ORAL ARGUMENTS NOT YET SCHEDULED
NO. 18-1051 (and consolidated cases)

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

MOZILLA CORP., ET. AL.
PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA
RESPONDENT.

ON PETITIONS FOR REVIEW OF REGULATIONS PROMULGATED BY
THE UNITED STATES FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF PROFESSORS OF ADMINISTRATIVE, COMMUNICATIONS, ENERGY, ANTITRUST, AND CONTRACT LAW AND POLICY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Certificate of Parties, Rulings, and Related Cases

Parties and Amici Except for the following, all parties, intervenors, and amici appearing before this Court are listed in the Brief for Petitioners. Amici appearing in this Court include Catherine J.K. Sandoval, Allen S. Hammond IV, Carolyn M. Byerly, and Anthony Chase.

Rulings Under Review References to the rulings at issue appear in the Brief for Petitioners.

Related Cases References to related cases before this court appear in the Brief for Petitioners.

Dated: August 27, 2018

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Certificate Regarding Consent, Authorship, and Separate Briefing

All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a). No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the Amici Curiae and the ordinary salary their university employers pay them, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief,. *See* Fed. R. App. P. 29(c)(5).

Counsel for Amici certify that a separate brief is necessary, because no other amicus brief of which Amici are aware addresses in detail the F.C.C.'s Congressionally mandated obligation to consider rulemaking's impact on public safety, critical infrastructure, and democracy. Nor does any other amicus brief discuss in detail how the F.C.C.'s rulemaking process, in particular the commission's disregard of public comments and tolerance of identity theft in the comment process, violates the Administrative Procedures Act, as Amici argue.

Amici understand that other briefs will be filed in support of Petitioners. While the interests and arguments raised by other Amici are broad, there is no overlap of arguments to the best of Amici's knowledge. In light of the different, important, and complex issues presented in these briefs, counsel for Amici certify

that filing a joint brief is not practicable and that it is necessary to submit separate briefs.

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Corporate Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Amici state that none of the Amici has a parent corporation and no publicly held corporation owns 10% or more of the stock of any Amicus.

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Glossary of Terms

2018 *Internet Freedom Order*	FCC, In the Matter of Restoring Internet Freedom, 33 FCC Rcd. 311 (WC Docket No. 17-108) (2018).
2015 Order	*In re Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015), *aff'd sub nom. United States Telecom Association v. FCC*, 825 F.3d 674.
Communications Act	Communications Act of 1934, as amended, 47 U.S.C. § 151 et seq.
CPUC	California Public Utilities Commission
Critical infrastructure	Systems and assets, whether physical or virtual, vital to the United States economy and national security as designated under 42 U.S.C. § 5195c, the Critical Infrastructures Protection Act of 2001.
Fire District	Santa Clara County Fire Central Fire Protection District
ISP	Internet Service Provider, a company that provides access to the Internet.
Net neutrality rules	Rules adopted in the 2015 Order, 30 FCC Rcd. 5601, prohibiting Internet Service Providers from blocking, throttling, paid priority, and unreasonable interference with or disadvantage to Internet users, with some exceptions for reasonable network management.
Paid Priority	Deals with Internet Service Providers that allow fast access to the Internet or priority over other transmissions with no safeguards for other Internet transmissions or users.

Interest of Amici

This *amicus curiae* brief is filed by Professors of Administrative, Communications, Energy, Antitrust, and Contract law and Policy: Associate Professor Catherine J. Kissée-Sandovál and Professor Allen S. Hammond, IV at Santa Clara University School of Law ("SCU Law") for the Broadband Institute of California, an unincorporated SCU Law technology regulation and public policy research and education institute; Dr. Carolyn M. Byerly, Professor and Chair, Department of Communication, Culture & Media Studies, Howard University, and; Anthony Chase, Associate Professor, University of Houston Law Center.

In the Internet Freedom rulemaking, Professor Hammond filed Reply Comments for the BBIC and Professor Sandoval filed Reply Comments in her capacity as a law professor and former Commissioner of the California Public Utilities Commission (CPUC). Professors Sandoval and Hammond authored this amicus brief, assisted by SCU Law student Research Assistant, Luke Batty and research from SCU Law's Broadband Regulatory Clinic course. No party, counsel, or person contributed money toward the preparation and submission of the brief, apart from the ordinary salaries SCU pays the authors as law professors and a student research assistant.

Summary of Argument

This amicus brief submitted in support of Petitioners argues that the Federal Communications Commission (FCC) 2018 *Internet Freedom Order* violates the agency's statutory mission under the Communications Act which requires the FCC to consider the effects of its decisions on public safety. The FCC failed to offer sufficient consideration of the values the FCC's 2015 *Open Internet Order* ("*2015 Order*") protected including critical infrastructure such as the energy sector,[1] national security, and democracy.[2] The *Internet Freedom Order* consigns aggrieved users to antitrust and deceptive conduct laws which remedy only harms to competition and a limited class of consumer harms, and to insufficient disclosure rules. The Administrative Procedures Act (APA), 5 U.S.C. § 553, 5 U.S.C. § 706, requires the FCC to analyze the legal limits of those laws and harms left without a remedy.[3]

The FCC's tolerance of alleged identity theft in its rulemaking comment process and failure to announce the methodology it use to classify public

[1] 42 U.S.C. § 5195c (West) ("critical infrastructure" means systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters).

[2] FCC, In the Matter of Restoring Internet Freedom, 33 FCC Rcd. 311, at n. 943 (WC Docket No. 17-108) (2018) (hereinafter *FCC, Internet Freedom Order*).

[3] Michigan v. E.P.A., __U.S. __, 135 S.Ct. 2699, 2706 (2015) ("Federal administrative agencies are required to engage in "reasoned decision making."). *See also*, Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc., 429 U.S. 477, 489 (1977) (requiring an antitrust plaintiff to prove injury arising from anticompetitive acts or reflecting anticompetitive effect).

comments as "non-substantive" distorts the record before this court, undermines democratic decision-making, and violates the APA. These omissions and the FCC's abysmal conduct of its rulemaking merit the *Internet Freedom Order's* vacatur, reversal, and remand.

Argument

I. The FCC Violates its Statutory Mandate and the APA by Failing to Consider the 2015 Open Internet Order's Protection of Public Safety, Critical Infrastructure, and Free Expression.

The FCC's *2015 Order* prohibited Internet Service Provider ("ISP") blocking, throttling, paid priority, and unreasonable interference with or disadvantage to Internet users, with some exceptions for reasonable network management ("net neutrality rules") to safeguard against harms to public safety including electric and gas reliability, environmental sustainability, universal service, free expression, injuries to competition and the market, and to protect consumers.[4] Energy and water utilities, designated "critical infrastructure" vital to national security and the nation's economy under the Critical Infrastructures Protection Act of 2001, increasingly depend on the open Internet.[5] Despite growing

[4] In the Matter of Protecting & Promoting the Open Internet, 30 F.C.C. Rcd. 5601, ¶ 22, n. 289-292 and accompanying text (2015) (hereinafter *FCC, 2015 Order*).

