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

UNITED STATES TELECOM ASSOCIATION, *Petitioner*, v. FEDERAL COMMUNICATIONS COMMISSION *et al.*, *Respondents*.	Case No. 15-1063 (and consolidated cases)

MOTION OF TECHFREEDOM, CARI.NET, JEFF PULVER, SCOTT BANISTER, CHARLES GIANCARLO, WENDELL BROWN, AND DAVID FRANKEL FOR LEAVE TO INTERVENE

Pursuant to 28 U.S.C. § 2348, 47 U.S.C. § 402(e), Rules 15(d) and 26(a)(1)(C) of the Federal Rules of Appellate Procedure, and D.C. Circuit Rule 15(b), we move for leave to intervene in the above-captioned petition for review and all consolidated cases arising from the FCC's final order in the proceedings captioned *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC 15-24 (Mar. 12, 2015) ("*Order*").

Specifically, TechFreedom, CARI.net, Jeff Pulver, Scott Banister, Charles Giancarlo, Wendell Brown, and David Frankel (collectively, the "Internet Independence Intervenors") move to intervene in support of the petitioners opposing the FCC's assertion of unprecedented regulatory power over the Internet, in all of the captioned and consolidated cases but one.

The only exception is *Full Service Network v. FCC*, No. 15-1151. In that appeal, the Internet Independence Intervenors move to intervene in support of *respondents*, opposing those petitioners' demands of still-heavier-handed regulation of the Internet.

A. TechFreedom

Founded in 2010, TechFreedom is a non-profit, non-partisan 501(c)(3) tax-exempt think tank dedicated to educating policymakers, the media and the public about Internet policy. TechFreedom participated significantly in the Commission's proceedings, submitting hundreds of pages of detailed comments, reply comments, and other docketed submissions on the statutory and constitutional problems pervading the FCC's proposed rules—problems that persist in the FCC's final *Order*. TechFreedom also co-filed a brief in this Court, in the

ultimately successful challenge to the FCC's 2010 Open Internet Order.[1]

TechFreedom's own activities are directly affected by the FCC's unprecedented claim of sweeping regulatory authority over the Internet, both insofar as the *Order* covers Internet infrastructure and as it necessarily opens the door to FCC regulation of other "layers" of the Internet. Like the advocacy organizations intervening in support of the *Order*, TechFreedom relies upon the independent Internet to communicate with supporters, coalition partners, and the public in furtherance of its mission as a 501(c)(3) tax-exempt organization. The FCC's actions in these proceedings significantly affect the ways in which Internet capacity is allocated and priced, and prohibits Internet Service Providers from taking actions to efficiently and effectively allocate broadband capacity to TechFreedom and other consumers of Internet capacity.

[1] Br. of TechFreedom *et al.*, *Verizon v. FCC*, No. 11-1355 (D.C. Cir. 2012), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-317118A1.pdf.

For example, TechFreedom regularly holds public educational events on tech policy issues, video of which it streams to a live audience over the Internet. Real-time remote participation is a critical part of these events: those watching the stream can participate as if they were in the audience. Like many small businesses, TechFreedom also relies on Voice over Internet Protocol ("VoIP") services like Google Hangouts and Skype to conduct virtual meetings daily with those outside its office. And TechFreedom further relies on virtual real-time collaboration tools like Google Docs and Slack for its work.

With respect to these technologies, the *Order*'s categorical ban on "paid prioritization" is particularly harmful to TechFreedom and other users of VoIP services and similar technologies. Internet Protocol, which breaks down a data stream into a series of packets sent to the user without the kind of dedicated circuit used for analog telephony, was not intended to facilitate video delivery, VoIP, or Software as a Service ("SAAS") offerings, but the protocol does, in both IPv4 and IPv6, specifically allow for prioritization, and has thus been adapted for these

services.[2] Live streaming of Internet video and VoIP are particularly sensitive to "latency" (delay between a data packet being sent and its arrival, causing the user's experience to be less than synchronous), "jitter" (variability in latency, which garbles the stream for the user), and "packet loss" (some packets simply never arrive at their destination). SAAS offerings like real-time, synchronous collaborative document editing are particularly sensitive to latency. Several technological measures address all three problems by effectively "prioritizing" packets for services that require priority to function (thus effectively giving the Internet, a "packet-switched" network, some of the advantages of "circuit-switched" networks like traditional telephony). But the *Order* categorically bans such paid prioritization. Without the ability to pay for such prioritization, these services will be under-supplied by the market; broadband providers will under-invest in that

---

[2] *See, e.g.,* Christopher S. Yoo, *Past Performance Does Not Guarantee Future Results: Towards a Dynamic Theory of Network Regulation,* 9-10 (Sept. 10, 2014), *available at* https://www.aei.org/wp-content/uploads/2015/03/yoo-final-fcc_105402876660.pdf (presenting at an AEI event, "Regulating the Evolving Broadband Ecosystem," at the FCC on September 10, 2014, and describing, *inter alia,* the history behind IPv4 and IPv6 and why the QoS (Quality of Service) field was included in the packet header of both versions of the protocol).

capability. In short, "paid prioritization" better aligns the incentive of broadband providers and providers of content and services such as those used by TechFreedom.

