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

United States Telecom Association, *et al.*,)
Petitioners,)
)
v.) No. 15-1063 (and
) consolidated cases)
Federal Communications Commission)
and United States of America,)
Respondents.)

OPPOSITION OF RESPONDENTS TO MOTION FOR STAY AND RESPONSE TO MOTION FOR EXPEDITION

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INTRODUCTION

The Federal Communications Commission has adopted open Internet rules essential to protect Internet users from harmful conduct by providers of broadband Internet access services (broadband). *Protecting and Promoting the Open Internet*, FCC 15-24 (rel. Mar. 12, 2015) (*Order*). The stay sought by petitioners would strip the Internet of these critical safeguards, exposing both consumers and "edge providers" (providers of Internet content, services, and applications) to the types of misconduct by broadband providers previously described in detail by this Court in *Verizon v. FCC*, 740 F.3d 623, 642-49 (D.C. Cir. 2014).

Petitioners' stay motion is not what it seems. It asks the Court to halt the application of Title II of the Communications Act to broadband, while allowing three bright-line rules to go into effect. But those bright-line rules are precisely the kind of regulation this Court held could *not* be applied until and unless broadband was reclassified as a "telecommunications service." *See Verizon*, 740 F.3d at 650. These rules prevent a broadband provider from, for example, blocking political speech it dislikes or providing a level of service that impairs an online video competitor—like Netflix or DISH's new Sling service—that challenges the provider's cable TV services. Granting the stay motion would effectively leave the FCC unable to stop these and similar practices.

Verizon affirmed that the threat of such harm is real, tangible, and endemic to the industry. Citing empirical evidence, "common sense" and "economic reali-

ty,"[1] *Verizon* upheld the FCC's conclusions that broadband providers' incentives and ability to restrict Internet traffic in various ways could produce "[w]idespread interference with the Internet's openness in the absence of Commission action," and that "[s]uch a problem is doubtless industry-wide." *Id.* at 649 (internal quotation marks omitted). Since 2005, the Commission has "signaled its intention to preserve and promote the open and interconnected nature of the public Internet" to prevent such harms. *Id.* at 631-34 (internal quotations omitted); *see also Order* ¶¶64-69, 103. The FCC's *Order* maintains the *status quo* of an open Internet for American consumers and the Internet economy.

In any event, petitioners cannot demonstrate that they are likely to prevail on the merits. This case is controlled by *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). *Brand X* recognized that the Commission has the discretion, exercised in the *Order*, to divide broadband service into two components: an offering of pure transmission or "telecommunications services," on the one hand, and a separate offering of "information services"—such as the provision of an email address—on the other. *Id.* at 986-1000. And *Brand X* confirmed that the Commission has the authority to set "federal telecommunications policy in this technical and complex area," *id.* at 992, and to "consider varying interpretations

[1] *Id.* at 645-46 (discussing evidence that online video services like Netflix and Hulu "compete directly with [broadband providers'] core video subscription service"; and a study, *see* Austan Goolsbee, *Vertical Integration and the Market for Broadcast and Cable Television Programming*, 31–32 (Sept. 5, 2007), providing "empirical evidence that cable providers have acted in the past on anticompetitive incentives to foreclose rivals").

and the wisdom of its policy on a continuing basis." *Id.* at 981 (internal quotations omitted).

The *Order* does precisely that. The decision to reclassify broadband as offering a telecommunications service is consistent with the marketplace today and necessary to fulfill the goals of an open Internet, which the *Verizon* Court held were valid. And the decision to classify mobile broadband services as commercial mobile services follows from specific statutory direction instructing the Commission to use its expertise. *See* 47 U.S.C. § 332(d). The FCC concluded that, in today's world, the best approach is to interpret the term "telecommunications service" consistently with the way it applies to hundreds of small broadband providers that operate successfully today under Title II, and to its historic application to Digital Subscriber Line (DSL) service (broadband provided over telephone lines) before 2005 and wireless voice and data services between 1993 and 2007. *See, e.g.*, *Verizon*, 740 F.3d at 630-31 (describing the FCC's past treatment of DSL as a "telecommunications service" subject to Title II). The *Order* amply justifies these decisions, and the FCC's actions were, in all respects, expressly raised by or a logical outgrowth of the *NPRM*. *Protecting and Promoting the Open Internet*, 29 FCC Rcd 5561 (2014) (*NPRM*).

