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

UNITED STATES TELECOM ASSOCIATION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA,
Respondents.

No. 15-1063 (and consolidated cases)

MOTION FOR STAY OR EXPEDITION OF UNITED STATES TELECOM ASSOCIATION, NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, CTIA – THE WIRELESS ASSOCIATION®, AT&T INC., AMERICAN CABLE ASSOCIATION, CENTURYLINK, AND WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

GLOSSARY ix

INTRODUCTION AND SUMMARY 1

BACKGROUND 5

ARGUMENT 10

I. PETITIONERS ARE LIKELY TO PREVAIL ON THE MERITS 11

A. The Reclassification Ruling Contravenes the Communications Act, Supreme Court Precedent, and FCC Precedent 11

B. The FCC's Reclassification of Mobile Broadband Conflicts with the Communications Act and FCC Precedent 17

C. The Reclassification Ruling Is Arbitrary and Capricious 20

D. The Order Independently Violates the APA Because It Is Not a Logical Outgrowth of the FCC's Proposal 23

II. THE EQUITIES AND THE PUBLIC INTEREST SUPPORT A STAY 25

A. The Order Creates Unrecoverable Losses and Harm to Consumers 25

B. The Order Imposes Broad, Ill-Defined Consumer-Information Duties That Threaten Significant Costs and Harm Consumers 29

C. Reclassification Undermines Interconnection Negotiations 31

D. New Pole Attachment Requirements Will Irreparably Harm Cable Petitioners 32

E. Petitioners Will Be Subject to New Fees and Taxes....................33

F. A Stay Will Not Harm Third Parties or the Public 34

III. ALTERNATIVELY, THE COURT SHOULD EXPEDITE THIS CASE 35

CONCLUSION....................35

TABLE OF AUTHORITIES

Page

CASES

Allina Health Servs. v. Sebelius, 746 F.3d 1102 (D.C. Cir. 2014) 23

AO Smith Corp. v. FTC, 530 F.2d 515 (3d Cir. 1976)....................27

Brendsel v. Office of Federal Hous. Enter. Oversight,
339 F. Supp. 2d 52 (D.D.C. 2004)....................27

City of Chicago v. Environmental Def. Fund, 511 U.S. 328 (1994) 16

Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010) 7

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(2d Cir. 1953)....................30

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(D.C. Cir. 1994) 25

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407 F.3d 1250 (D.C. Cir. 2005)....................24

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NCTA v. Brand X Internet Servs., 545 U.S. 967 (2005) 6, 13, 14, 15, 16
21, 22, 23

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Prometheus Radio Project v. FCC, 652 F.3d 431 (3d Cir. 2011) 24, 25

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STATUTES AND REGULATIONS

Communications Act of 1934, 47 U.S.C. § 151 *et seq.* 7, 11

§ 151 note 34

§ 153(20) 11

§ 153(24) 2, 5, 13, 14, 16

§ 153(50) 5

§ 153(51) 5, 11

§ 153(53) 5

§ 160 9

§ 201 .... 9, 26

§ 202 .... 9, 26

§§ 206-208 28

§ 222 ....9, 10, 29, 30, 31

§ 222(c) 29

§ 224 32

§ 230 12

§ 230(b)(2) 1, 12

§ 230(f)(2) 2, 12

§ 259 18

§ 332 18

§ 332(c)(1)(A) 5

§ 332(c)(2) 5, 17

§ 332(d)(1) 5, 17

§ 332(d)(2) 5, 17

§ 332(d)(3) 5, 17

§ 503 26

§ 769(a)(11) 18

§ 1422(b)(1) 18

Internet Tax Freedom Act, Pub. L. No. 105-277,
112 Stat. 2681-719:

§ 1105(8)(B) 34

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110 Stat. 56 ....1, 2, 5, 7, 12, 13

§ 706 7

28 U.S.C. § 1657(a) 35

47 C.F.R. § 20.3 18

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2010 Order:
Report and Order, *Preserving the Open Internet*,
25 FCC Rcd 17905 (2010) 7

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FCC 86-123, 1986 WL 291339 (Mar. 28, 1986)....................................18

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First Report and Order and Further Notice of Proposed
Rulemaking, *Non-Accounting Safeguards of Sections 271
and 272*, 11 FCC Rcd 21905 (1996) 13

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29 FCC Rcd 13325 (2014)....................................30

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prise Institute (June 12, 2014), *available at*
http://goo.gl/DbND5B 20

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available at https://goo.gl/88MpJX....................................34

Second Report and Order:
Second Report and Order, *Implementation of Sections 3(n)
and 332 of the Communications Act; Regulatory Treatment
of Mobile Services*, 9 FCC Rcd 1411 (1994)....................................18

Stevens Report:
Report to Congress, *Federal-State Joint Board on Univer-
sal Service*, 13 FCC Rcd 11501 (1998) 6, 11, 14, 16-17

Wireless Broadband Ruling:
Declaratory Ruling, *Appropriate Regulatory Treatment for
Broadband Access to the Internet Over Wireless Networks*,
22 FCC Rcd 5901 (2007)....................................6, 18, 19

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Report and Order and NPRM, *Broadband Access to the In-
ternet Over Wireline Facilities*, 20 FCC Rcd 14853 (2005) 12, 22

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http://goo.gl/Uzg2Is 22

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2010 Notice	Notice of Inquiry, *Framework for Broadband Internet Service*, 25 FCC Rcd 7866 (2010)
2010 Order	Report and Order, *Preserving the Open Internet*, 25 FCC Rcd 17905 (2010)
APA	Administrative Procedure Act
Bureaus	Wireline Competition Bureau and Wireless Telecommunications Bureau
Cable Broadband Order	Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002), *aff'd sub nom. National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)
Cable Petitioners	American Cable Association and National Cable & Telecommunications Association
D.C. Cir. Handbook	D.C. Circuit Handbook of Practice and Internal Procedures (2013)
FCC	Federal Communications Commission
Non-Accounting Safeguards Order	First Report and Order and Further Notice of Proposed Rulemaking, *Non-Accounting Safeguards of Sections 271 and 272*, 11 FCC Rcd 21905 (1996)
NPRM	Notice of Proposed Rulemaking, *Protecting and Promoting the Open Internet*, 29 FCC Rcd 5561 (2014)

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Pai Dissent	Dissenting Statement of Commissioner Ajit Pai to Order
Second Report and Order	Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411 (1994)
Stay Denial	Order Denying Stay Petitions, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, DA 15-563 (rel. May 8, 2015) (submitted with this motion)
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Wireless Broadband Ruling	Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901 (2007)
Wireline Broadband Order	Report and Order and Notice of Proposed Rulemaking, *Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853 (2005)

INTRODUCTION AND SUMMARY

This case concerns the attempt, by a sharply divided FCC, to assert unprecedented regulatory power over the Internet. Since its inception, the Internet has flourished as a space where companies may invest and innovate freely. Congress codified that approach in the Telecommunications Act of 1996 ("1996 Act") to ensure the continued growth of the Internet, "unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(2). For nearly two decades, bipartisan majorities of the FCC have consistently and repeatedly interpreted the 1996 Act to exempt broadband Internet access from common carrier, public-utility-style regulation. Providers have invested billions of dollars in networks and services in reliance on this statutory construction, to the enormous benefit of consumers.