Because TechFreedom's interests are substantially affected by the FCC's actions and the Court's review of those actions, it is a "party in interest in the proceeding," entitling it to intervene "as of right" in this matter. 28 U.S.C. § 2348; *see also* 47 U.S.C. § 402(e) ("any interested person may intervene and participate in the proceedings had upon said appeal").

The other parties to this motion are all involved in delivering services such as those consumed by organizations like TechFreedom, businesses, and individual consumers.

B. CARI.net

Founded in 1997, CARI.net is a company offering users "cloud" services based on the Internet, including Infrastructure-as-a-Service ("IAAS") and Software-as-a-Service ("SAAS"). CARI.net also operates managed data centers. In both capacities, it negotiates with broadband providers for interconnection of Internet traffic. For its services,

CARI.net relies upon an open and independent Internet, unfettered by burdensome federal oversight and regulation.

The *Order*'s ban on paid prioritization harms CARI.net in at least three ways. First, it bars the company from offering its Data Center customers the ability to purchase certain levels of treatment or a certain quality of treatment, or to send their traffic over specific networks. Second, barring CARI.net from negotiating better connections and partnerships with broadband providers eliminates potential competitive advantages that CARI.net could otherwise resell to its own customers (providers of content and services to end-users). By essentially commoditizing the services that CARI.net provides, the *Order* denies CARI.net the ability to distinguish itself from its competition. Third, the ban on paid prioritization eliminates CARI.net's ability to enter into strategic partnerships with venture capitalists and broadband providers.

The *Order*'s amorphous standard for regulating interconnection (which it calls "Internet traffic exchange")[3] directly affects CARI.net

[3] *Order* ¶¶ 119, 193.

because its business relies on efficient peering relationships with broadband providers.

Finally, in justifying its reclassification of wireless data services under Title II, the FCC's *Order* includes IP addresses in the definition of "public switched networks."[4] Since all Internet services rely on IP addresses, the FCC's decision to so define its regulatory reach indicates that the Commission will apply Title II regulation not only to broadband providers but also to companies such as CARI.net. This, combined with the amorphous nature of the FCC's "general conduct" standard,[5] casts a dark cloud of regulatory uncertainty over CARI.net's operations. This will jeopardize CARI.net's ability to attract investment and customers. Ironically, this is precisely the opposite of the "virtuous circle" by which the FCC claims, without economic basis, that its rules will actually promote investment in companies like CARI.net.

[4] *Id.* ¶ 391.

[5] *Id.* ¶¶ 138-46

C. Jeff Pulver, Scott Banister, Charles Giancarlo, Wendell Brown, and David Frankel

The individual intervenors are leading pioneers of Internet services, entrepreneurs and investors united around a shared opposition to imposing Title II regulation on the Internet. Each of them has devoted his career, in significant part, to the development of VoIP services, and each of them is currently engaged in providing VoIP services.

But the *Order*'s ban on paid prioritization will reduce the quality of VoIP services. The *Order*'s reinterpretation of Title II, and specifically its equation of IP addresses with telephone numbers, effectively reverses long-standing FCC policy against regulating VoIP services under Title II. This creates immediate, significant regulatory uncertainty that reduces the ability of the individual intervenors and their companies to raise investment funds, and chills innovations that could benefit consumers. The Order's nebulous approach to interconnection likewise represents the beginning of FCC regulation of what has been a thriving free market for the exchange of Internet traffic. All of the companies founded and funded by the individual intervenors have relied on that market to provide their services.

1. Jeff Pulver has founded, co-founded, and invested in a number of Internet companies. In 1994, he founded Free World Dialup ("FWD") as the first worldwide Internet telephony company; in 2001, he co-founded Vonage, among the world's top VoIP providers. In 1996, he founded the VON Coalition to advocate on behalf of VoIP providers. In 2005, Pulver founded Vivox, a company that offers VoIP services that can be integrated into online gaming. The company now has 80 million users worldwide, all of whom benefit from more personal interaction while gaming. Pulver currently serves as Chairman of Zula, a company he co-founded together with Jacob Ner-David in 2013, to offer VoIP and messaging services to business customers.

