ORAL ARGUMENT NOT YET SCHEDULED

SURREPLY BRIEF FOR RESPONDENTS

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

NO. 11-1355

VERIZON ET AL.,

APPELLANTS/PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

APPELLEE/RESPONDENTS.

ON PETITIONS FOR REVIEW AND NOTICES OF
APPEAL OF AN ORDER OF THE FEDERAL
COMMUNICATIONS COMMISSION

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* *Authorities upon which we chiefly rely are marked with asterisks.*

ARGUMENT

As demonstrated in our principal brief, the Commission acted within its statutory authority – and consistently with the APA and the Constitution – in adopting the *Open Internet Order*. In this surreply, we focus on this Court's recent decision in *Cellco Partnership v. FCC*, No. 11-1135 (December 4, 2012), which reaffirms the Commission's conclusions concerning: (1) its authority under Title III of the Communications Act; (2) the absence of any common carriage mandate under the *Order*; and (3) the *Order*'s compliance with the Fifth Amendment.

1. Title III

Cellco confirms that the FCC has authority under Title III of the Communications Act to establish Open Internet rules applicable to wireless mobile broadband providers.

Cellco upheld an FCC rule requiring cellular telephone companies to enter into agreements for "data roaming" – arrangements that allow a customer outside the range of his own wireless provider's network to access mobile data services using another provider's network. This Court held that the rule was within the Commission's authority under Section 303(b) of the Act to "[p]rescribe the nature of the service to be rendered" by the holders of FCC-issued spectrum licenses. Slip op. 13 ("[T]he data roaming rule merely

defines the form mobile-internet service must take for those who seek a license to offer it."). The Court found it "clear" that the data roaming rule fell "well within the Commission's Title III authority," particularly when considered together with the Commission's authority both under Section 303(r) to promulgate implementing rules and under Section 316 to modify radio licenses. *Id.*

So too here. By setting basic "rules of the road" establishing that wireless broadband Internet access providers may not block lawful data traffic in using their FCC-licensed spectrum, *Order* ¶¶42, 99 (JA___), the Commission's Open Internet Rules likewise "prescribe the nature of the service to be rendered" by the holders of those licenses.[1] *See* FCC Br. 43-46.

Petitioners err in their contention that the Commission did not rely on Section 303(b) in the *Order* and therefore may not do so here. Verizon Reply 17; MetroPCS Reply 5. The Commission expressly grounded its Open Internet Rules on its authority under "Title III of the Communications Act," *Order* ¶133 (JA___); *see id.* at ¶¶127, 128 (JA___), and the "Ordering

[1] Nothing in Section 303(b) as construed in *Cellco* limits that provision to regulations concerning "spectrum management." Verizon Reply 18. Regardless, by ensuring that spectrum is used in a manner that will spur demand, innovation, and investment, *see Order* ¶134 (JA___), the *Order* ensures spectrum will be "manage[d]…in the public interest." *Cellco,* slip op. 11; *see* Br. 37-39.

Clauses" make clear that the *Order* was adopted "pursuant to," *inter alia*, "section[] 303…of the Communications Act," *Order* ¶170 (JA___). Moreover, the Commission relied on precedent adopting similar rules for wireless providers pursuant to, *inter alia*, Section 303(b). *See id.* ¶134 & nn.433, 434 (JA___); *700 MHz Order*, 22 FCC Rcd 15365 ¶207 n.471 (2007). Accordingly, this is not a case in which the Court must "guess at the theory underlying the agency's action." *SEC v. Chenery Corp.*, 332 U.S. 194, 197 (1947); *see Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983) (*Chenery* satisfied where "agency's path may reasonably be discerned").

Cellco likewise confirms that the *Order* is within the Commission's independent power to modify licenses (including by rulemaking) under Section 316 of the Act. The *Cellco* Court rejected Verizon's claim that a data roaming obligation was a "fundamental" change to radio license terms that exceeded the Commission's license-modification authority. Slip op. 15. Petitioners now argue that the rule in *Cellco* imposed only a "limited obligation," while this *Order* works a "fundamental change," Verizon Reply 20-21; MetroPCS Reply 10. But the *Order*, "grounded in broadly accepted Internet norms," *Order* ¶1 (JA___), simply preserves the status quo. By contrast, the rule in *Cellco* imposed a *new* duty to negotiate roaming

agreements with competing providers on "commercially reasonable terms." *See Cellco*, slip op. 3. Under *Cellco*, the *Open Internet Order* – which does not prevent Verizon from engaging in any anticipated business practices, *see, e.g.*, Verizon Br. 51 – is not a fundamental change.[2]

2. Common Carriage

Consistent with our arguments (Br. 61 & n.12), *Cellco* holds that "the Commission's interpretation and application of the term 'common carrier' warrants *Chevron* deference." Slip op. 17.