The Order represents a sharp about-face in which a federal agency — without any statutory change or congressional sanction — has arrogated to itself breathtaking authority over the most transformative technology in living memory. It has done so by subjecting broadband Internet access service to a regime that was originally designed, not for the era of social networking and streaming video, but for 19th century *railroads*. If the Order becomes effective, the FCC will become the "'Department of the Internet.'" Pai Dissent at 324 (quoting Nilay Patel, *We Won the Internet Back*, Verge (Feb. 4, 2015)). These challenges thus present some of the most consequential questions this Court is likely to encounter regarding

technology, the future of the economy, and the boundaries of administrative law.

Petitioners are likely to prevail on the merits. Broadband Internet access fits squarely within the 1996 Act's definition of "information service[s]," 47 U.S.C. § 153(24), that may not be regulated as common carriage under Title II. And Congress explicitly stated that the term "information service" "includ[es] specifically a service . . . that provides access to the Internet." *Id.* § 230(f)(2).

As CTIA and AT&T will also show, Title II reclassification is doubly unlawful as to mobile broadband, which is protected from common carrier regulation by additional, independent statutory provisions. In the Order, the FCC turned its back on both its multiple prior legal conclusions regarding those protections and its prior finding that mobile services warrant an especially light regulatory touch because of intense competition and unique operational characteristics.

The Order compounds these errors by defining the newly reclassified broadband service to run from the customer's premises (or mobile device) all the way across the Internet to the hand-off to other networks or content providers. It does so to try to evade this Court's holding in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), that the FCC cannot impose common carriage regulation on the relationship between broadband providers and "edge" providers without reclassifying *that relationship* as common carriage (as it declined to do). *Id.* at 653.

Wholly apart from the FCC's substantive errors, the Order is independently

unlawful because the FCC — in its headlong rush to implement this regulatory sea change at the President's urging — committed a string of glow-in-the-dark APA violations, any one of which would suffice to invalidate the Order. The FCC's original proposal to adopt a handful of prophylactic rules gave no notice that the FCC intended to craft out of whole cloth a "Title II tailored for the 21st Century" (Order ¶ 38), to rewrite its rules concerning mobile services, to redefine fundamentally the broadband service that it reclassified, or to adopt an amorphous "Standard for Internet Conduct," which gives the agency unfettered discretion to regulate new and innovative offerings. And the FCC abandoned its own longstanding classification decisions without grappling with either its prior legal conclusions and factual findings or the billions of dollars invested in reliance on prior policy.

The extension of public utility regulation to the Internet will impose on Petitioners and their members immense burdens and costs that a ruling overturning the Order cannot undo. The Order will also invite a torrent of enforcement proceedings and litigation, and force providers to undertake costly reviews of countless business practices, from "traffic exchange" agreements — which govern how providers carry data over one another's networks and which the Order subjects to a *sui generis* Title II regime in addition to the one applied to Internet access — to the handling of customer information and marketing. Many of Petitioners' members are small providers — some with just a few hundred subscribers — that will be

overwhelmed by the burdens thrust upon them, and may have to cease or curtail operations or forgo expansion.

Twenty-two separate declarations confirm that these harms are real, imminent, and irreparable. Absent a stay, broadband providers face many millions of dollars in unrecoverable losses. As the declarations show, providers are already cutting back on specific investments and deployment as a result of the Order. The public interest would thus best be served by preserving the *status quo* pending judicial review. Consumers and the industry would face a twice-convulsive situation if a new and extraordinarily broad regulatory regime were imposed on broadband providers, only to then be vacated. Nor can the FCC claim that upsetting that *status quo* is urgent, given that the prior approach prevailed for decades and fostered an explosion in Internet use and broadband investment.

The Court should stay the Order's ruling reclassifying broadband and the Internet conduct standard pending review. At a minimum, the Court should expedite this case. Petitioners respectfully request a ruling on this motion before **June 12, 2015**, the Order's effective date, or as soon thereafter as practicable.[1] If the Court cannot rule by June 12, Petitioners request an administrative stay.

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[1] Petitioners notified counsel for Respondents of this motion by telephone on May 13, 2015.

BACKGROUND

1. The 1996 Act establishes separate — and mutually exclusive — regimes for "telecommunications service[s]" and "information service[s]."[2] These distinctions are fundamental to the statutory scheme because only "telecommunications service[s]," not "information service[s]," are subject to common carrier regulation under Title II. *See* 47 U.S.C. § 153(51).

A few years before the 1996 Act was adopted, Congress provided additional protections for mobile broadband providers. Congress specified that "commercial mobile radio services" — that is, mobile services interconnected with the telephone network — be regulated under Title II. *See id.* § 332(c)(1)(A), (d)(1)-(2). But "private mobile radio services" — services that are *not* interconnected with the telephone network or the functional equivalent of such offerings — cannot be regulated under Title II. *See id.* § 332(c)(2), (d)(3).

2. Since 1996, and consistent with its pre-1996 decisions interpreting the

[2] "Telecommunications service" involves "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(53). "Telecommunications" means "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content." *Id.* § 153(50). In contrast, "information service[s]" offer "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," except where that "capability" is used "for the management, control, or operation of a telecommunications system or the management of a telecommunications service." *Id.* § 153(24).

terms Congress codified in the 1996 Act, the FCC has consistently and repeatedly held that Internet access service is an "information service." *E.g.*, *Stevens Report* ¶¶ 74-75, 79-80. As the FCC has explained, the most basic feature of an Internet access service — the ability of consumers to access and interact with information — makes it an information service: Internet access providers join transmission with "data processing, information provision, and other computer-mediated offerings, thereby creating an information service." *Id.* ¶ 81. That is true whether the provider or a third party provides the information. *See*, *e.g.*, *id.* ¶ 79.

Thus, as providers using a range of technologies began to offer Internet access services over their own broadband facilities, the FCC uniformly held that those services are "information services." *See* Pai Dissent at 340-41 & nn.130-34 (collecting citations). The FCC further concluded that mobile broadband is a "private mobile service" under the statute and thus doubly exempt from common carrier regulation. *Wireless Broadband Ruling* ¶¶ 39, 45.

In *NCTA v. Brand X Internet Services*, 545 U.S. 967, 975-76 (2005), the Supreme Court upheld the FCC's conclusion that cable broadband service is an information service because "it provides consumers with a comprehensive capability for manipulating information using the Internet." *Id.* at 987-89. Indeed, *all nine* Justices agreed that, in offering Internet access, broadband providers offered an "information service."

3. Recently, the FCC has attempted to impose "net neutrality" obligations on broadband Internet access providers. This Court struck down the FCC's first two attempts. In *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010), the Court held that the FCC — which had "[a]cknowledg[ed] that it has no express statutory authority" over Comcast's network management practices, *id.* at 644 — could not use its "ancillary authority" under Title I of the Communications Act or Section 706 of the 1996 Act (as then-interpreted by the FCC) to regulate those practices.

