers Union's *amicus* brief or do not oppose it. *Amicus curiae* filed notice of intent to participate on August 22, 2018. Pursuant to Circuit Rule 29(d), counsel for *amicus curiae* certifies that Consumers Union has coordinated with other known *amici* to ensure, to the extent possible, that there is no overlap between this brief and others, and Consumers Union is aware of no other brief that is expected to cover the same issues. Given the nature of these cases, the large number of issues raised in the briefs of the Petitioners, and the diversity of interests among *amici*, it impracticable to collaborate in a single brief. Moreover, in the circumstances of this case, the Court will benefit from the presentation of additional arguments on behalf of both Petitioners and Respondents.

Respectfully submitted,

/s/ James T. Graves
James T. Graves
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue NW
Washington, DC 20001
(202) 662-9545
James.Graves@law.georgetown.edu

August 27, 2018

Counsel for Consumers Union

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2015 Open Internet Order	*Protecting and Promoting the Open Internet*, 30 FCCR 5601 (2015), *aff'd sub nom. U.S. Telecom Ass'n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017)
2018 Order	*Restoring Internet Freedom*, 33 FCCR 311 (2018) (JA___-___)
ADSL	Asymmetric Digital Subscriber Line
BOC	Bell Operating Company
Cable Modem Order	*Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*,17 FCCR 4798 (2002)
Communications Act	Telecommunications Act of 1934, as amended, 47 U.S.C. § 151 *et seq*.
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Computer II	*Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980)
Computer III	*Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 FCC 2d 958 (1986)
CR	Consumer Reports

CU	Consumers Union
DSL	Digital Subscriber Line
FCC or Commission	Federal Communications Commission
ISP	Internet Service Provider
SDSL	Symmetric Digital Subscriber Line
Section 706	Section 706 of the 1996 Act, Pub. L. 104-104 § 706, 100 Stat. 56, 153, codified at 47 U.S.C. § 1302.
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Title II	Communications Act of 1934, as amended, 47 U.S.C. §§ 201–276
VoIP	Voice over Internet Protocol

INTEREST OF AMICUS CURIAE

Consumers Union ("CU") is the advocacy division of Consumer Reports ("CR"), which was chartered under New York law in 1936, and is currently headquartered in Yonkers. CU/CR is an expert, independent, non-profit organization working for a fair, just, and safe marketplace for all consumers, and to empower consumers to protect themselves. CU conducts its advocacy work in a number of policy areas, including telecommunications policy, as well as antitrust and competition, financial services, food and product safety, privacy and data security, and other areas.

CU's telecommunications policy work has included a long history of supporting strong, enforceable network neutrality rules dating back to 1998. CU supported the *2010 Open Internet Order* in a letter to Congress opposed to the overturn of that order via the Congressional Review Act. CU supported the Title II classification adopted by the *2015 Open Internet Order* in its comments to the FCC during that proceeding, and filed an *amicus curiae* brief in support of the Commission in *United States Telecom Association v. FCC*, which upheld the 2015 rules.[1] Finally, CU submitted comments and reply comments opposed to the

[1] *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017)

FCC's eventual repeal of most of the 2015 net neutrality rules during the rulemaking conducted in 2017.

Consumer Reports is the world's largest independent product-testing organization. Using its dozens of labs, auto test center, and survey research department, the non-profit organization rates thousands of products and services annually. CR has over 7 million subscribers to its magazine, website, and other publications.

No party's counsel has authored this brief either in whole or in part; no party or its counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than amici curiae and their counsel have contributed money intended to fund preparing or submitting the brief.

SUPPLEMENTAL STATEMENT OF THE CASE

The 2018 *Restoring Internet Freedom* order ("*2018 Order*")[2] attempts to rewrite history. By calling the *2015 Open Internet Order*[3] an unprecedented move that "abandoned almost twenty years of precedent," the *2018 Order* dismisses network neutrality and Title II reclassification of broadband as recent and radical innovations of the previous Federal Communications Commission ("FCC" or

[2] *Restoring Internet Freedom*, 33 FCCR 311 (2018) (JA___-___).
[3] *Protecting and Promoting the Open Internet*, 30 FCCR 5601 (2015), *aff'd sub nom. U.S. Telecom Ass'n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017).