Finally, petitioners have failed to carry their burden of demonstrating irreparable harm.[2] Petitioners showcase a few broadband providers representing a small

[2] Again, the *Verizon* decision is instructive. There, the Court explained that "[t]he record … contain[ed] much evidence supporting the Commission's conclusion that, by comparison to the benefits of [the no blocking rule and no unreasonable

percentage of the marketplace to allege that the entire industry will be harmed, yet even these cherry-picked examples fail to demonstrate harm from the *Order*. Of the 21 declarations from individual companies, six are from fixed wireless companies with a median of 1,100 customers. Nine declarations come from small cable broadband providers with a median of just over 2,100 customers (assuming that all video customers also subscribe to broadband). In addition to serving a small percentage of the marketplace, these fixed wireless, telco, and cable broadband providers overlook the fact that (1) they were subject to the Commission's "no unreasonable discrimination" rule from 2011 to 2014, apparently without harm, and (2) representatives of nearly 900 other small broadband providers have operated voluntarily under the *full* panoply of Title II regulations since 2005. *See Order* ¶425. The few declarations from larger companies that serve far more consumers fare no better. For example, only one even mentions the Internet conduct rule (and only in passing) (Mot. Ex. 17). And the stay motion goes out of its way to argue that petitioners' activities remain lawful under the *Order*.

As a group, the claims of irreparable harm cannot stand. Oliver Wendell Holmes, Jr. would be astonished to hear petitioners claim that unfairness, vagueness, and uncertainty result from the use of case-by-case adjudication in which the Commission simply seeks the "experience" that our common law tradition extols. HOLMES, THE COMMON LAW, at 1 (1881). Their other claims of harm are too conjectural, uncertain, or hypothetical to satisfy the demanding standard for irrepara-

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discrimination standard], the costs associated with the open Internet rules … are likely small." *Verizon*, 740 F.3d at 649 (internal quotations omitted).

ble injury.

As an alternative, petitioners ask this Court to expedite review of the case. Although petitioners have not met the standard for a stay, we believe that the public would be served by the Court's expedited consideration of this case.

BACKGROUND

1. For the past decade, a bipartisan goal of the FCC has been to "preserve and promote the open and interconnected nature of the public Internet" in a legally sustainable manner. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14986, 14988 (2005). In pursuit of that objective, the Commission in 2010 adopted "open Internet" rules that included: (1) barring fixed and mobile broadband providers from blocking consumers' access to the Internet; and (2) prohibiting fixed broadband providers from unreasonably discriminating in the transmission of Internet traffic. *Preserving the Open Internet*, 25 FCC Rcd 17905 (2010). The Commission concluded that it had authority to adopt those rules under section 706 of the Telecommunications Act of 1996 (1996 Act), 47 U.S.C. § 1302.

On review, this Court held that the FCC reasonably construed section 706 as authority to promulgate open Internet rules. *Verizon*, 740 F.3d at 635-42. It also upheld the Commission's determination that, absent such rules, broadband providers would have "powerful incentives" and "the technical and economic ability" to disrupt the "virtuous cycle" of Internet innovation and investment by engaging in conduct that threatens Internet openness. *Id.* at 642-49. The Court found that the FCC "more than adequately supported and explained its conclusion that edge-

provider innovation leads to the expansion and improvement of broadband infrastructure." *Id.* at 644.[3] The Court also found that record evidence of discriminatory conduct by broadband providers "buttressed the agency's conclusion that broadband providers' incentives and ability to restrict Internet traffic could produce widespread interference with the Internet's openness in the absence of Commission action. Such a problem is doubtless industry-wide." *Id.* at 648-49 (internal quotation marks and citations omitted).