In the *2010 Order*, the FCC reversed its reading of Section 706 and adopted "no blocking," "no unreasonable discrimination," and "transparency" rules. The FCC adopted less burdensome rules for mobile broadband based on the existence of particularly strong competition and unique operational challenges. *See 2010 Order* ¶¶ 94-95. This Court upheld the FCC's authority under Section 706, but vacated the no-blocking and no-discrimination rules because they imposed *per se* common carrier obligations on information service providers. *See Verizon*, 740 F.3d at 629, 650-59. At the same time, the Court explained how the FCC could use its Section 706 authority to adopt revised rules consistent with the prohibition on common carrier regulation. *See id.*

4. On remand, the FCC proposed to adopt such revised rules. *See* NPRM ¶ 24. The NPRM explained that, "[p]er the blueprint offered by

. . . *Verizon v. FCC*, the Commission proposes to rely on section 706" while retaining the FCC's longstanding classification of Internet access as an information service. *Id.* ¶ 4. Taking *Verizon*'s cue, the proposals in the NPRM were structured to avoid imposing common carrier regulation. *See id.* ¶¶ 6, 89-90, 97, 122, 136.

A few paragraphs of the NPRM sought comment on whether the FCC should reclassify broadband under Title II, but *solely* to provide an additional legal basis for the new Open Internet rules. *See id.* ¶¶ 4, 142, 149-150. The FCC made clear that it was *not* proposing to address interconnection or related traffic-exchange arrangements *at all*. *See id.* ¶ 59. And the FCC asked only generically whether mobile broadband is commercial mobile service. *See id.* ¶ 150.

5. Later, after the White House held months of private meetings with interest groups pushing for reclassification and the President called for that outcome,[3] the FCC abruptly changed course. Without providing notice of — and thus precluding meaningful comment on — scores of issues raised by reclassification, it issued a decision, by a 3-2 vote, that "differs dramatically from the proposal [it] put out for comment." Pai Dissent at 335; O'Rielly Dissent at 385-87. The Order reclassifies fixed and mobile broadband Internet access services as "telecommunications service[s]" subject to Title II. Order ¶¶ 336-337. The FCC then expansive-

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[3] *See* Gautham Nagesh & Brody Mullins, *Net Neutrality: How White House Thwarted FCC Chief*, Wall St. J., Feb. 4, 2015; The White House, *Net Neutrality: President Obama's Plan for a Free and Open Internet* (Nov. 10, 2014), *available at* http://goo.gl/zn8w9z.

ly defines the reclassified service to extend Title II to broadband providers' interconnection with other networks without reclassifying such interconnection as a telecommunications service. *See id.* ¶¶ 195, 338-339. The FCC also reclassifies mobile broadband service as commercial radio service — or, alternatively, its functional equivalent (under a newly minted test applicable, by its terms, only in this Order) — subject to common carrier regulation. *See id.* ¶ 408.

The Order adopts specific Open Internet rules: "no-blocking," "no-throttling," and "no paid-prioritization." *See id.* ¶¶ 111-132. The Order goes much further, however, and adopts, without any notice, a sweeping new "Standard for Internet Conduct," under which the FCC will decide, case-by-case, whether providers' practices "unreasonably interfere with or unreasonably disadvantage the ability of consumers to reach the Internet content, services, and applications of their choosing or of edge providers to access consumers using the Internet." *Id.* ¶ 135.

The Order forbears under 47 U.S.C. § 160 from some Title II provisions, but massive regulation remains. The FCC leaves in place the bulk of 15 Title II provisions. *See id.* ¶¶ 434-542. Most notably, the FCC retains the authority to regulate the "reasonableness" of all rates, terms, and practices of broadband Internet access service providers under Sections 201 and 202. *See id.* ¶¶ 441-452, 512, 522. The FCC will also apply Section 222's consumer-information duties, but, because it

forbore from its implementing rules, there is no guidance as to how Section 222's duties apply to broadband. *See id.* ¶¶ 462-467.

6. Petitioners each filed petitions for review in this Court. On May 1, 2015, each sought a stay before the FCC. On May 8, two FCC Bureaus denied relief. *See* Stay Denial (Attach. B).

ARGUMENT

The Court should stay the Order insofar as it (1) reclassifies broadband as a "telecommunications service" — thereby subjecting broadband providers to a wide array of Title II's requirements — and (2) adopts a related and vague "Internet conduct standard." The requested stay would leave in place the three "bright line" rules prohibiting blocking, throttling, and paid prioritization. Petitioners are likely to succeed on the merits, and a stay would avert irreparable harms to Petitioners, their members, and Internet users while causing no harm to the public interest.[4]

[4] *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). At a minimum, this case presents "a serious legal question," and a stay is warranted because the balance of harms favors Petitioners. *Holiday Tours*, 559 F.2d at 844; *cf. Sherley v. Sebelius*, 644 F.3d 388, 392-93, 398 (D.C. Cir. 2011).

I. PETITIONERS ARE LIKELY TO PREVAIL ON THE MERITS

A. The Reclassification Ruling Contravenes the Communications Act, Supreme Court Precedent, and FCC Precedent

1. Petitioners are likely to prevail on their argument that broadband Internet access service is a statutory "information service" and therefore cannot lawfully be classified as a "telecommunications service" subject to Title II common carrier regulation.[5] In holding otherwise, the FCC disregarded statutory text, overturned its own well-settled precedents, and misread governing law.

Internet access unquestionably meets the statutory definition of an information service. Internet access qualifies under *each* of the eight, independent parts of the statutory definition. It offers consumers the capability to "acquire" and "retrieve" information from websites, to "store" information in the cloud, to "transform" and "process" information by translating plain English commands into computer protocols, to "utilize" information through computer interaction with stored data, and to "generate" and "make available" information to other users by sharing files from their computers. 47 U.S.C. § 153(20). Simply put, the whole point of Internet access is to obtain, manipulate, and use *information*. Until now, the FCC

[5] The Communications Act directs that a provider "shall be treated as a common carrier under this chapter *only to the extent* that it is engaged in providing telecommunications services." 47 U.S.C. § 153(51) (emphasis added). Because "telecommunications service" and "information service" are "mutually exclusive" categories, *Stevens Report* ¶¶ 43-48, providers of information services cannot be subject to Title II common carrier regulation when providing those services.

itself had concluded, on at least five occasions, that broadband Internet access is an information service. *See supra* pp. 5-6.

Section 230, enacted alongside the definitions of information and telecommunications service, confirms that Internet access is an information service. In Section 230(b)(2), Congress established a federal policy "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). Section 230(f)(2) then defines those "interactive computer service[s]" to include any "information service[], . . . *including specifically a service . . . that provides access to the Internet*." *Id.* § 230(f)(2) (emphasis added). The FCC itself has previously concluded that Section 230 demonstrated that classifying Internet access as an information service was "consistent with Congress's understanding." *Wireline Broadband Order* ¶ 15 n.41.[6]

There is yet more evidence fortifying this conclusion. The 1996 Act codified two pre-existing regulatory classifications that confirm that Internet access is an information service: distinctions between information and telecommunications services under the Modification of Final Judgment ("MFJ") that broke up the Bell System; and between "enhanced" and "basic" services under the FCC's *Computer*

[6] The Bureaus' only response is to point back to the FCC's "specific analysis" of Section 230 in the Order. Stay Denial ¶ 15 (citing Order ¶ 386). That "analysis" offers no answers to the points stated above in the text.

decisions. *See Brand X*, 545 U.S. at 976-77, 992-93; *Verizon*, 740 F.3d at 630.

Applying those longstanding regulatory distinctions, the MFJ Court and the FCC squarely concluded that "gateways to online services" — the direct antecedents of today's Internet access services — are information/enhanced services, not basic/telecommunications services.[7] This regulatory history is critical because the statutory definition of information services in the 1996 Act includes "all of the services that the FCC has previously considered to be 'enhanced services.'" *Non-Accounting Safeguards Order* ¶ 102.