"Commission"). But Title II classification of broadband internet is not "unprecedented." It is, in fact, the logical outgrowth of nearly fifty years of steady FCC policy.

Since long before the term "network neutrality" existed,[4] the Commission has pursued a policy of openness, non-discrimination, and fair competition in public-access data networks, with the ultimate goal of fostering an open, vibrant marketplace that works for consumers and for the businesses that seek to serve them. It started with the *Computer Inquiries* of the 1970s and '80s, when the Commission struggled to determine how to deal with newly emergent data processing and packet-switching networks.[5] It continued in the late 1990s, when the FCC classified wireline broadband as a Title II telecommunications service,[6] and in 2005, when the Commission adopted its *Internet Policy Statement* affirming the principles of network neutrality.[7] From 2008 through 2014, it took the form of

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[4] *See* Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. Telecomm. & High Tech. L. 141 (2003).

[5] *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980); *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, 28 FCC 2d 291 (1970).

[6] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCCR 24012 (1998).

[7] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Internet Policy Statement, 20 FCCR 14986 (2005) ("*2005 Internet Policy Statement*").

attempts to enforce net neutrality principles using means other than Title II. The FCC's efforts culminated in the *2015 Open Internet Order*, which placed all broadband internet access service under Title II.[8]

History demonstrates that Title II classification has been good for the internet. The internet not only survived Title II classification of broadband access service; it thrived. DSL (Direct Subscriber Line) grew at an explosive rate under Title II classification. From 1999 to 2005, the number of Asymmetric DSL ("ADSL") lines grew 5,270% and the total number of fixed internet connections rose nearly twenty-fold.[9] Meanwhile, competition abounded: the number of nationwide providers increased from 105 in 1999 to 1,347 at the end of 2005.[10] Consumers have benefited tremendously.

This Supplemental Statement of the Case briefly summarizes the history of the Commission's approach to data networking and the internet from the *Computer Inquiries* of the 1970s through the *2015 Open Internet Order*. It then illustrates how the internet grew and thrived under these policies.

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[8] *See Protecting and Promoting the Open Internet*, 30 FCCR 5601 (2015), *aff'd sub nom. U.S. Telecom Ass'n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017).
[9] FCC, *High-Speed Services for Internet Access: Status as of December 31, 2006*, at t.1 (2007), https://www.fcc.gov/general/reports-high-speed-services-internet-access.
[10] *Id.* at t.7.

I. Regulatory History of Broadband Internet Access

A. The *Computer Inquiries*

In the mid-1960s, AT&T was still "Ma Bell," with a monopoly over telephone service throughout most of the United States. A new "data processing" industry was developing, using room-sized mainframes accessed through AT&T's transmission lines. AT&T sought to enter this market, but the FCC was concerned that AT&T and other carriers "might favor their own data processing activities by discriminatory services, cross subsidization, improper pricing of common carrier services, and related anti-competitive practices and activities."[11]

Faced with this marketplace of newly developing computer and internet services, the Commission put forth an initial notice of inquiry in 1966 on how to classify internet and computer developments under the Communications Act to promote competition and flexibility in the internet marketplace.[12] Four years later, the Commission announced a policy of structural separation between "communications activities" and "data processing."[13] To promote competition and growth, the Commission determined that it would not regulate the offering of data

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[11] *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 61 FCC 2d 103, 104 (1976).
[12] *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 7 FCC 2d 11, 15 (1966).
[13] *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, 28 FCC 2d 291, 302 ¶ 35 (1970).

processing services, which involved the processing of information—operations of "storing, retrieving, sorting, merging, and calculating data" on local or remote services.[14] But to avoid the problems of cross-subsidization and anti-competitive traffic discrimination, the FCC required AT&T and other communications common carriers that wanted to provide data processing services to do so through separate corporate entities.[15] These separate corporate entities could only obtain communications services from the parent carrier "pursuant to the same tariff terms, conditions, and practices as [were] applicable to any other customer of the carrier."[16]

Not all services fit neatly into the dichotomy of communications versus data processing, however. *Computer I* included a third category: "hybrid services," which involved a combination of communications and data processing. These were to be evaluated on a case-by-case basis. If a hybrid service was "primarily" a communications service, it fell under Title II. If it was "primarily" data processing, it was unregulated, but a common carrier could only offer it through a separate corporate entity.[17] As technology advanced, hybrid services quickly became the exception that swallowed the rule. A policy that was designed for big,

[14] *Id.* at 295–96 ¶ 15.
[15] *Id.* at 302–03 ¶ 36.
[16] *Id.*
[17] *Id.* at 295–96 ¶ 15, 304–06 ¶¶ 39–45.

centralized mainframes broke down as computing operations moved into terminals or the network itself.