At the time the FCC adopted its 2010 rules, however, broadband internet access was classified as an "information service," not as a "telecommunications service."[4] *Verizon*, 740 F.3d at 650. "[G]iven the manner in which the Commission [had] chosen to classify broadband providers," *id.*, the Court held that the agency could not adopt the anti-blocking and anti-discrimination rules because those rules

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[3] For example, "higher-speed residential Internet connections in the late 1990s stimulated the development of streaming video, a service that requires particularly high bandwidth, which in turn encouraged broadband providers to increase network speeds." *Id.* (internal quotation marks omitted).

[4] The Communications Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, … but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(24). It defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public … regardless of the facilities used." 47 U.S.C. § 153(53). "Telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(50). Telecommunications services are regulated as common carriage under Title II of the Act; information services are not. *See Brand X*, 545 U.S. at 975-77; 47 U.S.C. § 153(51).

imposed "*per se* common carriage obligations" on "information service" providers. *Id.* at 655-59.[5] The Court vacated those two rules and "remand[ed] the case to the Commission for further proceedings consistent with [its] opinion." *Id.* at 659.

2. The Commission commenced a new rulemaking to consider how it could best respond to the *Verizon* remand. After hearing from "nearly 4 million commenters," the FCC in March 2015 adopted new open Internet rules. *Order* ¶6. Under the three bright-line rules it adopted, providers of fixed and mobile broadband may not: (1) "block lawful content, applications, services, or non-harmful devices, subject to reasonable network management," *id.* ¶15; (2) "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.* ¶16; or (3) "engage in paid prioritization"—"the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic," either "in exchange for consideration" or "to benefit an affiliated entity." *Id.* ¶18.

The FCC also adopted two standards critical to ensuring that the bright-line rules could not be circumvented. First, it adopted a general Internet conduct standard prohibiting conduct that unreasonably interferes with or unreasonably disadvantages the ability of consumers to reach the Internet content, services, and applications of their choosing or the ability of edge providers to access consumers using the Internet. *Id.* ¶135. The FCC articulated several specific factors that would guide

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[5] The Court also noted that the FCC had classified mobile broadband as a "private" mobile service, and that the Act barred common carrier regulation of private mobile services. *Id.* at 650 (citing 47 U.S.C. § 332(c)(2)).

its application of this general conduct standard. *Id.* ¶¶138-145, 151-153. Second, in light of record evidence that broadband providers "have the ability to use terms of interconnection to disadvantage edge providers," the FCC stated that it would "be available to hear disputes" involving broadband providers' Internet traffic exchange arrangements "on a case-by-case basis" under the "just and reasonable" standards of 47 U.S.C. §§ 201 and 202. *Id.* ¶205.[6] The Commission found that these standards were a necessary backstop to the bright-line rules because broadband providers have the incentive and ability to adopt practices that, although not prohibited by the bright-line rules, could cause similar harms. *Id.* ¶¶137, 205.

The FCC also determined that, on the basis of the record, "broadband Internet access service" (as defined by the Commission) includes a separable offering of telecommunications service subject to Title II, and that mobile broadband Internet access service offers a commercial mobile service, or its functional equivalent, subject to Title II. *Id.* ¶¶306-433. The Commission defined broadband Internet access service as a "mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints." *Id.* ¶187. The agency reasoned that broadband, as currently offered, includes a pure transmission service that fits the statutory definition of "telecommunications service." *Id.* ¶¶341-56.

At the same time, the Commission used its authority under 47 U.S.C. § 160 to "forbear" from applying to broadband the large majority of Title II's provisions

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[6] The *Order* defines interconnection as "the exchange of traffic between a broadband Internet access provider and connecting networks." *Id.* ¶28.

and hundreds of FCC rules promulgated pursuant to Title II during the telephone era. *Id.* ¶¶434-542. This established "a light-touch regulatory framework," thereby "minimizing the burdens on broadband providers while still adequately protecting the public" and advancing the "goals of more, better, and open broadband." *Id.* ¶51. The agency reasoned that this balanced approach, "by combining minimal regulation with meaningful Commission oversight," was much like "the proven model Congress and the Commission have applied to [commercial mobile voice services], under which investment has flourished." *Id.* ¶409.

