

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

County of Santa Clara et al.)	
<i>Petitioner,</i>)	
v.)	
)	Case Nos. 18-70506, 18-70510,
Federal Communications)	(and consolidated cases) ¹
Commission, and the)	
United States of America)	
<i>Respondents</i>)	
)	
California Public Utilities)	
Commission,)	
<i>Petitioner,</i>)	
v.)	
)	
Federal Communications)	
Commission, and the)	
United States of America)	
<i>Respondents</i>)	

MOTION FOR LEAVE TO INTERVENE

Pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure, 28 U.S.C. § 2348, and 47 U.S.C. § 402(a), the National Association of Regulatory Utility

¹ See United States Judicial Panel on Multidistrict Litigation “Consolidation Order,” released March 8, 2018 in the proceedings captioned *In Re: Federal Communications Commission, In the Matter of Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order, FCC 17-166, 83 FED.REG. 7852, Published on February 22, 2018*, MCP No. 150, consolidating Ninth Circuit cases 18-70506 and 18-70510 with the following appeals docketed in the D.C. Circuit: *Mozilla Corporation v. FCC & USA*, D.C. Circuit No. 18-1051, *Vimeo, Inc. v. FCC & USA*, D.C. Circuit No. 18-1052, *Public Knowledge v. FCC & USA*, D.C. Circuit No. 18-1053, *Open Technology Institute v. FCC & USA*, D.C. Circuit No. 18-1054, *State of New York, et al v. FCC & USA*, D.C. Circuit No. 18-1055, *National Hispanic Media Coalition v. FCC & USA*, D.C. Circuit No. 18-1056, *Benton Foundation v. FCC & USA*, D.C. Circuit No. 18-1062, *Free Press v. FCC & USA*, D.C. Circuit No. 18-1064, *Coalition for Internet Openness v. FCC & USA*, D.C. Circuit No. 18-1065, & *Etsy, Inc. v. FCC & USA*, D.C. Circuit No. 18-1066.

Commissioners (“NARUC”) requests leave to intervene as a matter of right in the above-captioned consolidated proceedings.²

For over 120 years, NARUC, a quasi-governmental non-profit corporation in the District of Columbia, has represented the interests of public utility commissioners from agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with, *inter alia*, overseeing certain operations of telecommunications utilities.

NARUC is recognized by Congress in several statutes³ and consistently by the Courts⁴ as well as a host of federal agencies,⁵ as the proper entity to represent the collective interests of State utility commissions.

² The disclosure required by Rule 26.1 of the Federal Rules of Appellate Procedure is attached.

³ See 47 U.S.C. §410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Board to consider issues of common concern); See also 47 U.S.C. §254 (1996); See also *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where this Court explains “Carriers, to get the cards, applied to...(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the "bingo card" system).

⁴ See, e.g., *U.S. v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), *aff'd* 672 F.2d 469 (5th Cir. 1982), *aff'd en banc on reh'g*, 702 F.2d 532 (5th Cir. 1983), *rev'd on other grounds*, 471 U.S. 48 (1985) (where the Supreme Court notes: “The District Court permitted (NARUC) to intervene as a defendant. Throughout this litigation, the NARUC has represented the interests of the Public Service Commissions of those States in which the defendant rate bureaus operate.” 471 U.S. 52, n. 10. See also, *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976); *Compare, NARUC v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007); *NARUC v. DOE*, 851 F.2d 1424, 1425 (D.C. Cir. 1988); *NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

⁵ *Compare, NRC Atomic Safety and Licensing Board Memorandum and Order* (Granting Intervention to Petitioners and Denying Withdrawal Motion), LBP-10-11, *In the Matter of U.S. Department of Energy (High Level Waste Repository)* Docket No. 63-001-HLW; ASLBP No. 09-892-HLW-CABO4, *mimeo* at 31 (June 29, 2010) (“We agree with NARUC that, because state utility commissioners are responsible for protecting ratepayers’ interests and overseeing the operations of regulated electric utilities, these economic harms constitute its members’ injury-in-fact.”)