The Commission tried to fix this problem in the second of its *Computer Inquiries*. *Computer II*, approved in 1980, eliminated the "hybrid" category and created a scheme that distinguished between "basic services" and "enhanced services."[18] The FCC defined basic services as "the common carrier offering of transmission capacity for the movement of information"—in other words, moving data from place to place. Basic services continued to be Title II common-carrier services. Enhanced services were any offerings that underwent various processing applications or actions. Enhanced services were "the equivalent of today's applications, like Skype, or the web."[19] Enhanced services were unregulated, but could only be offered by common carriers through structurally separate companies. The Commission thus once again pursued a policy of prohibiting monopolization and discrimination by companies controlling internet transport, while fostering growth and competition in non-transport internet services.

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[18] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384, 387 ¶ 5, 419–20 ¶¶ 93–96 (1980).
[19] Tim Wu, *How the FCC's Net Neutrality Plan Breaks with 50 Years of History*, Wired (Dec. 6, 2017), https://www.wired.com/story/how-the-fccs-net-neutrality-plan-breaks-with-50-years-of-history/.

Five years later, the FCC revisited the issue once again in the *Third Computer Inquiry* ("*Computer III*"). The Commission found that structural separation had become inefficient and unworkable. Carriers wanted to offer call routing and voice mail services, for example, but could not because doing so through separate companies would have been impractical.[20] And "Ma Bell" had broken up by then: AT&T divested its Bell Operating Companies ("BOCs") in 1982 pursuant to a Modification of Final Judgment that also limited the BOCs, and, to a lesser extent, AT&T, from providing information services.[21] Technology and the industry had changed. The Commission's goal of preventing anti-competitive practices, however, had not.

In *Computer III*, the Commission retained the distinction between basic and enhanced services, but replaced the structural separation requirements of *Computers I* and *II* with non-structural safeguards, such as unbundling requirements, filing of detailed cost allocation plans, and following certain procedures.[22] The FCC remained justifiably concerned, however, about the ability

[20] *Third Computer Inquiry*, Proposed Rules, 50 Fed. Reg. 33,581, 33,582 ¶¶ 8–9 (Aug. 20, 1985).
[21] *Id.* at ¶ 17. *See also United States v. AT&T*, 552 F. Supp. 131, 226 (D.D.C. 1982).
[22] *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 FCC 2d 958, 964–65 ¶¶ 4-6 (1986).

of AT&T and the BOCs to "make unfair use of their regulated [basic service] operations for the benefit of the unregulated, enhanced services activities."[23]

The Telecommunications Act of 1996 embraced the *Computer II* and *III* framework of basic and enhanced services, but used the terms "telecommunications" and "information services."[24] The 1996 Act also continued the non-structural safeguards of transport services offered in *Computer III* by placing telecommunications services under Title II and establishing unbundling, reporting, and interconnectivity requirements.[25] Thus, the Commission's policies of openness, non-discrimination, and fair competition are fully reflected in the 1996 Act.

B. Classification of Wireline Broadband as a Title II Telecommunications Service

In 1998, following the *Computer Inquiries* and the 1996 Act, several petitioners asked the Commission to rule on the regulatory status of wireline broadband telecommunications services such as DSL and packet-switching.[26] Carriers envisioned using these services to provide products such as real-time video conferencing, movies on-demand, and higher-speed internet access.

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[23] *Id.* at 964 ¶ 3.
[24] Telecommunications Act of 1996, Pub L. No. 104-104 § 3, 100 Stat. 56, 59–60.
[25] *See* 47 U.S.C. § 251(c) (2012).
[26] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCCR 24012, 24014 ¶ 3 (1998).