ARGUMENT

On a stay motion, "a court considers four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (internal quotations omitted). Petitioners have failed to establish any of the four factors.[7]

I. Petitioners Fail To Show A Likelihood Of Success On The Merits.

A. The FCC's decision to reclassify broadband is consistent with the Communications Act and *Brand X*.

Petitioners' principal challenge—that the FCC lacked authority to reclassify

[7] While petitioners insist that the Court should apply a sliding scale in weighing the factors (*see* Mot. 10 n.4), there are questions as to the viability of such an approach after *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008). *See Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1295-96 (D.C. Cir. 2009) (Kavanaugh, J., with whom Henderson, J., joins, concurring).

broadband service as a telecommunications service, Mot. 11-16—is baseless.

Verizon already upheld the FCC's statutory authority to adopt broadband regulations to protect Internet openness. But *Verizon* also held that, "[g]iven the Commission's still-binding decision to classify broadband providers … as providers of 'information services,'" the FCC could implement only protections that steered clear of common carriage *per se*. 740 F.3d at 650. On remand, the FCC addressed this issue. It concluded that, in order to ensure an open Internet, it should rely on *all* available sources of legal authority—applied with a light touch consistent with innovation and investment.[8] Relying on (a) *Brand X*, which held that the relevant statutory terms governing the classification of broadband service are ambiguous, 545 U.S. at 992, (b) the established principle that agencies may revisit their interpretation of ambiguous statutory terms, *id.* at 981, and (c) the extensive record in this proceeding about the way broadband service is used and marketed today, the FCC determined that retail broadband service is now best understood as "separately identifiable offers of (1) a broadband Internet access service that is a telecommunications service (including assorted functions and capabilities used for the management and control of that telecommunications service) and (2) various 'add-on' applications, content, and services that generally are information services." *Order* ¶¶47, 341.

Petitioners assert that the *Order* contravenes *Brand X*, and that, in any event,

[8] Having reclassified both fixed and mobile broadband, the FCC "grounded" its new rules "in multiple sources" of legal authority, including section 706, Title II, and (for mobile broadband) Title III. *Order* ¶¶6, 273-84.

the broadband service classified by the *Order* is "unquestionably" an information service under the Communications Act. Mot. 11. These claims misread *Brand X* and misconstrue the scope of the *Order*.

Petitioners first contend that the *Order* contravenes *Brand X*'s conclusion that cable modem service could permissibly be classified as an information service. But the *Brand X* Court held only that the Commission's interpretation was (in light of the record at that time) permissible, not mandatory. Finding the statutory terms ambiguous, the Court deferred to the FCC under *Chevron* step two, upholding as permissible the FCC's conclusion that cable modem service at that time was best understood as a functionally integrated "offering" of an information service that included a telecommunications component. *See* 545 U.S. at 986-1000.[9]

Petitioners next argue that *Brand X* does not control because the *Order*'s classification extends beyond a transmission component and runs "all the way across the Internet." Mot. 2, 15-16. Not so. First, the Commission expressly found that broadband includes "separately identifiable offers" of (1) a telecommunications service "transmission capability," and (2) various "add-on" information services, such as email and online storage, offered together with broadband service but not covered by the *Order*'s classification or rules. *Order* ¶¶341, 356, 362

[9] *See also id.* at 992 ("[T]he statute fails unambiguously to classify the telecommunications component of cable modem service as a distinct offering. This leaves federal telecommunications policy in this technical and complex area to be set by the Commission."); *id.* at 1003 (Breyer, J., concurring) (Commission's interpretation permissible, "though perhaps just barely"); *Order* ¶¶332-33 (describing the *Brand X* opinions on this point).

n.1005, 365. Second, the *Order* defines "broadband Internet access service" as a service that "provides the capability *to transmit data*." *Id.* ¶336 (emphasis added). It thus by definition includes a transmission service offering. As the *Order* explains, in this respect the service the Commission classified *is the very same* as the transmission service discussed in *Brand X*.[10] Third, the classification does not sweep in the entire Internet. It applies only to retail broadband providers' transmission of traffic on their own networks, including the necessary exchange of traffic with other networks.[11] *Id.* ¶¶187-89, 336. This Court recognized that broadband providers have "gatekeeper" control over the flow of content. *Verizon*, 740 F.3d at 646. Interconnection is simply the operation of the gate. And the classified service expressly does not include, for example, virtual private network services, content delivery networks, hosting or data storage services, or Internet backbone services. *Id.* ¶¶340, 189-91. Finally, contrary to petitioners' contention that *Brand X* was limited to a portion of transmission that they label "last-mile transmission service," Mot. 16, the Court nowhere limited its discussion to transmission over the "last-mile," instead identifying the "telecommunications" that cable companies used in

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[10] *Order* n.1257. *See id.* ¶382 (Commission's "reclassification of broadband … service involves only the transmission component of Internet access service").