The Order disregards this controlling precedent, as does the Bureaus' Stay Denial. Both argue instead that the information-processing capabilities that are part and parcel of Internet access services fall within the narrow "telecommunications management" exception to the definition of "information services," Order ¶¶ 366-375; Stay Denial ¶ 17; 47 U.S.C. § 153(24), which the FCC acknowledges merely codifies the similar "adjunct to basic" exception to the enhanced services definition, Order ¶ 312. But, as the FCC has noted, gateway services were enhanced/information services prior to the 1996 Act, *not* services that fall within the

[7] *See United States v. Western Elec. Co.*, 673 F. Supp. 525, 587-97 & n.275 (D.D.C. 1987) (gateways offer a number of functions, including the capability for storing, processing, acquiring, and making available information that, "*[under] any fair reading*," fit within the definition of "information services") (emphasis added), *aff'd in part*, *rev'd in part*, 900 F.2d 283 (D.C. Cir. 1990); Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, ¶¶ 97-98 (1980) ("subscriber interaction with stored information" is an "enhanced service[]").

exceptions to those definitions. *Stevens Report* ¶ 75.[8] Moreover, the functions involved here — such as caching,[9] cloud storage, and e-mail — are not used for the "management of a *telecommunications* service," 47 U.S.C. § 153(24) (emphasis added), but allow consumers to interact with, obtain, and make available *information* and thus benefit the *user*, not the *system* or the *service*. The FCC's reading would allow the "management exception" to swallow these information-service functions, obliterating Congress's careful distinction between two, mutually exclusive categories.

2. The FCC and the Bureaus claim that *Brand X* effectively gives the agency *carte blanche* "to revisit [its] prior interpretation." Order ¶ 332; Stay Denial ¶ 12. That badly misreads *Brand X*. *No* Justice doubted that broadband providers, in offering consumers the ability to access the Internet, offered an "information service." The majority agreed with the FCC that the cable broadband Internet access service at issue was an "information service" because, *inter alia*, "[t]hat service enables users . . . to browse the World Wide Web, to transfer files . . . and to access e-mail and Usenet newsgroups." 545 U.S. at 987. Justice Scalia, in dissent,

[8] Likewise, the MFJ's "information services" definition included an identical "telecommunications management" exception, which the court held did not encompass the Internet's precursor, gateway services. *See Western Elec.*, 673 F. Supp. at 587 n.275.

[9] "Caching" is storing information so that it will be more quickly available to users. The FCC's dismissal of "caching" is particularly arbitrary, given its concession that third-party content *delivery* networks like Akamai offer an information service despite using caching to *deliver* information. *See* Order ¶ 372.

likewise quoted with approval an FCC staff paper stating that Internet access service "is an enhanced service provided by an ISP." *Id.* at 1009.

As the FCC once understood, the *only* difference between the *Brand X* majority and dissent — and where the majority found ambiguity — was whether the broadband provider "offered" a telecommunications service *in addition to and separate from* Internet access service.[10] Justice Scalia argued in dissent that cable companies offered a separate "delivery service" between "the customer's computer and the cable company's computer-processing facilities" that qualified as a "telecommunications service." 545 U.S. at 1010. Using the example of a pizza delivery service, Justice Scalia contended that the last-mile transmission (pizza delivery) was separate from the Internet access functions (making the pizza) because it was "downstream from the computer-processing facilities" that performed those information-service functions and "merely serve[d] as a conduit for the information services that have already been 'assembled' by" the broadband provider. *Id.* at 1007, 1010.[11]

[10] *2010 Notice* ¶ 18 (*Brand X* parties "agreed that cable modem service either *is* or *includes* an information service," and only question was whether "providers offer *only* an information service, rather than" an information service *plus* "a separate telecommunications service" consisting of transmission over the "last mile").

[11] These quotations illustrate another error by the Bureaus: no *Brand X* dissenter thought that providers offer a telecommunications service that extends *beyond* the last-mile transmission between a user's home and the provider's network. *See* Stay Denial ¶ 14.

Any dispute as to whether last-mile transmission is a separate offering of a telecommunications service is irrelevant here because the Order reclassifies the entire broadband Internet access service, not just the last mile, as a telecommunications service. Moreover, by classifying Internet access as exclusively a telecommunications service with *no* information service offering, the FCC has adopted a position that all nine Justices in *Brand X* rejected. And it has turned Justice Scalia's analogy on its head. Where Justice Scalia saw the relevant offerings as making pizza (information service) and delivering it (telecommunications service), the FCC pretends the pizzeria offers *only* delivery, and does not make pizza at all.

In sum, to classify broadband Internet access service in its entirety as a telecommunications service and not an information service "goes beyond the scope of whatever ambiguity [the statute] contains" and merits no deference. *City of Chicago v. Environmental Def. Fund*, 511 U.S. 328, 339 (1994). Even if the statute were ambiguous, the FCC's reading is unreasonable. By definition, all information services are provided "via telecommunications." 47 U.S.C. § 153(24). On the FCC's view, it could find that the use of transmission renders almost any Internet-based service a "telecommunications service." That view lacks any limiting principle. *See Brand X*, 545 U.S. at 994 (rejecting claim that use of transmission created a telecommunications service, as it would subject "all information-service providers that use telecommunications as an input" to common carrier regulation); *Stevens*

Report ¶ 57 ("[I]f . . . some information services were classed as telecommunications services, it would be difficult to devise a sustainable rationale under which all, or essentially all, information services did not fall into [that] category.").[12]

B. The FCC's Reclassification of Mobile Broadband Conflicts with the Communications Act and FCC Precedent

CTIA and AT&T are also likely to prevail on their argument that mobile broadband Internet access services cannot lawfully be subject to Title II. Congress made clear that private mobile services "shall not . . . be treated as a common carri[age]" service. 47 U.S.C. § 332(c)(2). Because mobile broadband is and always has been a private mobile service, it is exempt from Title II regulation.

Congress defined private mobile service as "any mobile service . . . that is not a commercial mobile service or [its] functional equivalent." *Id.* § 332(d)(3). A commercial mobile service must be, among other things, "interconnected with the public switched network." *Id.* § 332(d)(1)-(2). When this provision was adopted in 1993, it was well settled that the public switched network was the *telephone*

[12] The Commission's attempt to assert Title II authority over broadband Internet access service providers' interconnection arrangements with other Internet networks is derivative of its fatally flawed view that the retail broadband Internet access service is a "telecommunications service." Order ¶¶ 363-364. Independently, the Order's extension of Title II obligations to those interconnection arrangements is a transparent effort to evade *this* Court's decision in *Verizon*. There, this Court held that the FCC may not impose common carriage regulation on the relationship between broadband providers and edge providers in the guise of regulating retail, last-mile service. *See* 740 F.3d at 653. But the Order does just that. *See* Order ¶¶ 204, 363-364.

network: Congress, courts, and the FCC all shared that understanding.[13] Still today, *every* use of "public switched network" in the U.S. Code refers only to the telephone network, and three years ago Congress distinguished the "public switched network" from the "public Internet."[14] Because mobile broadband service uses a distinct network that routes traffic to the Internet — unlike mobile voice service, where the device is connected to the ordinary telephone network — it is neither commercial mobile service nor its functional equivalent.