As *Cellco* made clear, "there is room for permissible regulation of private carriers that shares some aspects of traditional common carrier obligations." Slip op. 23. Thus, a rule does not impose common carriage obligations simply because, as here, it limits providers' discretion in *some* manner. *Id.* 22-23. As the Court explained, "common carriage is not all or nothing – there is a gray area in which although a given regulation might be applied to common carriers, the obligations imposed are not common carriage *per se*." *Id.* 21-22. And within that "gray area," "the Commission's

[2] Because the rules for wireless and fixed providers operate independently, differ in scope, and rely in part on distinct authority, the rules for wireless service would be lawful regardless of the Court's determination regarding the fixed rules (which are also lawful). *Contra* Verizon Reply 21-22.

determination that a regulation does or does not confer common carrier status warrants deference." *Id.* 22.

Cellco further held that core common carriage exists when a carrier "is forced to offer service indiscriminately and on general terms." Slip op. 21. Here, the *Order* leaves a broadband provider free to offer (or decline) to serve *any* end user – the only "customer" here – on any price and terms it chooses. Br. 66. Because there is no obligation to "offer service indiscriminately and on general terms," there is no common carriage.

Verizon nevertheless argues (Reply 5-7) that the *Order* creates "per se" common carriage because an access provider "provi[des]… service" to edge providers. But under the Communications Act (and consistent with *Cellco*), a common carriage relationship is defined in relation to an entity that "request[s]" "service." 47 U.S.C. § 201(a); *see* Br. 61-62. Edge providers do not request service from an end user's Internet access provider. Indeed, they generally have no technological or commercial relationship with that access provider. Br. 62. Instead, edge providers typically pay their own access providers to connect to the Internet. *See* Internet Eng'rs Amicus Br. 11. Thus, as in *Cellco*, the FCC acted within its discretion in determining that there is no common carriage where a rule preserves a provider's right to serve (or not serve) the person requesting service – *i.e.*, any end user. Once a

service provider has opted to serve a customer, service is not turned into common carriage by a rule that protects the customer's ability to receive Internet content of his choice.

To be sure, common carriage may be provided on a wholesale basis, Verizon Reply 6-7, but still the relevant entity is the customer who "request[s]" service. Thus, Verizon's analogy to access charges (Reply 7) is inapt. In the telephone context, the long-distance carrier requests service (usually defined by tariff) from the local carrier. *See Access Charge Reform*, 14 FCC Rcd 14221, 14318 ¶188 (1999). The long-distance carrier and the local provider also have a direct technical relationship, as the long-distance provider delivers traffic to (or accepts traffic from) the local provider. In the case of the Internet, by contrast, edge providers do not request service from the end user's access provider, and that access provider is not required to deliver content based on the demand of edge providers. Instead, it is only the request of an end user – the access provider's customer – that triggers service. In this context, the FCC had discretion to conclude that a no-blocking rule does not create a common carriage relationship between edge providers and an end user's access provider. Indeed, any other result would have sharply expanded traditional notions of common carriage.

3. Fifth Amendment

As the *Cellco* Court held, "a justly compensated taking is not unconstitutional." Slip op. 26. Because broadband providers are compensated by their customers, there is no colorable takings claim here. Br. 76-77.

CONCLUSION

The notices of appeal should be dismissed and the petitions for review denied.

Respectfully submitted,

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January 4, 2013

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VERIZON ET AL., APPELLANTS/PETITIONERS, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, APPELLEE/RESPONDENTS.	NO. 11-1355

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Surreply Brief for Respondents in the captioned case contains 1,342 words.

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CERTIFICATE OF SERVICE

I, Joel Marcus hereby certify that on January 4, 2013, I electronically filed the foregoing Surreply Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Others, marked with an asterisk, will receive service by mail unless another attorney for the same party is receiving service through CM/ECF.

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