[11] That the *Order*'s classification includes traffic exchange arrangements is no "fatal[ ] flaw[ ]." Mot. 17 n.12. Rather, as the *Order* explains, such arrangements are implicit in the provision of the retail broadband service that offers consumers access to the entire Internet and, in any event, are provided for and in connection with that service. *Order* ¶204. The *Order* also explains precisely how the retail broadband service classification addresses *Verizon*'s concerns about a separate service to edge providers. *See id.* ¶¶338-39.

providing Internet service as traveling over the "high-speed wire that transmits signals to and from an end user's computer" without limitation. 545 U.S. at 988.

Justice Scalia's dissent further demonstrates that reclassification was well within the Commission's discretion. Petitioners claim the "FCC pretends the pizzeria offers only delivery, and does not make pizza at all." Mot. 16. But updating Justice Scalia's metaphor to broadband today, pizzerias now "deliver[] from any neighborhood restaurant (including their own pizza some of the time)." *Order* ¶¶45-46. Consumers now view broadband as a pure pathway to the Internet with no "change in the form or content of the information as sent and received." *See* 47 U.S.C. § 153(50). They do not expect their Internet search results to be altered by their broadband provider.[12]

None of petitioners' other arguments overcomes this straightforward application of *Brand X* and the 1996 Act.[13] Section 230(b) is entirely consistent with the *Order*'s adoption of rules to preserve an open Internet and extensive forbearance with respect to broadband. And Section 230(f) references information services in

[12] If petitioners' reading were true, then in the 20th Century the FCC would have had to apply common-carrier regulation not just to the transmission path of telephony but to the private speech—the information—that traveled via telephone wire.

[13] The *Order* properly relies on law and facts that supersede 1980s era interpretations of "gateway services" in the AT&T Modified Final Judgment, *see* Mot. 12-13, instead applying statutory terms from the 1996 Act to broadband as it exists and is offered today. And, as the *Order* explains, the 1998 *Stevens Report*, which concerned only universal service mandates and was not a binding classification decision, in no way precludes the FCC's analysis of how broadband is offered today. *Order* ¶315; *see also Brand X*, 545 U.S. at 991-95 (adverting to the *Stevens Report* but noting that the Commission's interpretation might not be the best available).

defining "interactive computer services," but has no bearing on the classification of the capability to transmit data to and from the Internet—the broadband service defined in the *Order*. *Order* ¶¶386, 532.

Petitioners' contention that broadband, as defined in the *Order*, is "unquestionably" an information service, Mot. 11, thus flies in the face of *Brand X* and long-standing FCC precedent demonstrating that the statutory definitions are ambiguous and that classifying broadband as offering a telecommunications service is permissible. Indeed, some of the petitioners in this Court previously argued that the Commission not only may but should classify the transmission component of broadband as a telecommunications service.[14] The *Order* painstakingly explains why broadband, as offered today, meets the definition of telecommunications service, *Order* ¶¶341-64, and why—to the extent it involves capabilities that would otherwise fall within the information service definition, *see* Mot. 11-14—those capabilities do not turn the service into an information service, *Order* ¶¶365-81. Either they are separable offerings, as discussed above, or they fall within the statutory exception to the definition of "information service" for the "use of any such [information service] capability for the … management of a telecommunications ser-

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[14] *See Order* ¶317, nn.810 & 823 (citing prior filings by Verizon, CenturyLink, USTA, and current AT&T entities SBC and BellSouth, all arguing that the transmission component of cable modem service is telecommunications service under Title II); *see also* PETER HUBER, MICHAEL KELLOGG, & JOHN THORNE, FEDERAL TELECOMMUNICATIONS LAW, § 11.8.1 (2d ed. 1999) (describing cable modem's "promise … to originate and deliver data traffic encoded and addressed [for] the Internet," as "the purest form of 'common carriage' ever devised").

vice."[15] *See id.* ¶365.