[5] 42 U.S.C. §5195c. *See*, CPUC, Comments, *In the Matter of Restoring Internet Freedom*, at 27 (WC Docket No. 17-108) (July 17, 2017) ("a free and open Internet is critical to areas such as energy, education, medicine, and public safety.") Brief for Gov. Petitioners, U.S.C.A. Case 18-1051, at 10 (stating the CPUC regulates under the California Constitution, Cal. Const., art. XII,

cybersecurity threats Congress detailed in the Countering America's Adversaries with Sanctions Act, and Homeland Security warnings, the FCC failed to consider the impact of net neutrality repeal on public safety, national security, and democracy.[6]

The *Internet Freedom Order* dismisses national security concerns through a footnote proclaiming "[n]or do we think we need to address assertions that paid prioritization would endanger U.S. national security as they are vague and lack any substantiation whatsoever."[7] Ellipsis obscure the *Internet Freedom Order's* failure to "analyze whether its proposals increase threats to national security or democracy,"[8] values the *Open Internet Order* protected. "The Commission is required to consider public safety by both its enabling act," Communications Act of 1934, 47 U.S.C. § 151, and by the Wireless Communication and Public Safety Act of 1999, 47 U.S.C. § 615.[9] The FCC's disregard for the facts, circumstances, and statutory duties that supported its prior policy violates the APA.[10]

"industries deemed critical to the public welfare, including gas, electricity, telecommunications, and water" and oversees "California's energy grid, public utility infrastructure, and universal service programs" affected by the *Internet Freedom Order*.).

[6] Catherine Sandoval, Reply Comments, *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, Aug. 30, 2017, at 28, 46-47, 57 (hereinafter *Sandoval, Reply Comments*).

[7] *FCC, Internet Freedom Order*, *supra* note 2, at n. 943 (citing *Sandoval Reply Comments*, *supra* note 6, at 25).

[8] *Id.*

[9] Nuvio Corp. v. F.C.C., 473 F.3d 302, 307 (D.C. Cir. 2006). See *Sandoval Reply Comments*, *supra* note 6, at 47.

[10] United States Telecom Ass'n v. F.C.C., 825 F.3d 674, 708–709 (D.C. Cir. 2016).

The Supreme Court in *Encino Motorcars, LLC v. Navarro* held that the APA requires that "the agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'"[11] When reversing existing policy, the APA requires an agency to provide more substantial justification "when its new policy rests upon factual findings that contradict those which underlay its prior policy..."[12] An agency rescinding a rule "is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."[13] "[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[14] "Put another way," the D.C. Circuit stated in *USTA v. FCC*, "[i]t would be arbitrary and capricious to ignore such matters."[15]

The FCC adopted net neutrality rules in 2015 to protect democratic values including free expression, public safety, and a range of Internet users and uses.[16]

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[11] Encino Motorcars, LLC v. Navarro, __U.S.__, 136 S.Ct. 2117, 2126 (2016) (citing S.E.C. v. Chenery Corp. 318 U.S. 80, 87 (1943)).
[12] Perez v. Mortgage Bankers Ass'n, —— U.S. ——, 135 S.Ct. 1199, 1209 (2015) (quoting Fox Television, 556 U.S. at 515; Fox Television Stations, Inc. v. F.C.C., 280 F.3d 1027, 1047 (D.C. Cir. 2002), *opinion modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002) ("the Commission failed to explain its departure from its previously expressed views," rendering its decision "arbitrary and capricious" and contrary to law) (quoting Fox Television, 556 U.S. at 515)).
[13] Motor Veh. Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 42 (1983).
[14] United States Telecom Ass'n, 825 F.3d. at 708-709 (quoting Fox Television, 556 U.S at 515-516).
[15] *Id.* (quoting Fox Television, 556 U.S. at 515).
[16] *FCC, 2015 Order*, *supra* note 4, ¶ 22, n. 291, 292 and accompanying text (citing Letter from Catherine J.K. Sandoval, Commissioner, California Public Utilities Commission, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, 10-127, Attach. at 2 (filed Oct. 14, 2014)) [hereinafter *CPUC Commissioner Sandoval Ex Parte Letter*].

The *2015 Order* considered critical infrastructure sector needs in rejecting proposals to allow paid priority or individualized negotiations for fast Internet access with a "minimum speed" guaranteed.[17] The *Open Internet Order* cited then-CPUC Commissioner Sandoval's comment that paid priority would increase "barriers to adopting Internet-based applications," such as Internet-enabled demand response deployed to "prevent power blackouts, forestall the need to build fossil-fueled power plants, promote environmental sustainability, and manage energy resources."[18]

Energy reliability has been a federal priority since Congress adopted the Electricity Modernization Act in 2005.[19] The Federal Power Act requires wholesale energy market participants to provide reliable service at just and reasonable rates.[20] Energy, water, and many telecommunications utilities face state law duties to provide safe, reliable service, at just and reasonable rates.[21]

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[17] *FCC, 2015 Order*, *supra* note 4, at n. 254 and accompanying text (citing *CPUC Commissioner Sandoval Ex Parte Letter*, *supra* note 16, Attach. at 14 ("[A]ny of the minimum level of access standards the FCC proposes would be insufficient to support the needs of a diversity of Internet users including Critical Infrastructure.")).

[18] *Id.* at 55, n. 291. *See* F.E.R.C. v. Electric Power Supply Ass'n., _U.S._, 136 S.Ct. 760, 768–69, as revised (Jan. 28, 2016) ("Wholesale demand response…pays consumers for commitments to curtail their use of power, so as to curb wholesale rates and prevent [electric] grid breakdowns.")

[19] Electricity Modernization Act of 2005, 42 U.S.C. § 15801, Pub. L. No. 109-58, § 1211, 119 Stat. 594, 941-46 (2005).

[20] 16 U.S.C. § 824d(a-b) ("[a]ll rates and charges . . . by any public utility for or in connection with the transmission or sale of electric energy . . . and all rules and regulations affecting or pertaining to such rates or charges" must be "just and reasonable" and not "undu[ly] preferen[tial]").

[21] *See, e.g.* CAL. PUB. UTIL. CODE § 451 ("Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities,

The CPUC's *Internet Freedom Order* comments warned "as the *2015 Order* discusses, the absence of strong anti-discriminatory rules could undermine critical infrastructure and public safety."[22] "[W]ithout non-discriminatory rules, providers of emergency services or public safety agencies might have to pay extra for their [Internet] traffic to have priority"; consequently, "their ability to provide comprehensive, timely information to the public in a crisis could be profoundly impaired."[23]

Rather than address these concerns, the *Internet Freedom Order* concludes "[t]o the extent that our approach relying on transparency requirements, consumer protection laws, and antitrust laws does not address all concerns, we find that any remaining unaddressed harms are small relative to the costs of implementing more heavy handed regulation."[24] The FCC's assumption that paid priority's harms would be "small" does not satisfy the Communications Act's requirement that FCC decision-making consider public safety.[25] "[C]omplete absen[c]e of any discussion of a statutorily mandated factor renders an agency decision arbitrary and

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including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.").

[22] CPUC, Comments, *In the Matter of Restoring Internet Freedom*, at 29 (WC Docket No. 17-108) (July 17, 2017) (citing *2015 Order*, *supra* note 4, at 114, 126, 150).

[23] *Id.* at 29 (citing *2015 Order*, *supra* note 4, ¶ 126 (citing *CPUC Commissioner Sandoval Ex Parte Letter*, *supra* note 16, "asserting that paid prioritization undermines public safety and universal service….")).

[24] *FCC, Internet Freedom Order*, *supra* note 2, ¶ 116.

[25] *Nuvio Corp. v. FCC*, 473 F.3d at 307–08.

capricious."[26] Neither did the FCC analyze the facts that motivated the 2015 paid priority ban adopted to safeguard public safety, universal service, and free expression,[27] or the contemporary record on those issues. The FCC's failure to articulate a reasoned basis for disregarding the *2015 Order* violates the APA.[28]

The *Internet Freedom Order* fails to examine the limits of antitrust and unfair competition law which remedy only harm to competition,[29] or deceptive conduct such as gaps between ISP promises and practices.[30] The *Internet Freedom Order* leaves without a remedy non-competition harms which the *2015 Order* protected against, a gap the APA requires the FCC to analyze.[31]

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[26] *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004) (citations omitted).