Pulver also has played a significant role in the FCC's long-standing light-touch approach to Internet regulation: he was the namesake of a significant FCC order that would be nullified by the new Open Internet Order. In 2004, Pulver and the VON Coalition succeeded in persuading the Commission to issue the so-called "*Pulver Order*," for the first time declaring VoIP to be a Title I information service—a landmark decision, given that analog voice telephony is the

quintessential Title II service.[6] Preserving VoIP services' freedom from heavy-handed Title II regulation was critical to the development not only of VoIP but also other Internet services, especially video streaming.

The *Pulver Order* opened as follows:

> In this Memorandum Opinion and Order (Order), we declare pulver.com's (Pulver) Free World Dialup (FWD) offering to be an unregulated information service subject to the Commission's jurisdiction. In so doing, we remove any regulatory uncertainty that has surrounded Internet applications such as FWD. We formalize the Commission's policy of nonregulation to ensure that Internet applications remain insulated from unnecessary and harmful economic regulation at both the federal and state levels. This action is designed to bring a measure of regulatory stability to the marketplace and therefore remove barriers to investment and deployment of Internet applications and services.[7]

Perversely, in the name of promoting broadband deployment under Section 706 of the (generally) *deregulatory* Telecommunications Act of

---

[6] *In re Petition for Declaratory Ruling that pulver.com's Free World Dialup Is Neither Telecommunications nor a Telecommunications Service*, 19 F.C.C.R. 3307 (2004) ("*Pulver Order*"), *at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-04-27A1.pdf

[7] *Pulver Order* ¶ 1.

1996,[8] the Open Internet Order has replaced that "regulatory stability" with vast regulatory uncertainty. The *Order* asserts that, through a Rube-Goldberg-esque "virtuous circle," regulation will actually promote investment in both broadband services and what it calls "edge services" (a highly artificial distinction contrived to conceal the *Order*'s true, sweeping implications). In fact, the *Order* will harm "edge"-services entrepreneurs such as Pulver by denying them the ability to know what is and is not regulated—a necessary initial step for evaluating entrepreneurial initiatives and investment. As Pulver explained in an October 2014 editorial urging the FCC not to revoke the *Pulver Order*:

> The madness of applying Title II means declaring everything telecom. It requires an entirely new standard and ends 60 years of precedent underlying the telecom versus information services distinction. The Federal Communication Bar Association may not see a problem, but I can attest I have no idea how to judge the difference between IP transmission and IP services for the purposes of my next startup. I will not be able to explain it to investors, because the line exists entirely in the mind of whoever happens to be

[8] *See e.g.,* 47 U.S.C. § 230(b)(2) ("It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation").

> Chairman of the FCC. Applying Title II to IP networks creates a new Federal Computer Commission with authority to weigh in on everything connected to an IP network, in other words—everything.[9]

2. Scott Banister was an early pioneer in the email business, founding ListBot, an email list hosting service, in 1998. Banister has since worked with other start-ups as a board member and investor, including PayPal and eVoice, which offered the first email-enabled home voicemail service and which was acquired by AOL in 2001. In 2000, Banister co-founded IronPort, an email appliance provider that was acquired in 2007 by Cisco for $830 million. Banister is currently a leading "angel" investor to a variety of Silicon Valley startups.

3. Charles Giancarlo has been involved in the computer and Internet industries for over thirty years. He served as Executive Vice President and Chief Development Officer of Cisco, the world's leading manufacturer of Internet networking equipment, where he led the company's overall product development and product management activities. From 2008 until 2013 he was a Managing Director and

---

[9] Jeff Pulver, *Fear and Loathing as Telecom Policy*, HUFFINGTON POST (Aug. 6, 2014), *at* http://www.huffingtonpost.com/jeff-pulver/fear-and-loathing-as-tele_b_5654881.html.

headed the operating group of Silver Lake Partners, one of the largest technology investment groups in the world.

In 2008, Giancarlo co-founded ItsOn, a company that is revolutionizing the delivery of mobile voice, text and data services. ItsOn's technology allows users to control what apps get access to wireless bandwidth, when they get access, and how much to pay for it. It also allows third parties to "sponsor" bandwidth for specific apps, meaning that data used by that app would not be counted against the user's monthly data plan. And it would also allow mobile carriers to charge different prices for bandwidth for specific apps. The carriers need only define the services, set prices, push the offerings out to the phones, and then have the phones report back to allow the carrier to generate a bill tailored to the consumer's demands. This innovative arrangement could save consumers money by allowing them to choose mobile services *a la carte*, instead of as part of a bundle. This "unbundling" would parallel the unbundling of cable channels long desired by many consumers. ItsOn's technology is already shipping to one U.S. mobile carrier and will be deployed on three international carriers this year. It dramatically lowers the cost of operations of the

carrier services; most notably, it stops apps that run in the background from calling for data when the network is busy, thus alleviating congestion on the network and reducing the need for unnecessary infrastructure investment, the costs of which would necessarily be passed on to consumers.