Packet switching was a relatively new offering for wireline carriers. Phone calls were "circuit-switched": when a call was placed, phone company switches would create a dedicated connection from phone to phone. That connection (or "circuit") would remain in place until the end of the call. Data networks, however, used "packet switching." Packet switching "breaks the information up into smaller packets that are transmitted separately … and then reassembled, microseconds later, at their destination."[27] No dedicated circuit is needed, and each packet can take a different path to its destination. Circuit-switching is somewhat analogous to hiring a courier to take a book manuscript to the publisher. Packet switching is more like mailing it to the publisher one page at a time. Each page travels separately, possibly by different routes. Some pages will arrive sooner than others, but the publisher can reassemble them in their proper order (if the author remembers to use page numbers). Although this example may make packet switching sound implausibly cumbersome, it was by far the more technologically efficient way to run data networks.

DSL involved a mix of telephony and data transmission. DSL lines typically carried both data and voice at the same time. Equipment at the phone company's

[27] *Id.* at 24016 ¶ 7.

central office split these streams, sending voice traffic to the circuit-switched voice network, and data traffic to the packet-switched data network.[28]

Accordingly, the FCC classified wireline broadband telecommunications services as Title II telecommunications services.[29] The Commission wrote that it "has repeatedly held that specific packet-switched services are … pure transmission services," that DSL and packet-switching services are "simply transmission technologies,"[30] and that nothing in the 1996 Act limited telecommunications services to conventional circuit-switched services.[31] With Title II classification came an unbundling requirement: telephone companies could set up their own information services to provide internet access over DSL, but they had to offer competing ISPs non-discriminatory access to network elements and the same services the telephone companies' ISPs used.[32]

The Commission exercised its then-existing Title II authority to enforce principles of open access and non-discrimination. For example, the Commission entered into a consent decree with DSL provider Madison River in 2005 for blocking internet ports used for voice over Internet Protocol ("VoIP").[33] Title II

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[28] *Id.* at 24027 ¶ 30.
[29] *Id.* at 24016 ¶ 7.
[30] *Id.* at 24029–30 ¶ 35.
[31] *Id.* at 24032-33 ¶ 41.
[32] *Id.* at 24031 ¶ 37.
[33] *See Madison River Communications, LLC,* 20 FCCR 4295 (2005).

classification gave the Commission authority to act, because Title II common carriers may not impermissibly discriminate against internet traffic. The consent decree required Madison River to pay a fine and promise not to block ports used for VoIP.

C. Litigation and Classification of Cable Broadband

While the Commission had settled—at least for a while—the status of wireline broadband services such as DSL, cable companies were also deploying technologies to enable high-speed internet access. When the Commission classified wireline broadband as a Title II telecommunications service in 1998, it avoided classifying cable data services.[34] And while the dilemma with wireline broadband services deployed by telecommunications carriers had been whether they fell under Title I or Title II, the question with cable data services was whether they were Title VI cable services, Title II telecommunications services, Title I information services—or some combination of the three. Before the Commission reached its own decision, the issue was litigated in court.

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[34] *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCCR 4798, 4800–01 (2002) ("*Cable Inquiry*") ("To date, however, the Commission has declined to determine a regulatory classification for, or to regulate, cable modem service on an industry-wide basis") (citing *Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co.*, 534 327, 337 (2002) (stating that the FCC had "not yet categorized Internet service")).

This uncertainty is most notably demonstrated in *AT&T Corp. v. City of Portland*, in which the City of Portland successfully argued in District Court that cable modem services were cable services under Title VI of the Communications Act, and thus could be regulated. The Ninth Circuit reversed, holding that cable modem internet services were not cable services under the Communications Act and could not be regulated under Title VI.[35]

Amidst the success of wireline broadband's classification under Title II and the period of uncertainty surrounding cable broadband, the Commission initiated a rulemaking proceeding in 2000. The resulting decision, in 2002, classified cable broadband as an information service.[36]

When the Commission issued its decision, it relied on industry representations that cable internet access was moving toward competition and choice. In its order, the FCC stated that the business model for cable internet access was in transition. Excite@Home, an ISP formed by Charter, Adelphia, Insight, Cogeco, MidContinent, Videon, and MediaCom, had filed for Chapter 11 bankruptcy. Meanwhile, AOL Time Warner, Comcast, and AT&T had either begun offering their cable customers a choice of ISPs (involuntarily, in the case of

[35] *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146 (D. Or. 1999), *rev'd*, 216 F.3d 871 (9th Cir. 2000).
[36] *See Cable Inquiry*, 17 FCCR at 4802 ¶ 7 (2002).