This was the FCC's consistent statutory conclusion before the Order. In 1994, the FCC found that the public switched network is "the traditional local exchange or interexchange switched network" — that is, the telephone network — and codified that conclusion in its rules. *Second Report and Order* ¶¶ 59-60; *see* 47 C.F.R. § 20.3. In 2007, the FCC confirmed that the public switched network, as that term is used in both "section 332 and [its] implementing rules," does not include the Internet. *Wireless Broadband Ruling* ¶ 45 n.119. In so holding, the FCC

[13] *See, e.g.*, H.R. Rep. No. 103-213, at 495-96 (1993) (Conf. Rep.) (describing the House version of the bill that became Section 332, which used the term "public switched network," to require that a commercial mobile service be interconnected with the "public switched telephone network"); Memorandum Opinion and Order, *Aeronautical Radio, Inc.*, FCC 86-123, 1986 WL 291339, ¶¶ 7-8 (Mar. 28, 1986) (using the terms "public switched network" and "public switched telephone network" interchangeably); *Public Util. Comm'n v. FCC*, 886 F.2d 1325, 1327, 1330 (D.C. Cir. 1989) (same).

[14] 47 U.S.C. § 1422(b)(1) (referring to "public Internet or the public switched network, or both"); *see also id.* § 259 (requiring incumbent local telephone companies to share certain "public switched network infrastructure"); *id.* § 769(a)(11) (referring to "public-switched network voice telephony").

rejected arguments that mobile broadband services were interconnected with the public switched network by virtue of third-party voice (known as "Voice-over-Internet-Protocol") applications allowing calls from mobile to regular telephones over a mobile broadband connection. *See id.* ¶¶ 42-45. The FCC reasoned that whether the *voice service* accessed via broadband interconnects with the public switched network is irrelevant to whether *the broadband service itself* is interconnected with the public switched network, which it is not. *See id.* ¶ 45.

In the Order, the FCC reversed itself on each of these points. *See* Order ¶¶ 388-408. It amended the regulatory definition of "the public switched network" to include the telephone network and the Internet. Leveraging that new definition, the FCC then found that mobile broadband is "interconnected" because it connects to the Internet. The FCC further reversed itself to claim that Voice-over-Internet-Protocol applications mean that mobile broadband service itself interconnects with the telephone network. And the FCC adopted a new functional equivalence test good for mobile broadband only, while leaving its general test in place.

In the Stay Denial, the Bureaus cite (¶ 24) Congress's grant of authority to the FCC to define "the public switched network." As shown above, that term, written in the singular, had (and has) a settled meaning and is not so elastic that it can include the telephone network *and* the Internet, much less every network or

device that "use[s] . . . public IP addresses." Order ¶ 391.[15] Nor did the FCC justify its about-face in finding that the same third-party voice applications that existed in 2007, and that still interconnect with the telephone network today by partnering with third-party telephone companies, now mean that mobile broadband service itself is interconnected with the telephone network. *See id.* ¶ 401. And the FCC's new functional equivalence finding turns on nothing more than the fact that mobile broadband, like mobile voice, is "widely available." *Id.* ¶ 404. That says nothing about the *functions* of those services, or whether they are equivalent, which they are not: one allows consumers to search Google or buy items on Amazon; the other enables voice calls. The results-oriented nature of this reasoning is made clear by the FCC's retention of its pre-existing test for functional equivalence — based on traditional concepts of substitutability — in all *other* contexts, while manufacturing this new test solely for this proceeding. *See id.* ¶ 408; 47 C.F.R. § 20.9(a)(14).[16]

C. The Reclassification Ruling Is Arbitrary and Capricious

The Order's reclassification ruling is independently unlawful because it is arbitrary and capricious. Before adopting a policy that " 'rests upon factual find-

[15] Under that definition of "the public switched network," "over 50 billion inanimate devices," including things like refrigerators, "will be interconnected" by 2020. Remarks of FCC Chairman Wheeler at AEI (June 12, 2014), *available at* http://goo.gl/DbND5B.

[16] Contrary to the Bureaus' claim, Petitioners did not "ignore[]" the FCC's functional equivalence finding in moving for a stay before the FCC. Stay Denial ¶ 23. Petitioners challenged the invention of a new, single-use test that ignored key functional differences between mobile broadband and mobile voice services.

ings that contradict those which underlay its prior policy,'" the FCC had to confront its prior findings and "provide [a] more substantial justification" than would be required absent the conflicting prior policy. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). And before abandoning a "prior policy" that "has engendered serious reliance interests," the FCC had to "account" for those interests, identifying offsetting benefits that justify disrupting regulated entities' reasonable reliance. *Fox*, 556 U.S. at 515. The Order, however, makes no serious effort to do *either*.

The Order flatly rejects the central factual premise of its prior classification of broadband: that consumers perceive broadband as a "single, integrated service" in which transmission *and* enhanced, information-processing, storage, retrieval, and other functions are inextricably intertwined. Order ¶¶ 366-369, 372-375; *cf. Brand X*, 545 U.S. at 987-88. The FCC does not dispute that consumers' perspectives are still paramount, but claims that those perceptions, somehow, have been transformed. *See* Order ¶ 350. Yet the supposed changes on which it relies — greater use of third-party services such as e-mail, and increased advertising of transmission speeds — are legally irrelevant. They do not affect the fundamental capabilities broadband offers consumers; they thus provide no basis to ignore the definition of "information service" that the FCC has long applied.

Moreover, these "changes" are not new at all. Alternative e-mail has been used for decades, and consumers have been able to access third-party websites and capabilities for decades, too.[17] Indeed, as Commissioner Pai notes (at 357), these facts are actually acknowledged in the *Cable Broadband Order*. Likewise, providers' marketing using speed claims predated the FCC's prior orders and cannot justify the agency's about-face. *See*, *e.g.*, Pai Dissent at 357-58.[18]

The Order also does not remotely attempt to provide the "more substantial justification" the APA requires given the billions of dollars invested in reliance on the FCC's prior policy. *See Perez*, 135 S. Ct. at 1209. Instead, the Order denies that reliance interests even *exist* and claims that classification has at most an "indirect effect" on investment. Order ¶ 360. But the FCC's explicit aim in classifying broadband as an information service was *to induce* investment in broadband in furtherance of congressional policy.[19] That policy achieved its aim, catalyzing more than $800 *billion* in investment in just over a decade.[20] The APA requires that agencies seeking to change their views confront their own prior policies and

[17] *See Cable Broadband Order* ¶¶ 25, 38 & n.153; *Brand X*, 545 U.S. at 998.

[18] Indeed, the *Brand X* dissent noted that "cable broadband" providers "advertise[d] quick delivery as one of its advantages over competitors." 545 U.S. at 1007 n.1 (Scalia, J., dissenting).

[19] *E.g.*, *Cable Broadband Order* ¶ 5; *Wireline Broadband Order* ¶¶ 1, 5.