B. Reclassification was reasonable and reasonably explained.

There is no merit to petitioners' claim that reclassification was arbitrary and capricious. Mot. 20-23. The Commission's decision to reclassify is amply supported by the record. *See Order* ¶¶341-81.

It is a bedrock principle of administrative law that an agency may change course so long as it acknowledges and reasonably explains the change. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-16 (2009). With respect to the statutory terms at issue here, *Brand X* made clear that the FCC's interpretation was "not instantly carved in stone," and that "the agency … *must* consider varying interpretations and the wisdom of its policy *on a continuing basis*." *Brand X*, 545 U.S. at 981 (emphasis added; citations omitted). Contrary to petitioners' assertion (Mot. 21), *Fox* "does not … equate to a 'heightened standard' for reasonableness"; rather, the Commission need only show "that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better." *Mary V. Harris Found. v. FCC*, 776 F.3d 21, 24 (D.C. Cir. 2015) (quoting *Fox*, 556 U.S. at 515); *accord Order* ¶¶357-60.

The *Order* easily satisfies this test, explaining that reclassification both (1) "best reflects the factual record" about consumer conduct, broadband provider conduct, and broadband technology; and (2) most efficiently furthers "sound policy

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[15] 47 U.S.C. § 153(24). Petitioners make much of the fact that such management capabilities can also benefit users of the telecommunications service, Mot. 14, but it is not evident why this would remove them from the exception.

… objectives, including … effective open Internet protections," of the kind *Verizon* found were supported by evidence. *Order* ¶¶47, 341-54. The *Order* then explains at length the FCC's interpretations of the relevant statutory definitions. *Id.* ¶¶355-81. Petitioners argue that the changed "consumers' … perceptions" on which the *Order* relies are "legally irrelevant," Mot. 21. But the *Order* explains why consumers' current use and perception of broadband, as well as broad changes in the marketplace—even for features petitioners claim are "not new," Mot. 22—justify the FCC's changed view. *Order* ¶358. In all events, the Commission noted that even assuming *arguendo* no facts had changed, it would still conclude under what it now views as the best interpretation of the Act that broadband is a telecommunications service. *Id.* n.993.

Finally, petitioners claim that the *Order* lacks a "substantial justification" given their financial "investm[ents] in reliance on the FCC's prior policy," Mot. 22. But as the *Verizon* Court explained, curtailing Internet openness actually suppresses demand for broadband and disrupts the virtuous cycle of innovation and investment. In addition, the *Order*: (1) explains that the FCC adopted extensive forbearance designed to preserve broadband investment incentives, *Order* ¶¶409, 417; (2) predicts based on evidence—both historical and recent—that reclassification will not deter continued investment, *id.* ¶¶414-16, 421-25; and (3) points out that the proper classification of broadband was far from settled law, *id.* ¶360. The *Order*'s comprehensive justification for the reclassification *does* fully "confront [the FCC's] own prior policies." Mot. 22. To suggest that the APA requires *even more* would permit petitioners' alleged reliance interests to freeze future commu-

nications policy, effectively superseding the continuing interpretive and rulemaking authority Congress has expressly vested in the FCC. *Brand X*, 545 U.S. at 992.

C. Classification of mobile broadband as Commercial Mobile Service or its functional equivalent was reasonable and reasonably explained.

Petitioners are also unlikely to prevail on their assertion that mobile broadband "cannot lawfully be subject to Title II … [b]ecause mobile broadband is and always has been a private mobile service." Mot. 17-20. The Communications Act defines "private mobile service" as "any mobile service … that is not a commercial mobile service or [its] functional equivalent … as specified by regulation by the Commission." 47 U.S.C. § 332(d)(3). In the *Order*, the FCC specified its interpretation of these terms; revisited its prior classification of mobile broadband as a private mobile service not subject to common carrier regulation; and found based on the record that mobile broadband is best viewed as (1) commercial mobile service or in the alternative (2) the functional equivalent of commercial mobile service. To prevail on their challenge, petitioners must convince the Court that *both* of the FCC's alternative grounds for reclassification are invalid. *See BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1183 (D.C. Cir. 2003). They are unlikely to succeed.