AOL and Time Warner)[37] or had said that they were considering doing so. Other cable operators had stated that they were either conducting or planned to conduct "technical trials to determine how cable modem service can be offered using multiple ISPs."[38]

Given these representations, the Commission assumed—incorrectly, it turned out—that competition was the future of cable internet access, and acted accordingly. But the cable operators abandoned their overtures towards openness and competition once they received Title I status. Without the specter of possible Title II classification over their heads, the cable providers (other than AOL and Time Warner) no longer had any incentive to open their networks to competition.

Even though wireline broadband's Title II classification had fostered growth, protected end-users, and deterred monopolization, the Supreme Court upheld the Commission's 2002 classification of cable broadband as an information service. In its 2005 *Brand X* decision, however, the Supreme Court was not making a *de novo* legal determination as to the appropriate classification; rather, it applied *Chevron* deference, found the Communications Act's classification scheme

[37] *See America Online, Inc.*, 131 FTC 829, 847–48 (2001), 2001 WL 410712 (conditioning approval of the AOL/Time Warner merger on the company providing customers with access to "Alternative Cable Broadband ISPs").
[38] *See Cable Inquiry*, 17 FCCR at 4815–16 ¶¶ 26–28.

ambiguous as applied to cable broadband, and held that the Commission's interpretation was reasonable.[39]

D. Reclassification of Wireline Broadband and the Move to Policy-Based Net Neutrality Principles

With cable broadband classified as a Title I information service, the Commission conducted a rulemaking to extend the *Brand X* decision to the classification of wireline broadband. Departing from nearly a decade of classifying wireline broadband as a Title II telecommunications service, the FCC reclassified it as a Title I information service in 2005.[40]

Despite reclassification, however, the Commission did not abandon the principles of net neutrality. On the same day as the FCC's reclassification order, the Commission released its *2005 Internet Policy Statement* announcing its intention to continue enforcing network neutrality under what it understood to be its ancillary jurisdiction to regulate interstate and foreign communications.[41] The *Policy Statement* set forth four principles affirming that consumers are entitled to (1) "access the lawful Internet content of their choice," (2) "run applications and

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[39] *See Nat'l. Cable & Telecomm. Assoc. v. Brand X Internet Services*, 545 U.S. 967, 980–1000 (2005).
[40] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* 20 FCCR 14853 (2005), *aff'd sub nom. Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).
[41] *See 2005 Internet Policy Statement*, *supra* n.7.

use services of their choice," (3) "connect their choice of legal devices that do not harm the network," and (4) benefit from "competition among network providers, application and service providers, and content providers."[42]

The Commission attempted to enforce these principles using its ancillary authority in an enforcement order against Comcast, which had been blocking certain peer-to-peer network traffic.[43] Comcast complied with the order but appealed. In April 2010, this Court vacated the Commission's order, holding that the FCC had not sufficiently justified its use of ancillary authority to enforce net neutrality principles.[44]

The FCC tried again to craft workable, enforceable net neutrality rules. In December 2010, it enacted new "open internet" rules—relying, in part, on its Section 706 authority.[45] These new rules required broadband providers to disclose their network management practices; banned the blocking of lawful applications, content, or services; and forbade unreasonable discrimination in transmitting lawful network traffic.[46]

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[42] *Id.* at 3.
[43] *See Formal Compl. of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer–to–Peer Applications*, 23 FCCR 13028 (2008).
[44] *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).
[45] *Preserving the Open Internet*, 25 FCCR 17905 (2010), *rev'd in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).
[46] *Id.* at 17906 ¶ 2.