On February 22, 2018, the California Public Utilities Commission and the County of Santa Clara filed separate petitions in this circuit seeking review of the “Declaratory Ruling, Report and Order and Order” (“*Order*”) of the Federal Communications Commission (“FCC”) released January 4, 2018 in the proceeding captioned *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, FCC 17-166. The FCC published a notice of the *Order* in the Federal Register on February 22, 2018. Ten additional petitions seeking review of the same order were filed before the United States Court of Appeals for the District of Columbia Circuit.⁶ On March 8, 2018, the United States Judicial Panel on Multidistrict Litigation, released an order in CASE MCP No. 150 “to consolidate these petitions for review” in this circuit.⁷

In the challenged *Order*, the FCC again changed the classification of broadband Internet access service to an information service eliminating the common carrier requirements Congress imposed (and that applied to) such services until the

⁶ *Mozilla Corporation v. FCC & USA*, D.C. Circuit No. 18-1051, *Vimeo, Inc. v. FCC & USA*, D.C. Circuit No. 18-1052, *Public Knowledge v. FCC & USA*, D.C. Circuit No. 18-1053, *Open Technology Institute v. FCC & USA*, D.C. Circuit No. 18-1054, *State of New York, et al v. FCC & USA*, D.C. Circuit No. 18-1055, *National Hispanic Media Coalition v. FCC & USA*, D.C. Circuit No. 18-1056, *Benton Foundation v. FCC & USA*, D.C. Circuit No. 18-1062, *Free Press v. FCC & USA*, D.C. Circuit No. 18-1064, *Coalition for Internet Openness v. FCC & USA*, D.C. Circuit No. 18-1065, *Etsy, Inc v. FCC & USA*, D.C. Circuit No. 18-1066.

⁷ See United States Judicial Panel on Multidistrict Litigation “Consolidation Order,” released March 8, 2018 in the proceedings captioned *In Re: Federal Communications Commission, In the Matter of Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order, FCC 17-166*, 83 FED.REG. 7852, Published on February 22, 2018, MCP No. 150.

Supreme Court's plurality decision in *National Cable and Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005). Petitioners in the consolidated appeals challenge this most recent FCC flip-flop claiming the FCC has failed to justify its reclassification of the service. A copy of the *Order* is attached to each filed petition for review.

NARUC requests leave to intervene in the consolidated proceedings supporting Petitioners.

This petition is being filed within 30 days of the filing of all 12 petitions seeking review of the *Order*.

Telecommunications ratepayers and the public interest overseen by NARUC's members are directly impacted by the FCC's action in this case. Indeed, the *Order* broadly preempts any existing or future exertion of authority by NARUC's member Commissions⁸ which unquestionably directly affects their interests. 28 U.S.C. § 2348. NARUC was an active participant in the proceedings below.⁹ NARUC is therefore a "party in interest in the proceeding" entitled to intervene. 28 U.S.C. § 2348.

⁸ See *Order*, at ¶¶ 194 -204, at ¶ 195, *mimeo* at p. 117, stating: "We therefore preempt any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order."

⁹ See *Comments of the National Association of Regulatory Utility Commissioners*, WC Docket 17-108 (filed July 17, 2017).

For the foregoing reasons, NARUC respectfully requests this Court grant its intervention in these consolidated appeals.

Respectfully submitted,

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the National Association of Regulatory Utility Commissioners (NARUC) respectfully submits this disclosure statement. NARUC is a quasi-governmental nonprofit organization founded in 1889 and incorporated in the District of Columbia. NARUC is a “trade association” as that term is defined in Rule 26.1(b). NARUC has no parent company. No publicly held company has any ownership interest in NARUC. NARUC represents those government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with the duty of regulating utilities within their respective borders.

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of March 2018, I caused copies of the Motion to Intervene of the National Association of Regulatory Utility Commissioners to be filed via the Court's ECF Filing system, and served upon each of the parties listed below by first-class mail, postage prepaid (and via electronic mail where listed).¹⁰

Respectfully submitted,

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¹⁰ Note 47 U.S.C. § 402(e) only requires intervenors to serve the Federal Communications Commission, the United States, and petitioners.

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