[20] *Historical Broadband Provider Capex*, USTelecom, http://goo.gl/Uzg2Is; Comcast Comments at 54-55 (Exh. 23); Pai Dissent at 361; O'Rielly Dissent at 390.

adequately explain why they were mistaken. It does not permit agencies to erase the past with the bureaucratic equivalent of "we've always been at war with Eastasia."[21]

The Order also fails to offer any countervailing benefit provided by reclassification that could justify the immense disruption to providers' investment-backed reliance. Aside from a few stale and dubious anecdotes, the Order cites only *hypothetical* harms that "may" or "could" come to pass. That cannot justify overturning a *status quo* settled for decades, upsetting hundreds of billions of dollars in investment-backed expectations, and throwing the industry into disarray.

D. The Order Independently Violates the APA Because It Is Not a Logical Outgrowth of the FCC's Proposal

Petitioners are likely to succeed on the merits for an additional reason: the Order was not a "'logical outgrowth'" of the NPRM. *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1107-08 (D.C. Cir. 2014). The APA required the FCC to "make its views known to the public in a concrete and focused form," *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (per curiam), and to "describe

[21] The claim that any reliance was unreasonable because broadband's status was "unsettled" (Order ¶ 360; Stay Denial ¶ 21) fails for the same reason. The FCC expressly sought to promote investment by "remov[ing] regulatory uncertainty" in 2002. *Cable Broadband Order* ¶ 5. Any claim that broadband's status was "unsettled" could not survive *Brand X*.

the range of alternatives being considered with reasonable specificity."[22] It did not.

The NPRM made clear that the rulemaking's goal was limited "to protecting and promoting Internet openness." NPRM ¶ 4. Its two-paragraph discussion of reclassification of fixed broadband was merely a series of open-ended questions that boiled down to "Should we reclassify? Why or why not?" *See id.* ¶¶ 149-150. The NPRM offered no answers and gave no guidance as to *what* or *how* or *why* the FCC might reclassify, and did not even hint at the rationale and analysis that now consumes 128 paragraphs and fundamentally alters the regulation of a crucial industry. Order ¶¶ 306-433. That falls far short of what the APA requires. *See Prometheus*, 652 F.3d at 453 ("general and open-ended" sentences did not "fairly appris[e] the public"). The NPRM, moreover, affirmatively misled commenters as to interconnection, assuring them that the Order would *not* address that subject (NPRM ¶ 87), which the Order ultimately *did* (Order ¶¶ 338-339). The APA forbids that. *See International Union, UMW v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1260 (D.C. Cir. 2005).

As to mobile broadband, the NPRM asked simply whether it "fit[s] within the definition of 'commercial mobile service.'" NPRM ¶ 150. The NPRM never suggested that the FCC was contemplating redefining "the public switched network," adopting a new functional equivalence test, or reversing its prior position

[22] *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450-52 (3d Cir. 2011) (internal quotation marks omitted).

regarding third-party voice applications and classification of the underlying broad-band service. *See*, *e.g.*, *Prometheus*, 652 F.3d at 453.

Nor did anything in the NPRM apprise commenters of the new catchall ban on "unreasonable interference or unreasonable disadvantage," guided by a "non-exhaustive" list of factors. Order ¶¶ 133-153. This "wholly new" standard was nowhere mentioned in the NPRM. *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994) (per curiam).[23]

II. THE EQUITIES AND THE PUBLIC INTEREST SUPPORT A STAY

A. The Order Creates Unrecoverable Losses and Harm to Consumers

If the Order becomes effective, the FCC will be able to "micromanage virtually every aspect of how the Internet works," creating a "monumental shift toward government control." Pai Dissent at 321. That, in turn, will create unrecoverable losses for providers and ultimately harm consumers.

The "rates" and "practices" of thousands of providers, small and large, will

[23] In asserting that the FCC provided ample notice, the Bureaus do not grapple with any of this precedent, instead pointing to filings that addressed these matters. *See* Stay Denial ¶¶ 20, 26. Comments themselves, of course, do not satisfy an agency's obligation to provide notice. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 555 (D.C. Cir. 1983) (agency "cannot bootstrap notice from a comment."). To the extent comments (particularly ex parte filings after the comment period ended and rumors of the FCC's post-Presidential-intervention course-change circulated) addressed a wider range of possibilities than the NPRM specifically proposed, that only illustrates the uncertainty stemming from the inadequate notice the NPRM provides.

be subject to the broad yet vague standards set out in Sections 201 and 202, plus the FCC's sweeping yet indeterminate "Internet conduct standard." To be sure, providers' existing rates and practices are not unjust or unreasonable. Yet class-action attorneys and the FCC's enforcement personnel will immediately be able to pursue costly litigation — leading to potentially substantial financial penalties, *see*, *e.g.*, 47 U.S.C. § 503, and harming providers' reputations — based on the FCC's "almost unfettered discretion." Pai Dissent at 323. This threat is magnified by the FCC Enforcement Chief's belief that "when it's clear that something is impermissible, [regulated companies] generally don't do it . . . . So when you're in enforcement, you're almost always working in a gray area."[24]

This open season of regulation and litigation will impose immediate and unrecoverable costs. Small providers particularly will be harmed, as they "don't have the means or the margins to withstand a regulatory onslaught." Pai Dissent at 330. Some may be "squeezed . . . out of business altogether." *Id.*[25] Others, including cable and wireless Internet providers that serve a few hundred customers and have never been subject to Title II, will spend their limited resources on hiring new em-

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[24] Brendan Sasso, *The FCC's $365 Million Man*, Nat'l J. (Apr. 26, 2015), http://goo.gl/8QuT6h (quoting Enforcement Bureau Chief Travis LeBlanc).

[25] *See* Decl. of Nathan Stooke, CEO of Wisper ISP, Inc. ("Stooke Decl.") ¶ 10 (Exh. 1) (noting that the threat of class action suit "would most likely force us to close the company"); Decl. of Elizabeth Bowles, President of Aristotle Inc. ("Bowles Decl.") ¶ 7 (Exh. 2); Decl. of Ken Hohhof, President of KWISP Internet ("Hohhof Decl.") ¶ 11 (Exh. 3).

ployees and lawyers and other compliance costs.[26] That is irreparable harm.[27]

Because they must spend scarce resources complying with broad yet uncertain Title II mandates, smaller providers, many of whom serve rural areas that often have fewer broadband options, will not be able to invest those resources to improve and expand broadband products and service.[28] One provider has determined that it will now need 66% more customers to justify deploying Internet access ser-

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[26] *See*, *e.g.*, Decl. of Michael Jensen, GM of Bagley Public Utilities ¶ 6 (Exh. 16) ("Jensen Decl."); Decl. of William Bauer, CEO of WinDBreak Cable ¶ 6 (Exh. 13) ("Bauer Decl."); Decl. of Herbert Longware, President of Cable Communications of Willsboro ¶ 6 ("Longware Decl.") (Exh. 18); Decl. of Steven Neu, Owner of Mountain Zone Broadband ¶ 6 ("Neu Decl.") (Exh. 20); Decl. of Robert Watson, Owner of Watson Cable ¶ 6 ("Watson Decl.) (Exh. 22); Decl. of Ron Smith, CEO of Bluegrass Cellular, Inc. ("Smith Decl.") ¶ 9 (Exh. 4); Decl. of Clay Stewart, CEO of SCS Broadband ("Stewart Decl.") ¶¶ 5-6 (Exh. 5); Decl. of Forbes Mercy, President, Washington Broadband, Inc. ("Mercy Decl.") ¶ 4 (Exh. 6); Decl. of Josh Zuerner, President and CEO of Joink LLC ("Zuerner Decl.") ¶¶ 5-6 (Exh. 7).