Creating a market for elements of mobile service that are currently bundled together would clearly benefit consumers and spur as-yet-unforeseen innovations. But it faces an ominous and burdensome cloud of regulatory uncertainty, under the *Order*'s ban on paid prioritization. The *Order* specifically rejects AT&T's proposal for "a distinction between paid prioritization that is not directed by end users, and prioritization arrangements that are user-driven,"[10] saying that:

> Although there are arguments that some forms of paid prioritization could be beneficial, the practical difficulty is this: the threat of harm is overwhelming, case-by-case enforcement can be cumbersome for individual consumers or edge providers, and there is no practical means to measure the extent to which edge innovation and investment would be chilled. And, given the dangers, there is no room for a blanket exception for instances where consumer permission is

[10] *Order* ¶ 19 n.22.

> buried in a service plan—the threats of consumer deception and confusion are simply too great.[11]

The *Order* notes that only in "very limited circumstances" would the Commission "be willing to allow paid prioritization,"[12] that the burden of proof falls upon the innovator, that an "applicant seeking waiver relief under this rule faces a high bar," and that waivers will be granted "only in exceptional cases."[13]

In other words, even a company attempting to revolutionize the mobile service industry to *empower* consumers and *save* them money would have to seek FCC permission for its proposed practices—and go back for FCC re-approval whenever it wanted to change them. And there is nothing in the statute, the FCC's rules, or the *Order* to require the FCC to act upon a request for waiver—or even to encourage it to do so. Thus, there is literally no way to tell how long it might take the FCC to respond to a request for waiver, or even whether the Commission will *ever* respond.

---

[11] *Id.* ¶ 19 (footnotes omitted).

[12] *Id.* ¶ 130.

[13] *Id.* ¶ 132.

Simply put, the *Order* imposes a *per se* ban yet promises to apply the rule in a way that still purports to allow beneficial services. But the *Order* fails to deliver, at least regarding the kind of services offered by the intervenors. Ironically, in the name of defending permissionless innovation from alleged (but unsubstantiated) threats of "gatekeeper" control by broadband providers, the *Order* makes the FCC itself a very real gatekeeper to innovation by Giancarlo and the other the individual intervenors.

4. Wendell Brown is a pioneering innovator of VoIP technology, having founded multiple successful VoIP companies, including eVoice, Teleo, and LiveOps. eVoice created the first large-scale Internet-enabled voicemail platform including technology such as voicemail-to-email, visual voicemail, and enhanced caller ID. eVoice was acquired by AOL in 2001.

Brown's innovative company, Teleo, became an early competitor of Skype. Teleo created VoIP applications that allowed users to send and receive calls over the Internet. Teleo was acquired by Microsoft in 2005 and is part of Microsoft's MSN group.

At LiveOps, Brown and his co-founding team created a pioneering advancement in the work-at-home virtual workforce industry. By 2013, LiveOps employed the world's largest work-at-home call agent workforce, with more than 20,000 agents employed in the USA. The LiveOps platform has processed more than one billion minutes of customer service interactions, and LiveOps has designed call center solutions and social media management for Coca-Cola, Pizza Hut, and eBay among others.

Brown strongly believes his many inventions in VoIP and the resulting benefits to the American economy are directly due to the independence he has enjoyed to innovate freely on the Internet, without having to seek the FCC's permission, and that the *Order* will replace that independence with unnecessary Title II regulation that will stifle innovation.

5. David Frankel is a Silicon Valley entrepreneur and engineer focused on VoIP and other cloud-based collaboration services. He holds nine patents on technologies related to VoIP and conference calling. He founded his first VoIP company in 1994, Jetstream Communications, which pioneered Voice-over-DSL as an alternative to traditional analog

telephony. In 2006, he founded ZipDX and currently serves as its CEO. ZipDX offers special kinds of "virtual meetings," such as multilingual meetings using simultaneous (human) interpreters. Its customers include various agencies of the United Nations. Having delivered this service using both traditional telephony using the Public Switched Telephone Network and VoIP, Frankel has first-hand experience in operating both under Title II and Title I (thanks to the *Pulver Order*), and the corresponding differences in both regulatory burdens and taxation at the federal and state level. Frankel believes, based on his experience and expertise, that the *Order* will impede, not encourage, further innovation in real-time services delivered over the Internet.