[27] *Cf. FCC, 2015 Order*, *supra* note 4, 2015, ¶¶ 68, 125-129.

[28] Michigan, 135 S.Ct. at 2710 ("a court may uphold agency action only on the grounds that the agency invoked when it took the action") (citing SEC v. Chenery Corp., 318 U.S. 80, 87); Perez, 135 S.Ct. at 1209 (quoting Fox Television, 556 U.S. at 515).

[29] *Sandoval, Reply Comments*, *supra* note 6, at 45 ("antitrust and unfair competition law remedies are available *only for injuries to competition*") (emphasis in original) (citing Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990) ("antitrust injury" claims and remedies are limited anti-competitive injury)).

[30] *Id.* ("Antitrust and unfair competition regulations possess no authority to address harms to national security and democracy.") (citing Catherine J. K. Sandoval, *Disclosure, Deception, and Deep-Packet Inspection: The Role of the Federal Trade Commission Act's Deceptive Conduct Prohibitions in the Net Neutrality Debate*, 78 FORDHAM L. REV. 641, 662 (2009) ("An act has been held to be deceptive [under the FTC Act] if it involves a material representation, omission, or practice that is likely to mislead consumers acting reasonably under the circumstances.")); F.T.C. Act, 15 U.S.C. § 45 (2006) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.").

[31] Michigan, 135 S.Ct. at 2706 ("Federal administrative agencies are required to engage in 'reasoned decisionmaking.'").

The FCC removed the *2015 Order's* paid priority ban asserting "prioritizing the packets for latency sensitive applications will not typically degrade other applications sharing the same infrastructure,"[32] such as "email, software updates, or cached video."[33] The *Internet Freedom Order* neither defines the range of "typical" degradation anticipated, nor discusses paid priority's potential to degrade other Internet applications deployed by public safety agencies, critical infrastructure, courts, education, businesses, and families.[34]

In support of repealing the *2015 Order*'s paid priority ban, AT&T touted the prospect of paid priority for online video games.[35] The *Internet Freedom Order* fails to consider the dangers of ISP-video game provider paid priority deals that may delay signals to energy resources such as smart thermostats which share the same Internet infrastructure, risks the *Open Internet Order* addressed.[36] The

[32] *FCC, Internet Freedom Order*, *supra* note 2, ¶ 258 (citing Comments of AT&T Services Inc., *In the Matter of Restoring Internet Freedom*, 17-208, at 44-45 (July 17, 2017)).
[33] *Id*. ¶ 258 (citations omitted).
[34] *See* Brief for Gov. Petitioners, *supra* note 5, Declaration of Fire Chief Anthony Bowden, Add. 2-3 (during an active firefight, Verizon throttled Internet speeds of the Santa Clara County, California Fire Protection District's emergency incident support unit which "relied heavily on the use of specialized software and Google Sheets to do near-real-time resource tracking through the use of cloud computing over the Internet.") The District uses applications other than "email, software updates, or cached video" the FCC assumed paid priority would not "typically" delay.
[35] *Sandoval, Reply Comments*, *supra* note 6, at 27 (citing Comments of AT&T Services Inc., *supra* note 30, at 5 ("Suppose, for example, that ISPs began implementing isolated paid-prioritization arrangements to support quality of service … for unusually latency-sensitive applications, such as high-definition videoconferencing or massively multiplayer online gaming.")).
[36] *Id.* at 50 ("*ex parte* comments and [a] letter submitted for the 2015 *Open Internet* rulemaking discussed in detail why individualized bargaining proposals endanger critical infrastructure

Internet Freedom Order imposes no eligibility requirements for paid priority buyers – whether foreign or domestic – and fails to analyze public safety and national security consequences of authorizing paid priority without restriction or FCC jurisdiction.[37] Rejecting arguments against lifting the 2015 paid priority ban, the FCC cited but failed to define the "practical limits on paid prioritization."[38] "An agency action will be sustained if 'the agency has articulated a rational connection between the facts found and the conclusions made.'"[39] A federal agency cannot fail "to consider an important aspect of the problem" or offer "an explanation for its decision that runs counter to the evidence' before it."[40]

The *Internet Freedom Order* failed to consider the public safety consequences of repealing the *2015 Order*'s restrictions on ISP throttling or unreasonable interference with or disadvantage to Internet users including those

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which relies on the open Internet for services such as energy demand response to prevent electrical blackouts.")

[37] *FCC, Internet Freedom Order*, *supra* note 2, ¶ 2-4 (repealing FCC 2015 rules that prohibited ISP blocking, throttling, or Internet traffic paid priority, and required reasonable network management); *Sandoval, Reply Comments*, *supra* note 6, at 4, 25, 27, 46.

[38] *FCC, Internet Freedom Order*, *supra* note 2, ¶ 258 and n. 943 (rejecting, for example, American Association of Law Libraries et al. Comments at 16 ("A world in which libraries and other noncommercial enterprises are limited to the internet's 'slow lanes' while HD movies can obtain preferential treatment undermines a central priority for a democratic society—the necessity of all citizens to inform themselves and each other just as much as the major commercial and media interests can inform them.")

[39] Center for Biological Diversity v. U.S. Fish & Wildlife Service, 807 F.3d 1031, 1043 (9th Cir. 2015) ("factual determinations must be supported by substantial evidence") (citing Dickinson v. Zurko, 527 U.S. 150, 162 (1999)).

[40] Dist. Hosp. Partners, L.P. v. Burwell, 786 F.3d 46, 57 (D.C. Cir. 2015) (quoting Motor Veh. Mfrs. Ass'n, 463 U.S. at 43).

with "unlimited" data plans.[41] In July 2018, while the Santa Clara County, California Fire Protection District ("*Fire District*") was fighting the Mendocino Complex Fire, California's largest fire, Verizon throttled the unit's "unlimited" data plan and forced the Fire District to buy a more costly plan.[42] The *2015 Order* enabled the *Fire District* to file a complaint with the FCC arguing Verizon violated net neutrality rules by slowing the unit's Internet speeds to act "more like an AOL dial up modem from 1995," no longer supporting "a modern broadband internet connection," and "hampering operations for the assigned crew."[43] The *2015 Order* shielded emergency responders through *ex ante* rules *and* an *ex post* enforcement process rooted in FCC jurisdiction.

The *Internet Freedom Order* conjectures that paid priority will not typically degrade email, cached video, and software updates, but fails to account for the range of Internet applications commonly used.[44] Modern firefighters rely on real-time geographic information system ("GIS") mapping to monitor fires and

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[41] *FCC, 2015 Order*, *supra* note 4, ¶¶21, 32-34, 133, Appx. A, §8.7 (ordering ISPs "shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management"); Id., Appx. A, §8.11 (ordering ISPs "shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.")

[42] Brief for Gov. Petitioners, *supra* note 5, Add. 2-4.

[43] *Id.*, Add. 11.