But these rules also failed to survive judicial review intact. In its 2014 *Verizon v. FCC* decision, this Court vacated the anti-blocking and anti-discrimination portions of the *2010 Open Internet Order's* rules, leaving only the transparency rules in place.[47] The Court held that the FCC's order had essentially relegated broadband providers to common carrier status—something the FCC could not do without actually classifying the broadband providers as telecommunications providers under Title II.[48]

E. Return to Title II—and Then, Retreat

The lesson of the *Comcast* and *Verizon* decisions was clear: if the FCC wanted network neutrality, it would have to ground such rules within a Title II framework. In 2015, the Commission did exactly that.[49] The *2015 Open Internet Order* reclassified broadband internet access service as a Title II telecommunications service and imposed open internet rules while declaring broad forbearance from price regulation and other provisions of Title II.

The Commission's action was far from "unprecedented." It implemented the same policy the FCC had been pursuing for more than four decades, using the tool that was available to it—a tool that the Commission had used before, from

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[47] *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).
[48] *Id.* at 650–59.
[49] *See Protecting and Promoting the Open Internet*, 30 FCCR 5601 (2015), *aff'd sub nom. U.S. Telecom Ass'n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017).

1998–2005. True, it was the first time that cable broadband had been classified under Title II. But the policy underlying that change was a policy that the Commission had attempted to implement in every way other than Title II reclassification until, finally, it settled on the obvious means available to do so.

What *was* unprecedented was the current Commission's decision in 2017 to launch a proceeding to roll back the *2015 Open Internet Order*. For the first time since the 1960s, the FCC abandoned the principles of openness, non-discrimination, and competition central to net neutrality. The resulting *2018 Order*'s revision of history ignored nearly a decade of wireline broadband classification under Title II—years that also saw the Commission's best success, until 2015, in deterring monopolization of the internet's transportation backbone and in promoting competition and growth of internet services.

II. The Growth of the Internet Under Title II

Title II classification of wireline broadband as a telecommunications service allowed the internet to grow and prosper, with an increase in high-speed lines, the number of providers, and the number of households with access. From 1998 through 2005, the Commission classified wireline broadband services as Title II telecommunications services, with the intent to foster growth and innovation in the internet marketplace. The Commission's statements in 1998 offer evidence that it wanted to foster opportunities for all companies—incumbents and entrants—to

invest in internet infrastructure, innovate new internet technologies, and meet the needs and wants of American consumers.[50]

This intent was realized. Internet development saw increased investment, innovation, and overall expansion to consumers across the nation during the regulation of wireline broadband as a Title II telecommunications service. According to data collected by the Commission, the number of total high-speed fixed internet lines increased significantly during the period when DSL was classified under Title II: from 2.4 million high-speed lines in December 1999 to almost 48 million lines in December 2005.[51] During this period, the nationwide number of providers of high-speed lines also dramatically expanded, from 105 in December 1999 to 1,347 by December 2005.[52]

[50] *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* 13 FCCR 24012, 24014 (1998).
[51] *See* FCC, *High-Speed Services for Internet Access: Status as of December 31, 2006*, at t.1 (2007), https://www.fcc.gov/general/reports-high-speed-services-internet-access.
[52] *Id* at t.7.

Table 1: Wireline Broadband Lines, 1999-2015[53]
(Over 200 kbps in at least one direction)

Year	Total Fixed High-Speed Lines (Thousands)[54]	DSL Lines (Thousands)[55]	Cable Modem Lines (Thousands)	Nationwide Providers
1999	2,434	980	1,412	105
2000	6,645	3,003	3,583	136
2001	12,178	5,037	7,060	203
2002	19,166	7,976	11,369	299
2003	27,377	10,840	16,446	432
2004	36,803	15,323	21,357	552
2005	47,803	20,310	26,558	1,347

Additionally, according to reports issued by the Census Bureau, the number of households with internet use also grew dramatically during the time that wireline broadband services were classified as Title II telecommunications services. In 1997, the year before DSL was classified as a telecommunications service, 18% of households used the internet at home. By 2003, under Title II classification of the internet, that number had increased to 55%.[56]

[53] *Id.* at t.1, t.7.
[54] Total fixed high-speed lines include DSL, cable modem, and fiber-to-the-premises numbers as reported by the FCC.
[55] This figure includes both ADSL, SDSL, and traditional wireline figures offered by the FCC.
[56] *See* U.S. Dept. of Commerce, *Computer and Internet Use in the United States: 1984 to 2009* (2010), https://www.census.gov/data/tables/time-series/demo/computer-internet/computer-use-1984-2009.html.