* * *

Accordingly, the Internet Independence Intervenors respectfully request that the Court grant their motion for leave to intervene in the captioned cases.

Respectfully submitted,

/s/ Adam J. White

Bradley A. Benbrook
BENBROOK LAW GROUP, PC
400 Capitol Mall, Suite 1610
Sacramento, CA 95814
Tel: (916) 447-4900
Fax: (916) 447-4904

C. Boyden Gray
Adam J. White
(counsel of record)
Adam R.F. Gustafson
BOYDEN GRAY & ASSOCIATES PLLC
1627 I St. NW, Suite 950
Washington, DC 20006
(202) 955-0620
(202) 955-0621 (fax)
adam@boydengrayassociates.com

June 8, 2015

Counsel for Intervenors

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

UNITED STATES TELECOM ASSOCIATION, *Petitioner*, v. FEDERAL COMMUNICATIONS COMMISSION *et al.*, *Respondents*.	Case No. 15-1063 (and consolidated cases)

CERTIFICATE AS TO PARTIES

Pursuant to D.C. Circuit Rule 27(a)(4), the Movant-Intervenors hereby certify as follows:

In the lead case, No. 15-1063, the Petitioner is the United States Telecom Association. The Respondents are the Federal Communications Commission ("FCC") and the United States of America. Intervening for Petitioner is the Independent Telephone and Telecommunications Alliance. And Intervening for Respondents are: AdHoc Telecommunications Users Committee; Akamai Technologies, Inc.; COMPTEL; Center for Democracy & Technology; Cogent

Communications, Inc.; ColorOfChange.org; Credo Mobil, Inc.; DISH Network Corporation; Demand Progress; Etsy, Inc.; Fight For The Future, Inc.; Free Press; Kickstarter, Inc.; Level 3 Communications, LLC; Meetup, Inc.; National Association of Regulatory Utility Commissioners; National Association of State Utility Consumer Advocates; Netflix, Inc.; New America's Open Technology Institute; Public Knowledge; Tumblr, Inc.; Union Square Ventures, LLC; Vimeo, Inc.; and Vonage Holdings Corporation.

In the following consolidated cases, in addition to Respondents and Intervenors listed above, the Petitioners are, respectively: Alamo Broadband, Inc. (No. 15-1078); United States Telecom Association (No. 15-1086); National Cable & Telecommunications Association (No. 15-1090); CTIA—The Wireless Association (No. 15-1091); AT&T, Inc. (No. 15-1092); American Cable Association (No. 15-1095); CenturyLink (No. 15-1099); Wireless Internet Service Providers Association (No. 15-1117); and Daniel Berninger (No. 15-1128).

Finally, in No. 15-1151, Petitioners are Full Service Network, Truconnect Mobile, Sage Telecommunications LLC, and Telescape Communications Inc. Respondents are the Federal Communications

Commission and the United States of America. And Movant-Intervenors for Respondents are: Wireless Internet Service Providers Association; National Cable & Telecommunications Association; American Cable Association; CTIA—The Wireless Association; United States Telecom Association; AT&T, Inc.; and CenturyLink.

/s/ Adam J. White
Adam J. White
BOYDEN GRAY & ASSOCIATES

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

UNITED STATES TELECOM ASSOCIATION, *Petitioner*, v. FEDERAL COMMUNICATIONS COMMISSION *et al.*, *Respondents*.	Case No. 15-1063 (and consolidated cases)

RULE 26.1 CORPORATE DISCLOSURE STATEMENTS

TechFreedom is a nonprofit, non-stock corporation organized under the laws of the District of Columbia. TechFreedom has no parent corporation. It issues no stock.

CariNet, Inc., doing business as CARI.net, is a privately held California S-Corporation. It has no parent corporation, and no corporation holds any stock in it.

/s/ Adam J. White
Adam J. White
BOYDEN GRAY & ASSOCIATES

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.

Furthermore, I have directed that copies of the foregoing motion be served by first class mail to the persons listed below.

/s/ Adam J. White
Adam J. White
BOYDEN GRAY & ASSOCIATES

Served by first-class mail:

Rick Charles Chessen
Nat'l Cable & Telecomm. Ass'n
25 Massachusetts Avenue, NW
Suite 100
Washington, DC 20001-1431

Robert S. Schwartz
Constantine Cannon LLP
1301 K Street, NW
Suite 1050 East
Washington, DC 20005

Kellam McChesney Conover
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306