[27] *See*, *e.g.*, *Sottera, Inc. v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010) (product distributor would be irreparably harmed by agency's order that would destroy the distributor's ability to cover its costs); *Brendsel v. Office of Federal Hous. Enter. Oversight*, 339 F. Supp. 2d 52, 66 (D.D.C. 2004) (general rule that economic losses are not irreparable harm "is of no avail . . . where the plaintiff will be unable to sue to recover any monetary damages against [federal agencies]"). By contrast, in the case cited in the Stay Denial (¶ 28 n.89), the court concluded that there was no showing that the "cost of compliance would be so great . . . that significant changes in a company's operations would be necessitated." *AO Smith Corp. v. FTC*, 530 F.2d 515, 527 (3d Cir. 1976).

[28] *See* Decl. of Ron B. McCue, COO of Silver Star Communications ("McCue Decl.") ¶¶ 4-5, 10 (Exh. 8); Smith Decl. ¶¶ 9-10; Stooke Decl. ¶¶ 12-13; Hohhof Decl. ¶ 6; Stewart Decl. ¶¶ 7-11; Mercy Decl. ¶ 6; Bowles Decl. ¶ 11; Decl. of Richard Ruhl, Geneal Manager of Pioneer Telephone Cooperative ¶¶ 4-5, 10 (Exh. 11); Decl. of Darby McCarty, President and CEO of Smithville Communications ¶¶ 4-5, 10 (Exh. 12).

vice at a new base station and may have to "uninstall" existing customers. *See* Stooke Decl. ¶ 14. Similarly, a fixed wireless provider serving rural areas estimated that the Order will lead it to delay or cancel capacity upgrades to seven towers; construction of additional towers and repeater sites; and an experiment to serve customers in heavily wooded areas. *See* Hohhof Decl. ¶ 13.[29] This diminished investment in broadband will harm consumers.[30]

The Bureaus' Stay Denial remarkably disregards this specific, sworn evidence of immediate harm, even though it was before the agency. The Bureaus simply assert without elaboration that this specific showing is "insufficiently concrete." Stay Denial ¶ 32. Even more remarkably, the Bureaus rely on the FCC's past imposition of an unreasonable discrimination standard *that this Court found illegal* in *Verizon*. *See id.* ¶ 30. In any event, no party engages in the paid prioritization addressed by that standard, and it could not then have led to class-action or agency complaints under 47 U.S.C. §§ 206-208, because Title II did not then apply. Nor does the existence of other, established regulatory norms, *see id.*, allevi-

[29] *See also* Stewart Decl. ¶¶ 8, 11 (investment in serving five additional counties is "in jeopardy" and company is "withholding full investments to other rural counties"); Mercy Decl. ¶ 10 (WABB has "decided to scale back expansion to new, unserved or underserved areas"); Bowles Decl. ¶ 13 (provider has "scal[ed] back" its plan "to triple our customer base by deployment of a redundant fixed wireless network that would cover a three-county area"); Zuerner Decl. ¶¶ 12-13 (describing a reduction or cessation of investment in deployment).

[30] *See*, *e.g.*, Stooke Decl. ¶ 15 ("[C]onsumers . . . will be left with slower broadband speeds, less dense coverage, and absence of expansion into new areas."); Mercy Decl. ¶ 11; Stewart Decl. ¶ 12.

ate the harm from the vague and effectively limitless Internet conduct standard whose import no party (including the FCC Chairman[31]) can predict.

B. The Order Imposes Broad, Ill-Defined Consumer-Information Duties That Threaten Significant Costs and Harm Consumers

The Order subjects broadband providers to Section 222's consumer-information duties but forbears from the existing implementing rules that give specific content to Section 222's requirements. *See* Order ¶ 462. Providers already go to great lengths to protect consumer information, and the Order makes no finding that their practices are inadequate. They may nevertheless need to take further steps to avoid potential alleged violations that pose no threat to consumer privacy, based on guesses as to what the FCC or a court will find the statute requires.

For example, Section 222(c) requires consent before customer proprietary network information can be used for some marketing purposes. Today, broadband providers can lawfully use information about customers' Internet access services and usage to develop customized marketing programs that benefit both the provider and its customers. *See* AT&T Decl. ¶¶ 7-15 (Exh. 9). The FCC's reclassification creates significant uncertainty as to what the new rules of the road will be for broadband — and whether existing practices will subject providers to liability if they guess wrong as to how Section 222(c) will apply to "broadband-related" cus-

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[31] February 2015 Open Meeting Press Conference of Chairman Tom Wheeler (Feb. 26, 2015), *available at* http://goo.gl/oiPX2M (165:30-166:54) (FCC Chairman "do[esn't] really know" what it means).

tomer proprietary network information. *Id.* ¶ 15.

That uncertainty creates irreparable harm. AT&T estimates that it would lose up to $400 million in revenues (plus $13 million in implementation costs) if it ceased existing marketing that uses broadband-related customer proprietary network information in ways that might require customer consent while implementing consent mechanisms based on its guess as to content of future FCC rules.[32] Smaller providers face an even greater risk of harm. The entire Section 222 regulatory regime is foreign to some of them, and many do not even have in-house employees with knowledge to assist with compliance. As several small providers explain, they have as few as 440 customers; have never been subject to Section 222; and risk irreparable losses including loss of goodwill (or large price increases to consumers) in trying to develop wholly new compliance policies without FCC guidance.[33]

[32] *See* AT&T Decl. ¶ 20 (alternative programs would be "substantially less effective"). The Bureaus' quibbles as to the extent of these costs, *see* Stay Denial ¶ 34 & n.112, are irrelevant. The unrebutted, sworn evidence is that AT&T and other providers are threatened with massive lost revenue. The fact that AT&T cannot predict its losses precisely does not render them any less real or irreparable; that inability is a traditional indicator of irreparable harm. *See Foundry Servs., Inc. v. Beneflux Corp.*, 206 F.2d 214, 216 (2d Cir. 1953) (Hand, J., concurring).

[33] *See* Bauer Decl. ¶ 23; Stooke Decl. ¶¶ 8-9; Mercy Decl. ¶¶ 7-8; Bowles Decl. ¶¶ 8-9; Zuerner Decl. ¶¶ 8-10; *cf.* Notice of Apparent Liability for Forfeiture, *TerraCom, Inc.*, 29 FCC Rcd 13325, ¶¶ 18, 30 (2014) (proposing $10 million forfeiture for small company's alleged failure to meet Section 222 duties first announced in FCC decision). The Bureaus' attempt to respond to these showings by emphasizing the lack of "prescriptive regulations," Stay Denial ¶ 34, is baffling.

C. Reclassification Undermines Interconnection Negotiations

The Order's assertion of authority to apply Title II to broadband is already causing irreparable harm with respect to interconnection. The Internet is a network of networks, and interconnection is the means by which those networks are connected. Until now, a variety of voluntarily negotiated, individualized arrangements have been used to exchange traffic between networks.[34] But, under the Order, these arrangements are now part of the "telecommunications service" that broadband Internet access providers offer their retail customers, and thus broadband providers — but not their interconnecting counter-parties — are subject to the requirements of Title II. Order ¶¶ 28, 195. Yet again, however, the FCC did not explain what that means or how broadband providers must act. *Id.* ¶¶ 202-203 ("premature" to provide guidance).