Table 2: Percentage of Households with Internet Use At Home, 1997-2009

Year	Percent
1997	18.0
2000	41.5
2001	50.4
2003	54.7
2007	61.7
2009	68.7

The *2018 Order* ignores this period of the internet's growth and development under Title II, instead opting to argue that Title II regulation would somehow stifle innovation and growth.[57] This argument does not align with the exponential growth of the internet from the late 1990s to the mid-2000s of high-speed lines, providers, and households with access, which occurred under wireline broadband's classification as a Title II telecommunications service. The 1998 Commission's desire to create an environment of growing investment, innovation, and consumer-usage was achieved. It was under Title II classification that the internet rapidly developed throughout the United States and grew to its widespread use consumers now enjoy today.

[57] *2018 Order* ¶ 254 (JA___-___).

SUMMARY OF ARGUMENT

In its *2018 Order*, the Commission asserted that the previous Commission "abandoned almost twenty years of precedent" by classifying broadband internet access service under Title II of the Communications Act. This assertion misrepresents the FCC's history by disregarding seven years of Title II classification of broadband wireline broadband. It also ignores nearly fifty years of history, dating back to the first *Computer Inquiry*, of the Commission's persistent efforts to prevent monopolization and discrimination in public data networking and foster an open marketplace that best serves consumers.

ARGUMENT

In asserting that it was returning to a regulatory precedent of internet services as Title I information services, the Commission misrepresented its history. In the *2018 Order*, the FCC repealed the prior Commission's *2015 Open Internet Order* and reclassified broadband internet services as Title I information services under the Communications Act. The *2018 Order* attempts to justify this reversal by claiming that the previous Commission had "abandoned almost twenty years of precedent and reclassified broadband Internet access service as a telecommunications service subject to myriad regulatory obligations under Title II of the Communications Act of 1934, as amended[.]"[58]

[58] *2018 Order* ¶ 254 (JA___-___).

The FCC's *2018 Order* also asserted that "[f]or the next 16 years [after the 1996 Act], the Commission repeatedly adopted a light-touch approach to the Internet that favored discrete and targeted actions over pre-emptive, sweeping regulation of Internet service providers ...."[59] And it asserted, "The Internet was open before Title II, and many economic factors support openness. The internet thrived for decades under the 'light-touch' regulatory regime in place before the Title II Order, as ISPs built networks and edge services were born."[60]

The Commission's assertions misrepresent its history. The Commission fails to mention the seven years during which it classified broadband wireline broadband as a Title II telecommunications service, and it ignores nearly fifty years of Commission policy of preventing monopolization and discrimination in public data networking.

In its *2015 Open Internet Order* that the current Commission calls "unprecedented," the precedent includes the classification of wireline broadband as a Title II telecommunications service from 1998 through 2005—nearly half of the sixteen years the *2018 Order* describes as "light touch regulation." The internet grew at an unprecedented rate over the seven years of Title II classification, from approximately 2.4 million high-speed internet lines in 1999 to nearly 48 million

[59] *Id.* at 314 ¶ 9.
[60] *Id.* at 590 ¶ 109.

lines in 2005. The percentage of households that used the internet at home grew from 18% in 1997 to 62% in 2007. And competition thrived, with the number of nationwide providers increasing from 105 in 1999 to 1,347 in 2005. The Commission is correct that the internet thrived. What it misses, crucially, is that the internet thrived under Title II classification.

The *2015 Open Internet Order's* precedent also reflected decades of the Commission distinguishing between "basic" and "enhanced" services. Those terms came from the *Computer Inquiries* of the '70s and '80s and were codified by Congress in the 1996 Act under the terms "telecommunications services" and "information services." The *Computer Inquiries* established the principle that transmitting data was a Title II common-carrier activity, just as transmitting voice had always been.

Furthermore, the rulings of this Court created another set of precedents that led to the *2015 Open Internet Order*. In conjunction with its reclassification of wireline broadband in 2005, the Commission had set out to continue enforcing the principles of network neutrality, without Title II, under its ancillary authority. These efforts continued to deter throttling and blocking practices until this Court ruled that those efforts were outside the FCC's ancillary authority. The *Comcast* and *Verizon* cases sent a clear message that Title II was the only way for the

Commission to implement its open internet principles. The Commission's *2018 Order* downplayed the significance of these cases.