[44] *FCC, Internet Freedom Order*, *supra* note 2, ¶ 258.

coordinate emergency response,[45] track information, and save lives. Net neutrality repeal left public safety agencies unable to rely upon GIS and other Internet applications that require more bandwidth than an email, software updates, or cached video. The *2015 Order* gave the FCC the jurisdiction and rules to consider a complaint that an ISP unreasonably interfered with and disadvantaged public safety data transmissions − whether GIS mapping or live video of a fire or flood's path – data the ISP would not have slowed had the user been watching an ISP's "zero-rated" entertainment video exempt from ISP data caps. The APA and the FCC's enabling statute require the Commission to consider the public safety implications of net neutrality's repeal.[46]

"[U]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice."[47] "An "arbitrary and capricious" regulation of this sort is itself unlawful and receives no *Chevron* deference" to an administrative agency's interpretation of an ambiguous statute.[48]

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[45] *See* CAL. PUB. UTIL. COMM'N, DECISION UPDATING THE WATER ENERGY NEXUS COST CALCULATOR, PROPOSING FUTURE INQUIRY, AND NEXT STEPS, Decision 16-12-047, 33-34 (Dec. 15, 2016).
[46] *See* Nuvio Corp., 473 F.3d at 307.
[47] Encino Motorcars, 136 S.Ct. at 2126 (citing National Cable & Telecomm. Assn. v. Brand X, 545 U.S. 967, 981 (2005)).
[48] *Id.* (citing United States v. Mead Corp., 533 U.S. 218, 227 (2001)).

The FCC leaves this court unable to evaluate the basis for the agency's judgment.[49] A reviewing court is not authorized to conjecture an explanation the agency did not offer. [I]t is a "foundational principle" that "a court may uphold agency action only on the grounds that the agency invoked when it took the action."[50] Therefore, the *Internet Freedom Order* should be vacated, reversed, and remanded.

II. The FCC Violates the APA and Distorts the Record by Failing to Adequately Respond to Public Comment

The *Internet Freedom Order* violates the APA by omitting systematic analysis of more than 23 million public comments filed in this proceeding. Federal rulemaking under 5 U.S.C. § 553 requires the agency to seek and take public comment into account, and explain its reasoning relevant to those comments.[51]

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[49] Fox Television, 556 U.S. at 561.
[50] Michigan, 135 S.Ct. at 2710.
[51] Perez v. Mortgage Bankers Ass'n, 135 S.Ct. 1199, 1203 ("An agency must consider and respond to significant comments received during the period for public comment") (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)); California v. Health and Human Services, 281 F.Supp.3d 806, 825 (N.D. Cal. 2017) (following an agency's rulemaking notice, 5 U.S.C. § 553(b-c) requires "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." "The agency must then consider any "relevant matter presented ...."); International Snowmobile Mfrs. Ass'n v. Norton, 340 F.Supp.2d 1249, 1265 (D. Wyo. 2004) ("a predetermined political decision that did not seriously

An *Internet Freedom Order* footnote states "the Commission devoted substantial resources to a review and evaluation of the content of the approximately 23 million express comments filed in this proceeding, which are shorter submissions that are made directly into a web form and do not require supporting file attachments."[52] The FCC reports that "Staff individually analyzed distinct form comments and standard or unique comments for substantive issues, and developed a systematic process for review of the non-form, non-standard comments, consistent with the recommendations of the Administrative Conference of the United States."[53]

The *Internet Freedom Order* contains few citations to comments filed through the FCC's Express Comment portal.[54] For example, the FCC did not discuss the 1,835 Express Comments containing the text "lack of competition."[55] Many of those comments contest the basis for the FCC's conclusion that "in this industry, even two active suppliers in a location can be consistent with a noticeable

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consider public comments and performed mere *pro forma* compliance with NEPA [National Environmental Protection Act]" and agency rulemaking conduct that ignored the "purposes and procedures of NEPA and the APA" merited vacating the Record of Decision of the National Park Service's Final Environmental Impact report regarding a Yellowstone and Grand Teton National Park snowmobile ban).

[52] *FCC, Internet Freedom Order, supra* note 2, at n. 1182.

[53] *Id.*

[54] *See e.g. Id.* at n. 176 (rejecting commenters' assertions that the primary function of ISPs is to simply transfer packets and not process information citing comments including Harold Hallikainen Comments at 1; Ryan Blake Comments at 1-2).

[55] Search FCC, ECFS for filings with the term "lack of competition," https://www.fcc.gov/ecfs/search/filings?proceedings_name=17-108&q=%22lack%20of%20competition%22&sort=date_disseminated,DESC.

degree of competition, and in any case, can be expected to produce more efficient outcomes than any regulated alternative."[56] "Notice and comment rulemaking procedures obligate the FCC to respond to *all* significant comments, for the opportunity to comment is meaningless unless the agency responds to significant points raised by the public."[57]

Neither the *Internet Freedom* NPRM nor the FCC website inform the public that Express Comments will be treated differently than other filed comments.[58] The FCC describes its electronic comment filing system (ECFS) "as the repository for official records in the FCC's docketed proceedings from 1992 to the present.[59] "Public comments, including those filed as Express Comments are part of the FCC record, and the FCC has accorded them weight in past proceedings including the *2015 Order*."[60] The *2015 Order* was grounded in part on the 4 million public comments filed in that proceeding, including those submitted through the Express

[56] *FCC, Internet Freedom Order*, *supra* note 2, ¶ 126.
[57] Fox Television, 556 U.S. at 561 (emphasis in original) (citing ACLU v. F.C.C., 823 F.2d 1554, 1581 (C.A.D.C.1987)).
[58] *See Sandoval, Reply Comments*, *supra* note 6, at 21 ("The FCC cannot now change its policy *sub silent[i]o* and wholesale discount comments filed through the Express Comment portal or ignore the allegations of identity theft and false filings being committed in the FCC proceeding through the FCC record and comment filing system.").
[59] *See Sandoval, Reply Comments*, *supra* note 6, at 21 (citing FCC, Welcome to the Electronic Comments Filing System, https://www.fcc.gov/ecfs/browse-popular-proceedings (last visited August 29, 2017)).
[60] *Sandoval, Reply Comments*, *supra* note 6, at 21 (citing *FCC, 2015 Order*, *supra* note 4, at ¶ 13); *FCC, 2015 Order*, *supra* note 4, ¶ 206 (citing Small Refiner Lead Phase-Down Task Force v. E.P.A., 705 F.2d 506, 547 (D.C. Cir. 1983) (noting that the quality of agency rulemaking is improved as it "tested by exposure to diverse public comment") (quoting BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 641 (1st Cir. 1979))).

Comment portal.[61] The APA requires the FCC's *Internet Freedom Order* to explain its public comment analysis.[62] Instead, the *Internet Freedom Order* treats the public like an "interloper."[63]

The *Internet Freedom Order* states the "Commission focused its review of the record on the submitted comments that bear substantively on the legal and public policy consequences of the actions we take today."[64] The FCC notes "it appears that 7.5 million identical one-sentence comments were submitted from about 45,000 unique e-mail addresses, all generated by a single fake e-mail generator website. Moreover, we received over 400,000 comments supporting Internet regulation that purported to be from the same mailing address in Russia."[65] The FCC contends its "decision to restore Internet freedom did not rely on comments devoid of substance, or the thousands of identical or nearly identical non-substantive comments that simply convey support or opposition to the proposals in the *Internet Freedom NPRM*."[66]

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[61] *FCC, 2015 Order*, *supra* note 4, ¶ 13 ("The Commission has considered the arguments, data, and input provided by the commenters, even if not in agreement with the particulars of this Order; that public input has created a robust record, enabling the Commission to adopt new rules that are clear and sustainable.").
[62] Perez, 135 S.Ct. at 1203.
[63] Office of Communication of United Church of Christ v. F.C.C., 425 F.2d 543, 546 (D.C. Cir. 1969).
[64] *FCC, Internet Freedom Order*, *supra* note 2, ¶ 344.
[65] *Id*. n. 1178.
[66] *Id*. ¶ 344.