First, under section 332(d), "commercial mobile services" must be "interconnected with the public switched network (*as such terms are defined by regulation by the Commission*)." 47 U.S.C. § 332(d)(2) (emphasis added). Petitioners claim that mobile broadband cannot be a commercial mobile service because it is not interconnected with the "public switched *telephone* network." Mot. 17-20. But the word "telephone" appears nowhere in section 332(d). Rather, "what is clear

from the statutory language is not what the definition of 'public switched network' was intended to cover but rather that Congress expected the notion to evolve and therefore charged the Commission with the continuing obligation to define it." *Order* ¶396.[16] When it originally implemented section 332(d) in 1994, the Commission rejected calls to limit the term to the "public switched telephone network," concluding that the term should "not be defined in a static way" because the network is continuously evolving in light of new technology and increasing demand. *See id.* ¶396 & n.1145. In the *Order*, the FCC found that the mobile broadband service widely available today is not "akin to the private mobile service of 1994, such as … taxi dispatch service," which "offered users access to a discrete and limited set of endpoints." *Id.* ¶404. Instead, the agency concluded that mobile broadband as used today is best understood as an offering of "commercial mobile service"—also a term Congress expressly left to the Commission to "specif[y]." 47 U.S.C. § 332(d)(1); *Order* ¶¶389-403.

Second, in any event, the Commission found that mobile broadband is functionally equivalent to commercial mobile service and thus not private mobile service. *Order* ¶¶404-08. Congress expressly delegated to the Commission the author-

[16] Petitioners' citation of legislative history using the term "public switched telephone network" is at most evidence that theirs would be a permissible interpretation, but cannot override the statute's express delegation of interpretive authority to the Commission. Likewise, subsequent statutes adopted for different purposes are "beside the point." *Gutierrez v. Ada*, 528 U.S. 250, 257-58 (2000); *Order* n.1147. Finally, petitioners' reference to the growth in connected devices, Mot. n.15, is of little moment since the *Order* determines these are outside the scope of Title II broadband service. *Order* ¶380; *see also id. ¶¶*207-09.

ity to determine "functional[ ] equivalen[ce]." 47 U.S.C. § 332(d)(3). Petitioners contend that mobile broadband cannot be considered functionally equivalent because "unlike mobile voice service [it is not] connected to the ordinary telephone network," and thus cannot be an interconnected service. Mot. 18. But that analysis would require a service to meet the literal definition of commercial mobile service to be functionally equivalent, rendering the "functional equivalent" provision superfluous. *Order* ¶407. And the *Order* explains that "from an end user's perspective," both mobile voice service and mobile broadband are "commercial services that allow users to communicate with the vast majority of the public," and "from both a technical as well as a consumer perspective, there are increasingly fewer distinctions or interoperability issues between these types of services." *Id.* ¶¶404, 407.[17] Moreover, contrary to petitioners' claim, the *Order* does address "the *functions* of those services" (Mot. 20), explaining that "[t]he fact that [mobile broadband services] may *also* enable communications in other ways or with different groups does not make them less useful as substitutes for commercial mobile service." *Id.* ¶407. Consumers today, for example, can use their mobile device to order a pizza—by making a voice call or by placing an on-line order.

D. The *Order* meets all APA notice requirements.

Finally, petitioners are no more likely to succeed with their argument, Mot.

[17] As the *Order* explains, the Commission is not bound by the petition-based process outside parties must follow to challenge the classification of a service as private mobile service. *Order* ¶408. Rather, it is bound by the APA's requirement to provide a reasoned explanation for its classification based on record evidence. For the reasons explained, the *Order*'s functional equivalence finding meets that test.

23-25, that the FCC provided inadequate notice. Under the APA, an agency's "final rule need not be the one proposed in the NPRM" so long as "interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject." *Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013). That test is met here: The Commission's actions were, in all relevant respects, expressly raised by or a logical outgrowth of the *NPRM*, and comments on those actions were in fact filed in spades. *Order* ¶¶206, 387, 393-94, 406.