The *2018 Order* paints a highly selective, partial history of the FCC's approach to data networking in general and the internet in particular. Despite the profoundly beneficial effect of the FCC's decision to classify wireline broadband under Title II, the current Commission failed to mention this historical precedent in the *2018 Order*, instead skipping from the 1998 *Stevens Report*[61] directly to the 2002 *Cable Modem Order* upheld in *Brand X*.[62] In doing so, the Commission neglected a period during which the internet dramatically expanded in size and capability under classification as a Title II telecommunications service.

The FCC's discussion of the 2005 Madison River Consent Decree further mis-stated the importance of Title II regulation in protecting the growth and accessibility of the internet. In that Consent Decree, the Commission acted against Madison River for unreasonably blocking VoIP ports.[63] The current Commission downplayed the significance of that Consent Decree, claiming that "problematic conduct was quite rare" in the marketplace of internet providers.[64] This statement overlooks the fact that the Madison River Order occurred during Title II

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[61] *See Federal-State Joint Board on Universal Service,* 13 FCCR 11830 (1998).
[62] *2018 Order* ¶¶ 9–10 (JA___-___).
[63] *Madison River Communications, LLC*, 20 FCCR 4295 (2005).
[64] *2018 Order* ¶ 112 (JA___-___).

classification of wireline broadband. If "problematic conduct" was in fact rare in 2005, it was likely because of the possibility of FCC enforcement (under Title II) at the time. Instead, the Commission's *2018 Order* misleadingly implied that Madison River occurred when internet services were all regulated as information services—asserting that the information service classification existed for "nearly two decades."[65] This is flatly incorrect.

Furthermore, if "problematic conduct" was rare in that period of so-called "light-touch regulation" after 2005, it was likely because of the FCC's efforts to enforce net neutrality principles under what it believed to be its ancillary authority. Although this Court would ultimately hold that the FCC had no such authority, the FCC's policy likely deterred misconduct by internet providers during the intervening years. Because the *2018 Order* disclaims any authority under the Communications Act to enforce network neutrality principles,[66] no such deterrent effect will exist if this Court upholds the Order.

By misrepresenting the established regulatory history and the Commission's rationale of holding wireline broadband services as Title II telecommunications services, downplaying the significance of the Madison River Consent Decree, and ignoring the fifty-year history of steadfast FCC efforts to ensure open, competitive,

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[65] *Id.* ¶ 161 (JA___-___) ("Restoring the information service classification that applied for *nearly two decades* before the Title II Order ....") (emphasis added).
[66] *Id.* ¶ 267 (JA___-___)..

and non-discriminatory public data networking, the Commission's *2018 Order* fails to provide a basis to justify the Commission's reclassification of internet service as a Title I information service.

CONCLUSION

To justify its abrupt about-face, the Commission described the *2015 Open Internet Order* as "unprecedented." It attempts to support this claim with a revision of history based on selective memory. But it is the *2018 Order* that is unprecedented. "Since 1970 there have always been some rules controlling what the owners of the pipes on national networks can do to the businesses and people who rely on them."[67] The internet grew and competition thrived under those rules, and consumers benefited tremendously. The Commission's *2018 Order* is a radical change in policy that has abandoned principles the FCC has promoted and enforced for fifty years.

[67] *Wu*, *supra* n.19.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because the motion contains 5,510 words, excluding those omitted from the word count by Rule 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times Roman.

Respectfully submitted,

/s/ James T. Graves
James T. Graves
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue NW
Washington, DC 20001
(202) 662-9545
James.Graves@law.georgetown.edu

Counsel for Consumers Union

August 27, 2018

CERTIFICATE OF SERVICE

I certify that the foregoing motion was filed on August 27, 2018, via the Court's CM/ECF system, which will electronically notify all participants in the case who are registered CM/ECF users.

Respectfully submitted,

/s/ James T. Graves
James T. Graves
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue NW
Washington, DC 20001
(202) 662-9545
James.Graves@law.georgetown.edu

Counsel for Consumers Union