The *Internet Freedom Order* discusses no factors, methodology, or staff report the FCC relied upon to classify comments as "devoid of substance" or assign them weight. The resulting gap in the proceeding's "whole record"[67] leaves the court and the public unable "to see what major issues of policy were ventilated ... and why the agency reacted to them as it did."[68]

The FCC gave no notice about the test it applied to deem a comment "devoid of substance," violating the APA's requirements.[69] The "final rule the agency adopts must be 'a logical outgrowth' of the rule proposed."[70] The FCC's *sub silentio* comment standard shift violates the APA's notice and reasoned explanation requirements.[71]

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[67] *Cf.* American Radio Relay League, Inc. v. F.C.C., 524 F.3d 227, 243 (D.C. Cir. 2008) (Tatel, Circuit Judge, concurring) (underscoring that the FCC's failure to make public unredacted technical studies and data upon which the agency's decision-making process relied "undermines this court's ability to perform the review function APA section 706 demands.").

[68] Huntco Pawn Holdings, LLC v. U.S. Department of Defense, 240 F.Supp.3d 206, 219 (D.D.C. 2016) (citing Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 335 (D.C. Cir. 1968)).

[69] *See* Prometheus Radio Broad. v. F.C.C., 652 F.3d 431, 450 (3d Cir. 2011) (requiring under the APA that an agency "describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision-making") (citing Horsehead Res. Dev. Co., Inc. v. Browner, 16 F.3d 1246, 1268 (D.C.Cir.1994)).

[70] Council Tree Comm., Inc. v. F.C.C., 619 F.3d 235, 249 (3rd Cir. 2010) (citing Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007) (quoting Nat'l Black Media Coal. v. F.C.C., 791 F.2d 1016, 1022 (2d Cir.1986))).

[71] Fox Television, 556 U.S. at 515 ("An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." (citing United States v. Nixon, 418 U.S. 683, 696 (1974))); *Cf.* Prometheus Radio Project v. F.C.C., 373 F.3d 372, 412 (3rd Cir. 2004) (holding the FCC's decision to withhold from public scrutiny and not publish for notice and comment its new methodology for measuring broadcast diversity was "not without prejudice," meriting remand).

The *Internet Freedom Order* asserts the Commission complied with the APA's obligation to adequately consider "important aspect[s] of the problem,"[72] all "relevant matter" received, and to "reasonably respond to those comments that raise significant problems."[73] The FCC cites *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, to bolster its proposition that "comments must be significant enough to step over a threshold requirement of materiality before any lack of consideration becomes of concern."[74] *Vermont Yankee* interpreted under the National Environmental Policy Act (NEPA) the Atomic Energy Commission's "threshold test" for consideration of energy conservation alternatives in its environmental impact statement (EIS) for an application to construct two pressurized water nuclear reactors.[75] The *Vermont Yankee* NEPA review standard for an agency's EIS does not establish a "threshold requirement of materiality" for consideration of comments under the APA.

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[72] *FCC, Internet Freedom Order*, *supra* note 2, n. 1176 (citing Motor Veh. Mfrs. Ass'n, 463 U.S. at 43).

[73] *Id.* n. 1175 (citing Vermont Public Service Board v. F.C.C., 661 F.3d 54, 63 (D.C. Cir. 2011) (refusing to credit a three-sentence comment with no supporting evidence)); North Carolina v. F.A.A., 957 F.2d 1125, 1135 (4th Cir. 1992) (noting an agency "need not respond to every comment").

[74] *FCC, Internet Freedom Order*, *supra* note 2, at n. 1177 (citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 553 (1978)); National Ass'n of Manufacturers v. E.P.A., 750 F.3d 921 (D.C. Cir. 2014) [cited by the FCC as 650 F.3d 821] (noting that under the Clean Air Act, National Ambient Air Quality Standards, an agency address only "the more significant comments").

[75] Vermont Yankee, 435 U.S. at 553.

FBME Bank Ltd. v. Mnuchin stated that "to respond adequately, the agency must only address significant comments "in a reasoned manner" that allows a court "to see what major issues of policy were ventilated ... and why the agency reacted to them as it did."[76] The APA requires an agency to demonstrate their "decision was ... based on a consideration of the relevant factors."[77] The FCC's derisive public comment treatment fails these requirements.

III. The FCC's Tolerance of Allegedly Criminal Identity Theft in its Rulemaking Distorts the Record, Undermines Democratic Decision-making, and Violates the APA

Identity thieves allegedly submitted millions of comments in the *Internet Freedom* docket in other people's names without their authorization.[78] The FCC "reject[ed] calls to delay adoption of this Order out of concerns that certain non-

[76] FBME Bank Ltd. v. Mnuchin, 249 F.Supp.3d 215, 222 (D.D.C. 2017), *appeal dismissed sub nom.*, 709 Fed.Appx. 4 (D.C. Cir. 2017) (citing Reytblatt v. Nuclear Regulatory Comm'n, 105 F.3d 715, 722 (D.C. Cir. 1997)); Pub. Citizen, Inc. v. F.A.A., 988 F.2d 186, 197 (D.C. Cir. 1993)).
[77] *Id.* (citing Thompson v. Clark, 741 F.2d 401, 409 (D.C. Cir. 1984)).
[78] *Sandoval, Reply Comments*, *supra* note 6, at 1-4, 6-25 (arguing material false statements allegedly filed in the FCC *Internet Freedom* proceeding violate federal and state law and constitute arbitrary and capricious decision-making); *See*, Office of Attorney General Schneiderman, State of New York, A.G. Schneiderman Releases Open Letter To FCC: Net Neutrality Public Comment Process Corrupted By "Massive Scheme," Nov. 21, 2017, https://ag.ny.gov/press-release/ag-schneiderman-releases-open-letter-fcc-net-neutrality-public-comment-process.

substantive comments (on which the Commission did not rely) may have been submitted under multiple different names or allegedly 'fake' names."[79] Many of those comments were not merely "fake," filed in the name of cartoon characters, for example, but were allegedly filed using identity theft.[80] The FCC failed to disclose what, if any, criteria it used to distinguish comments falsely filed using identity theft from authorized comments.[81]

"False filings based on identity theft hack the tools of democratic decision-making for an ulterior motive."[82] The FCC's claims that it did not rely on "fake" comments[83] do not cure the massive alleged identity theft scheme the FCC tolerated in this rulemaking as the FCC disclosed no methodology to distinguish false from authorized comments.

Professor Sandoval's *Reply Comments* recommended the FCC comment filing system "display a note informing filers that submission constitutes the filer's certification under penalty of perjury that the filer is authorized to submit the

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[79] *FCC, Internet Freedom Order*, *supra* note 2, ¶ 345 (citing *See, e.g.*, Brian Fung, *FCC net neutrality process 'corrupted' by fake comments and vanishing consumer complaints, officials say*, Washington Post (Nov. 24, 2017), https://www.washingtonpost.com/news/theswitch/wp/2017/11/24/fcc-net-neutrality-process-corrupted-by-fake-comments-and-vanishing-consumer-complaintsofficials-say/.)

[80] *Sandoval, Reply Comments*, *supra* note 6, at 1-3, 6-25, 58.

[81] *Id.* at 54 ("Because the FCC has taken no steps to distinguish false from authorized comments, it cannot address this problem merely through the weight it gives or denies to express comments.").