Providers are thus left to negotiate contracts subject to sweeping statutory mandates without knowing what decisions could lead to enforcement action. Order ¶ 451 (FCC will evaluate interconnection "issues ex post under sections 201 and 202"). Already, providers face demands for significant changes to intercon-

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Given that the FCC has still provided no assurance that providers will not be found liable for violating Section 222 itself, that lack of regulatory guidance is a large part of the problem, not the solution.

[34] *See* Decl. of Pieter Poll, Senior Vice President of Network Planning, CenturyLink ("Poll Decl.") ¶¶ 3-8 (Exh. 10); NCTA Decl. ¶ 20 (Exh. 19); Order ¶ 203.

nection agreements.[35] The parties making those demands are threatening to file enforcement actions if their demands are not met. *See* Poll Decl. ¶¶ 10-12; da Silva Decl. ¶ 7.[36] This distortion in what had been a well-functioning private negotiation process is irreparable harm. *See Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996) (irreparable harm where new regulatory regime distorted negotiations between private parties).

The Bureaus brush aside this argument by claiming that other parties have long been seeking better deals. *See* Stay Denial ¶ 40. That is true but irrelevant. The FCC's decision sharply tips the scales in negotiations because it creates a new, *one-sided* ability for those parties to bring complaints and impose costs against broadband providers. *See* Order ¶ 205 (findings limited to "broadband Internet access services"). As the declarations show, the Order has had an immediate effect on private negotiations, the very fact that prompted the injunction in *Iowa Utilities.*

D. New Pole Attachment Requirements Will Irreparably Harm Cable Petitioners

The Cable Petitioners' members will also suffer irreparable harm from Section 224, which governs agreements that allow them to attach their network

[35] *See* Poll Decl. ¶¶ 9-10; NCTA Decl. ¶ 11; Decl. of Ronald da Silva, Vice Pres. for Network Engineering, Time Warner Cable ¶¶ 2-4 (Exh. 14).

[36] Brendan Sasso, *The First Net Neutrality Complaints Are Coming*, Nat'l J. (Apr. 9, 2015), http://goo.gl/GVd36m ("Cogent Communications, which controls part of the Internet backbone, is preparing to file complaints to the FCC, charging service providers Comcast, Time Warner Cable, AT&T, Verizon, and CenturyLink with inappropriately degrading Internet traffic.").

equipment to utility poles. Reclassification will trigger duties for those entities to notify utilities that they offer telecommunications services — a massive undertaking given the thousands of agreements that may be implicated, many with individualized requirements.[37] These costs, which will especially burden smaller operators, cannot be recouped.

Furthermore, as the Order concedes, utilities will rely on reclassification to increase the rates they charge cable operators. *See* Order ¶¶ 482-483. Although the Order "caution[s]" utilities not to increase these fees (¶ 482), as the Stay Denial confirms (¶ 43), it does not *bar* them from doing so, and utilities clearly have the incentive to do so. When utilities try to raise rates, cable operators will face serious burdens in opposing them, both in negotiations and in litigation, and smaller operators will have no choice but to succumb. *See* Hightower Decl. ¶ 17; Bauer Decl. ¶ 31. The costs of opposing those demands cannot be recovered, and later efforts to recover increased fees paid in the meantime will be costly and potentially unsuccessful. *See* NCTA Decl. ¶ 23.

E. Petitioners Will Be Subject to New Fees and Taxes

The Order's reclassification ruling will also expose Cable Petitioners and other companies to a wide assortment of state and local taxes and fees, to which

[37] *See* NCTA Decl. ¶¶ 21-22; Decl. of Jennifer Hightower, Senior VP of Law and Policy, Cox Communications ¶ 15 ("Hightower Decl.") (Exh. 15); Larsen Decl. ¶ 9; *cf.* Stay Denial ¶ 42 (conceding the existence of this obligation, but asserting without support that this is "simple").

broadband providers have never been subject, including new franchise fees and property taxes.[38] These harms, too, will be irreparable. While there will be strong arguments that these taxes and fees are preempted, disputing them will require time and resources that cannot be recovered, and paying them will slow broadband deployment and irreparably harm goodwill. *See* NCTA Decl. ¶¶ 26, 28, 30.

F. A Stay Will Not Harm Third Parties or the Public

Far from harming third parties, a stay of the reclassification decision and the Internet conduct standard will prevent substantial harm to consumers in the form of reduced investment in broadband deployment and stifled innovation. A stay is particularly merited because the FCC has pointed to no imminent threat to other parties necessitating common carrier regulation. Chairman Wheeler analogized reclassification to an insurance policy designed to protect against low-probability events,[39] and the FCC described the Internet conduct standard as a way to "future-proof"[40] the bright-line rules, from which Petitioners do not seek a stay. Similarly,

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[38] *See* Hightower Decl. ¶ 19; Larsen Decl. ¶ 13; NCTA Decl. ¶ 27; *see also*, *e.g.*, *Community Telecable of Seattle, Inc. v. City of Seattle, Dep't of Exec. Admin.*, 186 P.3d 1032, 1034, 1037 (Wash. 2008) (city could not tax service as a "telecommunications service," in part because "[c]able Internet service should mean the same thing inside the Seattle city limits as elsewhere"); *see also* 47 U.S.C. § 151 note, Internet Tax Freedom Act § 1105(8)(B), (10)(B) (allowing states and localities to impose property taxes and franchise fees).

[39] Remarks of Tom Wheeler, Chairman, FCC, at 7 (Mar. 27, 2015), *available at* https://goo.gl/88MpJX.

[40] FCC News Release at 2, *FCC Adopts Strong, Sustainable Rules to Protect the Open Internet* (Feb. 26, 2015), *available at* https://goo.gl/K4YDJh.

the Stay Denial describes the aspects of the Order we seek to stay as mere "backstops," Stay Denial ¶ 47, and cannot deny that the decades-long *status quo*, even without the three bright-line rules, has greatly benefited consumers.

III. ALTERNATIVELY, THE COURT SHOULD EXPEDITE THIS CASE

If the Court does not grant a stay, it should expedite this case to "minimize" the "harm to [Petitioners' members] and the public." *D.C. Cir. Handbook* § VIII(B). The Court may expedite a case for "good cause," 28 U.S.C. § 1657(a), that is, if "delay will cause irreparable injury and . . . the decision under review is subject to substantial challenge" or if "the public generally . . . [has] an unusual interest in prompt disposition." *D.C. Cir. Handbook* § VIII(B). The Order is subject to "substantial challenge," *id.*; will irreparably injure Petitioners' members; and will undermine the public interest. Petitioners will work to propose an expedited briefing schedule within seven days of this Court's order.

CONCLUSION

The Court should grant the requested stay, or alternatively, grant expedition.

Dated: May 13, 2015

Respectfully submitted,

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RULE ECF-3(B) ATTESTATION

In accordance with D.C. Circuit Rule ECF-3(B), I hereby attest that all other parties on whose behalf this joint motion is submitted concur in the motion's content.

/s/ *Michael K. Kellogg*
Michael K. Kellogg

May 13, 2015

CERTIFICATE OF SERVICE

I hereby certify that, on May 13, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

In addition, a copy of the foregoing and the exhibits and attachments thereto was hand-served on counsel for Respondents as listed below:

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