[82] *Id.* at 13 ("False filing allegations [in the FCC's *Internet Freedom* proceeding] raise additional alarm bells in light of Congressional findings of a Russian influence campaign in 2016 aimed at the United States presidential election, findings incorporated into the *Countering America's Adversaries Through Sanctions Act* Pub. L. No. 115-44, 131 Stat 886, Title II (211) (2017)).

[83] *FCC, Internet Freedom Order*, *supra* note 2, ¶ 344-345.

material on behalf of the named commenter."[84] The FCC cited *Vermont Yankee* for its contention that the "Commission is under no legal obligation "to adopt any 'procedural devices' beyond what the APA requires, such as identity-verification procedures."[85] *Vermont Yankee* rejected the argument that NEPA or the APA requires procedural devices such as a formal hearing, discovery or cross-examination.[86] *Vermont Yankee's* holding declining to require formal rulemaking with full hearing procedures is inapposite to the agency's duty to insure the integrity of the notice and comment rulemaking process.

The FCC's *Internet Freedom Order* stated "the Commission has previously decided not to apply its internal rules regarding false statements in the rulemaking context" because we do not want "to hinder full and robust public participation in such policymaking proceedings by encouraging collateral wrangling over the truthfulness of the parties' statements."[87] The FCC provided no notice of intent to apply this 2003 standard to the *Internet Freedom* rulemaking. Neither did the FCC reconcile its unannounced forbearance from requiring truthfulness in this

[84] *Sandoval, Reply Comments*, *supra* note 6, at 9-10.
[85] *FCC, Internet Freedom Order*, *supra* note 2, ¶ 345, n. 1180 (citing Vermont Yankee, 435 U.S. at 548).
[86] Vermont Yankee, 435 U.S. at 529, 548.
[87] *FCC, Internet Freedom Order*, *supra* note 2, ¶ 345, n. 1181 (citing *Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to Commission*, GN Docket No. 02-37, Report and Order, 18 FCC Rcd 4016, 4021-22, ¶¶ 13 (2003); 47 C.F.R. § 1.17).

rulemaking with its decision to allow "bot" filings − automated computer filings including "batch comments."[88]

The FCC's August 13, 2018 amicus curiae brief regarding the Department of Justice's appeal of the decision approving AT&T's merger with Time Warner emphasized that the "Commission's rules require *all* regulated parties—whether applicants seeking to transfer licenses in connection with a proposed merger or competitors who oppose the merger—to abide by the same standard of truthfulness in adjudicatory proceedings."[89] The *Internet Freedom Order's* conclusion that truthfulness is not required in FCC rulemakings[90] corrodes the integrity of FCC proceedings. The FCC's blind eye to criminal behavior in this proceeding achieves the opposite of the Commission's stated goal of "full and robust public participation."[91] The FCC's conduct undermines public participation and judicial review of the rulemaking process, vitiating vital tools of democracy.

Federal Rulemaking requires that "the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data,

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[88] *Cf.* In the Matter of Restoring Internet Freedom, Notice of Proposed Rulemaking, 32 F.C.C. Rcd. 4434, ¶ 120-122 (2017) (describing Comment Filing Procedures without stating the 47 C.F.R. § 1.17 truthfulness standard does not apply or reference to 18 FCC Rcd 4016); *Sandoval, Reply Comments*, *supra* note 6, at 4, n. 16-18, 9, n. 32 and accompanying text.
[89] F.C.C., Amicus Brief in Support of Neither Party, at 3, USA v. AT&T, Inc.; DIRECTV Group Holdings, LLC; and Time Warner, Inc., U.S.C.A. Case # 18-5214 (Aug. 13, 2018).
[90] *FCC, Internet Freedom Order*, *supra* note 2, ¶ 345, n. 1181.
[91] *Id.*

views, or arguments with or without opportunity for oral presentation."[92] The notice-and-comment rulemaking statute, 47 U.S.C. § 553(c), does not provide a license to purloin other people's identities to file comments or countenance agency indulgence of such conduct.[93]

This court should vacate, reverse, and remand the FCC's Order and require a new notice and comment process.[94] The D.C. Circuit in *Prometheus Radio Broad. v. FCC* found that irregularities in the procedural conduct of an FCC rulemaking constituted arbitrary and capricious-decision making in violation of the APA.[95] The FCC's abysmal conduct of the *Internet Freedom* rulemaking flunks the APA.[96]

IV. Conclusion

For the reasons stated above, this court should vacate, reverse, and remand the *Internet Freedom Order*.[97]

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[92] Prometheus Radio Project, 652 F.3d at 449 (citing 5 U.S.C. § 553(c)).
[93] *Sandoval, Reply Comments*, *supra* note 6, at 17.
[94] *See* Fox Television, 280 F.3d at 1048 (citing Allied-Signal, Inc. v. United States Nuclear Regulatory Comm'n, 988 F.2d 146, 150–51 (D.C.Cir.1993) ("The decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.")); Prometheus Radio, 652 F.3d at 450.
[95] Prometheus Radio, 652 F.3d at 450.
[96] United Church of Christ, 425 F.2d at 547 ("The record now before us leaves us with a profound concern over the entire handling of this case following the remand to the Commission." In light of the FCC's "impatience with the Public Intervenors" and other factors, the "administrative conduct reflected in this record is beyond repair.").
[97] Fox Television, 280 F.3d at 1048; Allied-Signal, Inc., 988 F.2d at 150–51.

Dated: August 27, 2018

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Certificate of Compliance

I certify that, pursuant to Rules 29(c)(7) and 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,491 words excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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Certificate of Service

I hereby certify that on August 27, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by 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.

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Addendum of Statutes and Regulations

Except for the following, listed in Addendumndix A, all applicable statutes, etc., are contained in the Joint Brief for Government and Non-Government Petitioners, in compliance with D.C. Cir. Rule 28(a)(5).

ORAL ARGUMENTS NOT YET SCHEDULED

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

NO. 18-1051 (and consolidated cases)

MOZILLA CORP., ET. AL.
PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA
RESPONDENT.

ON PETITIONS FOR REVIEW OF REGULATIONS PROMULGATED BY
THE UNITED STATES FEDERAL COMMUNICATIONS COMMISSION

ADDENDUM TO BRIEF OF PROFESSORS OF ADMINISTRATIVE, COMMUNICATIONS, ENERGY, ANTITRUST, AND CONTRACT LAW AND POLICY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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ADDENDUM OF STATUTES AND REGULATIONS

BRIEF OF PROFESSORS OF ADMINISTRATIVE, COMMUNICATIONS, ENERGY, ANTITRUST, AND CONTRACT LAW AND POLICY AS AMICUS CURIAE

Except for the following, all statutes, regulations, and administrative authorities appear in the Brief for Petitioners.

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5 U.S.C. § 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383.)

15 U.S.C. § 45. Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless--

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect--

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(4)(A) For purposes of subsection (a), the term "unfair or deceptive acts or practices" includes such acts or practices involving foreign commerce that--

(i) cause or are likely to cause reasonably foreseeable injury within the United States; or

(ii) involve material conduct occurring within the United States.

(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

(b) Proceeding by Commission; modifying and setting aside orders

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of

competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in

subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph[1] (2) not later than 120 days after the date of the filing of such request.

(c) Review of order; rehearing

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in

the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgement to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if

any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

(d) Jurisdiction of court

Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

(e) Exemption from liability

No order of the Commission or judgement of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

(f) Service of complaints, orders and other processes; return

Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to

such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

(g) Finality of order

An order of the Commission to cease and desist shall become final--

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b).

(2) Except as to any order provision subject to paragraph (4), upon the sixtieth day after such order is served, if a petition for review has been duly filed; except that any such order may be stayed, in whole or in part and subject to such conditions as may be appropriate, by--

(A) the Commission;

(B) an appropriate court of appeals of the United States, if (i) a petition for review of such order is pending in such court, and (ii) an application for such a stay was previously submitted to the

Commission and the Commission, within the 30-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the application; or

(C) the Supreme Court, if an applicable petition for certiorari is pending.

(3) For purposes of subsection (m)(1)(B) and of section 57b(a)(2) of this title, if a petition for review of the order of the Commission has been filed--

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(4) In the case of an order provision requiring a person, partnership, or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order of the Commission has been filed--

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(h) Modification or setting aside of order by Supreme Court

If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(i) Modification or setting aside of order by Court of Appeals

If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such

petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(j) Rehearing upon order or remand

If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

(k) “Mandate” defined

As used in this section the term “mandate”, in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

(l) Penalty for violation of order; injunctions and other appropriate equitable relief

Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

(m) Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure

(1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this subchapter

respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1)) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice--

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(C) In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1), each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a).

(3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court.

(n) Standard of proof; public policy considerations

The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

CREDIT(S)

(Sept. 26, 1914, c. 311, § 5, 38 Stat. 719; Mar. 21, 1938, c. 49, § 3, 52 Stat. 111; June 23, 1938, c. 601, Title XI, § 1107(f), 52 Stat. 1028; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Mar. 16, 1950, c. 61, § 4(c), 64 Stat. 21; July 14, 1952, c. 745, § 2, 66 Stat. 632; Pub.L. 85-726, Title XIV, §§ 1401(b), 1411, Aug. 23, 1958, 72 Stat. 806, 809; Pub.L. 85-791, § 3, Aug. 28, 1958, 72 Stat. 942; Pub.L. 85-909, § 3, Sept. 2, 1958, 72 Stat. 1750; Pub.L. 86-507, § 1(13), June 11, 1960, 74 Stat. 200; Pub.L. 93-153, Title IV, § 408(c), (d), Nov. 16, 1973, 87 Stat. 591, 592; Pub.L. 93-637, Title II, §§ 201(a), 204(b), 205(a), Jan. 4, 1975, 88 Stat. 2193, 2200; Pub.L. 94-145, § 3, Dec. 12, 1975, 89

Stat. 801; Pub.L. 96-37, § 1(a), July 23, 1979, 93 Stat. 95; Pub.L. 96-252, § 2, May 28, 1980, 94 Stat. 374; Pub.L. 97-290, Title IV, § 403, Oct. 8, 1982, 96 Stat. 1246; Pub.L. 98-620, Title IV, § 402(12), Nov. 8, 1984, 98 Stat. 3358; Pub.L. 100-86, Title VII, § 715(a)(1), Aug. 10, 1987, 101 Stat. 655; Pub.L. 103-312, §§ 4, 6, 9, Aug. 26, 1994, 108 Stat. 1691, 1692, 1695; Pub.L. 109-455, § 3, Dec. 22, 2006, 120 Stat. 3372.)

TERMINATION OF AMENDMENTS

<For repeal of Pub.L. 109-455 and the amendments made by Pub.L. 109-455, effective September 30, 2020, by section 13 of Pub.L. 109-455, as amended, see Sunset Provisions note set out under this section and 15 U.S.C.A. § 44. >

42 U.S.C. § 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or

sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate,

charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or

charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine--

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are--

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to--

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

CREDIT(S)

(June 10, 1920, c. 285, § 205, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 851; amended Pub.L. 95-617, Title II, §§ 207(a), 208, Nov. 9, 1978, 92 Stat. 3142.)

42 U.S.C. § 5195c. Critical infrastructures protection

(a) Short title

This section may be cited as the "Critical Infrastructures Protection Act of 2001".

(b) Findings

Congress makes the following findings:

(1) The information revolution has transformed the conduct of business and the operations of government as well as the infrastructure relied upon for the defense and national security of the United States.

(2) Private business, government, and the national security apparatus increasingly depend on an interdependent network of critical physical and information infrastructures, including telecommunications, energy, financial services, water, and transportation sectors.

(3) A continuous national effort is required to ensure the reliable provision of cyber and physical infrastructure services critical to maintaining the national defense, continuity of government, economic prosperity, and quality of life in the United States.

(4) This national effort requires extensive modeling and analytic capabilities for purposes of evaluating appropriate mechanisms to ensure the stability of these complex and interdependent systems, and to underpin policy

recommendations, so as to achieve the continuous viability and adequate protection of the critical infrastructure of the Nation.

(c) Policy of the United States

It is the policy of the United States--

(1) that any physical or virtual disruption of the operation of the critical infrastructures of the United States be rare, brief, geographically limited in effect, manageable, and minimally detrimental to the economy, human and government services, and national security of the United States;

(2) that actions necessary to achieve the policy stated in paragraph (1) be carried out in a public-private partnership involving corporate and non-governmental organizations; and

(3) to have in place a comprehensive and effective program to ensure the continuity of essential Federal Government functions under all circumstances.

(d) Establishment of national competence for critical infrastructure protection

(1) Support of critical infrastructure protection and continuity by National Infrastructure Simulation and Analysis Center

There shall be established the National Infrastructure Simulation and Analysis Center (NISAC) to serve as a source of national competence to

address critical infrastructure protection and continuity through support for activities related to counterterrorism, threat assessment, and risk mitigation.

(2) Particular support

The support provided under paragraph (1) shall include the following:

(A) Modeling, simulation, and analysis of the systems comprising critical infrastructures, including cyber infrastructure, telecommunications infrastructure, and physical infrastructure, in order to enhance understanding of the large-scale complexity of such systems and to facilitate modification of such systems to mitigate the threats to such systems and to critical infrastructures generally.

(B) Acquisition from State and local governments and the private sector of data necessary to create and maintain models of such systems and of critical infrastructures generally.

(C) Utilization of modeling, simulation, and analysis under subparagraph (A) to provide education and training to policymakers on matters relating to--

(i) the analysis conducted under that subparagraph;

(ii) the implications of unintended or unintentional disturbances to critical infrastructures; and

(iii) responses to incidents or crises involving critical infrastructures, including the continuity of government and private sector activities through and after such incidents or crises.

(D) Utilization of modeling, simulation, and analysis under subparagraph (A) to provide recommendations to policymakers, and to departments and agencies of the Federal Government and private sector persons and entities upon request, regarding means of enhancing the stability of, and preserving, critical infrastructures.

(3) Recipient of certain support

Modeling, simulation, and analysis provided under this subsection shall be provided, in particular, to relevant Federal, State, and local entities responsible for critical infrastructure protection and policy.

(e) Critical infrastructure defined

In this section, the term "critical infrastructure" means systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.

(f) Authorization of appropriations

There is hereby authorized for the Department of Defense for fiscal year 2002, $20,000,000 for the Defense Threat Reduction Agency for activities of the National Infrastructure Simulation and Analysis Center under this section in that fiscal year.

CREDIT(S)

(Pub.L. 107-56, Title X, § 1016, Oct. 26, 2001, 115 Stat. 400.)

42 U.S.C.A. § 5195c, 42 USCA § 5195c

Current through P.L. 115-223. Also includes P.L. 115-225 to 115-231. Title 26 current through P.L. 115-231.

42 U.S.C. § 15801. Definitions

Except as otherwise provided, in this Act:

(1) Department

The term "Department" means the Department of Energy.

(2) Institution of higher education

(A) In general

The term "institution of higher education" has the meaning given the term in section 1001(a) of Title 20.

(B) Inclusion

The term "institution of higher education" includes an organization that--

(i) is organized, and at all times thereafter operated, exclusively for the benefit of, to perform the functions of, or to carry out the functions of one or more organizations referred to in subparagraph (A); and

(ii) is operated, supervised, or controlled by or in connection with one or more of those organizations.

(3) National Laboratory

The term "National Laboratory" means any of the following laboratories owned by the Department:

(A) Ames Laboratory.

(B) Argonne National Laboratory.

(C) Brookhaven National Laboratory.

(D) Fermi National Accelerator Laboratory.

(E) Idaho National Laboratory.

(F) Lawrence Berkeley National Laboratory.

(G) Lawrence Livermore National Laboratory.

(H) Los Alamos National Laboratory.

(I) National Energy Technology Laboratory.

(J) National Renewable Energy Laboratory.

(K) Oak Ridge National Laboratory.

(L) Pacific Northwest National Laboratory.

(M) Princeton Plasma Physics Laboratory.

(N) Sandia National Laboratories.

(O) Savannah River National Laboratory.

(P) Stanford Linear Accelerator Center.

(Q) Thomas Jefferson National Accelerator Facility.

(4) Secretary

The term "Secretary" means the Secretary of Energy.

(5) Small business concern

The term "small business concern" has the meaning given the term in section 632 of Title 15.

CREDIT(S)

(Pub.L. 109-58, § 2, Aug. 8, 2005, 119 Stat. 604.)

47 U.S.C. § 615. Support for universal emergency telephone number

The Federal Communications Commission shall encourage and support efforts by States to deploy comprehensive end-to-end emergency communications infrastructure and programs, based on coordinated statewide plans, including seamless, ubiquitous, reliable wireless telecommunications networks and enhanced wireless 9-1-1 service. In encouraging and supporting that deployment, the Commission shall consult and cooperate with State and local officials responsible for emergency services and public safety, the telecommunications industry (specifically including the cellular and other wireless telecommunications service providers), the motor vehicle manufacturing industry, emergency medical service providers and emergency dispatch providers, transportation officials, special 9-1-1 districts, public safety, fire service and law enforcement officials, consumer groups, and hospital emergency and trauma care personnel (including emergency physicians, trauma surgeons, and nurses). The Commission shall encourage each State to develop and implement coordinated statewide deployment plans, through an entity designated by the governor, and to include representatives of the foregoing organizations and entities in development and implementation of such plans. Nothing in this section shall be construed to authorize or require the Commission to impose obligations or costs on any person.

CREDIT(S)

(Pub.L. 106-81, § 3(b), Oct. 26, 1999, 113 Stat. 1287.)

Cal. Pub. Util. Code § 451. Just and reasonable charges, service, and rules

All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.

Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necesary[1] to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

All rules made by public utility affecting or pertaining to its charges or service to the public shall be just and reasonable.

Credits

(Stats.1951, c. 764, p. 2036, § 451. Amended by Stats.1977, c. 700, p. 2257, § 2.)

California Constitution ARTICLE XII PUBLIC UTILITIES [SECTION 1 - SEC. 9]

(Article 12 added Nov. 5, 1974, by Prop. 12. Res.Ch. 88, 1974.)

SECTION 1.

The Public Utilities Commission consists of 5 members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for staggered 6-year terms. A vacancy is filled for the remainder of the term. The Legislature may remove a member for incompetence, neglect of duty, or corruption, two thirds of the membership of each house concurring.

(Sec. 1 added Nov. 5, 1974, by Prop. 12. Res.Ch. 88, 1974.)

SEC. 2.

Subject to statute and due process, the commission may establish its own procedures. Any commissioner as designated by the commission may hold a hearing or investigation or issue an order subject to commission approval.

(Sec. 2 added Nov. 5, 1974, by Prop. 12. Res.Ch. 88, 1974.)

SEC. 3.

Private corporations and persons that own, operate, control, or manage a line, plant, or system for the transportation of people or property, the transmission of

telephone and telegraph messages, or the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage directly or indirectly to or for the public, and common carriers, are public utilities subject to control by the Legislature. The Legislature may prescribe that additional classes of private corporations or other persons are public utilities.

(Sec. 3 added Nov. 5, 1974, by Prop. 12. Res.Ch. 88, 1974.)

SEC. 4.

The commission may fix rates and establish rules for the transportation of passengers and property by transportation companies, prohibit discrimination, and award reparation for the exaction of unreasonable, excessive, or discriminatory charges. A transportation company may not raise a rate or incidental charge except after a showing to and a decision by the commission that the increase is justified, and this decision shall not be subject to judicial review except as to whether confiscation of property will result.

(Sec. 4 added Nov. 5, 1974, by Prop. 12. Res.Ch. 88, 1974.)

SEC. 5.

The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of

commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain.

(Sec. 5 added Nov. 5, 1974, by Prop. 12. Res.Ch. 88, 1974.)

SEC. 6.

The commission may fix rates, establish rules, examine records, issue subpenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction.

(Sec. 6 added Nov. 5, 1974, by Prop. 12. Res.Ch. 88, 1974.)

SEC. 7.

A transportation company may not grant free passes or discounts to anyone holding an office in this State; and the acceptance of a pass or discount by a public officer, other than a Public Utilities Commissioner, shall work a forfeiture of that office. A Public Utilities Commissioner may not hold an official relation to nor have a financial interest in a person or corporation subject to regulation by the commission.

(Sec. 7 added Nov. 5, 1974, by Prop. 12. Res.Ch. 88, 1974.)

SEC. 8.

A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission. This section does not affect power over public utilities relating to the making and enforcement of police, sanitary, and other regulations concerning municipal affairs pursuant to a city charter existing on October 10, 1911, unless that power has been revoked by the city's electors, or the right of any city to grant franchises for public utilities or other businesses on terms, conditions, and in the manner prescribed by law.

(Sec. 8 added Nov. 5, 1974, by Prop. 12. Res.Ch. 88, 1974.)

SEC. 9.

The provisions of this article restate all related provisions of the Constitution in effect immediately prior to the effective date of this amendment and make no substantive change.

(Sec. 9 added Nov. 5, 1974, by Prop. 12. Res.Ch. 88, 1974.)

47 C.F.R. § 1.17 Truthful and accurate statements to the Commission.

(a) In any investigatory or adjudicatory matter within the Commission's jurisdiction (including, but not limited to, any informal adjudication or informal investigation but excluding any declaratory ruling proceeding) and in any proceeding to amend the FM or Television Table of Allotments (with respect to expressions of interest) or any tariff proceeding, no person subject to this rule shall;

(1) In any written or oral statement of fact, intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading; and

(2) In any written statement of fact, provide material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading.

(b) For purpose of paragraph (a) of this section, "persons subject to this rule" shall mean the following:

(1) Any applicant for any Commission authorization;

(2) Any holder of any Commission authorization, whether by application or by blanket authorization or other rule;

(3) Any person performing without Commission authorization an activity that requires Commission authorization;

(4) Any person that has received a citation or a letter of inquiry from the Commission or its staff, or is otherwise the subject of a Commission or staff investigation, including an informal investigation;

(5) In a proceeding to amend the FM or Television Table of Allotments, any person filing an expression of interest; and

(6) To the extent not already covered in this paragraph (b), any cable operator or common carrier.

Credits

[55 FR 23084, June 6, 1990; 68 FR 15098, March 28, 2003]