Petitioners' characterization of the *NPRM* as including only a "two paragraph" discussion of reclassification, Mot. 24, is just wrong. The *NPRM* expressly identified reclassification as an alternative course of action and sought comment on the use of Title II authority in almost every section.[18] Parties—including both petitioners and intervenors—plainly "anticipated that the change was possible," filing lengthy comments for and against Title II reclassification for both fixed and mobile broadband. *Order* nn.1101, 1134-36, 1188.[19] The *NPRM* here was thus nothing like the one in *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) (*see* Mot. 24). There, an NPRM responding to a court order requiring that "any new 'metric' [for analyzing newspaper-broadcast cross-ownership] … be made subject

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[18] *See NPRM* ¶4 (Commission "seeks comment on the benefits of both section 706 and Title II, including the benefits of one approach over the other" and "recognizes that both section 706 and Title II are viable solutions and seek[s] comment on their potential use"); *see also id.* ¶¶10, 65, 89, 96, 112, 121, 138, 142, 149-55.

[19] Even the statements made by Commissioners dissenting from the *NPRM* reflect that Title II was in play. *See, e.g., NPRM*, 29 FCC Rcd at 5655 (Commissioner Pai, dissenting).

to public notice and comment" included *no* such metric, much less any alternatives. *Id.* at 445-46, 450-51.

Petitioners' remaining notice claims are no more persuasive. *First*, as to the general conduct standard, the *NPRM* proposed a "commercially reasonable" standard, but "[a]s an alternative … s[ought] comment on whether the Commission should adopt a different rule to govern broadband providers' practices" and how it should "define [such a] rule" if it adopted a Title II approach. *NPRM* ¶121. *Second*, contrary to petitioners' assertion, the *NPRM* did not "assur[e]" commenters "that the Order would *not* address" interconnection, Mot. 24; it "tentatively conclude[d]" that the rules should not apply to interconnection, but asked "whether we should change our conclusion" and sought comment on parties' suggestions that the FCC "cover issues related to traffic exchange." *NPRM* ¶59.[20] Finally, the *Order* fully explains why reclassification of mobile broadband as either "commercial mobile service" or its "functional equivalent" logically arose from the *NPRM*. *See Order* ¶¶393-94, 406. Among other things, the *NPRM* expressly asked whether mobile broadband would fit within the definition of "commercial mobile service," specifically citing to section 332 as well as the FCC definitions at issue, and expressly referenced *Framework for Broadband Internet Service*, 25 FCC Rcd 7866 (2010), which asked additional questions about mobile broadband classification. *NPRM*

[20] The *Order*'s assertion of case-by-case authority over interconnection practices also flows logically from the *NPRM*'s express desire to "ensure that a broadband provider … not be able to evade our open Internet rules by engaging in traffic exchange practices" that could inflict similar harms. *NPRM* ¶59; *Order* ¶206.

¶¶149, 154-55. Comments on all these points show that parties "had no problem understanding the scope of the issues up for consideration." *NAM v. EPA*, 750 F.3d 921, 926 (D.C. Cir. 2014).

II. Petitioners Have Not Established Irreparable Injury.

To obtain a stay, petitioners must prove an irreparable injury that is "both certain and great; it must be actual and not theoretical." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). "Bare allegations of what is likely to occur are of no value …. The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future." *Id*. Moreover, economic injury must be "more than simply irretrievable; it must also be serious in terms of its effect on the plaintiff." *Hi-Tech Pharmacal Co. v. FDA*, 587 F. Supp. 2d 1, 11 (D.D.C. 2008); *see also, e.g.*, *Mylan Labs., Inc. v. Leavitt*, 484 F. Supp. 2d 109, 123 (D.D.C. 2007). Though petitioners submit 22 (largely duplicative) declarations, they fall far short of meeting this exacting standard. Their alleged harms are insubstantial, speculative, or both.

A. Petitioners' arguments suffer from several over-arching flaws.

Several themes run through petitioners' assertions of harm, but fail on closer inspection. Before turning to the specifics, we address these.

1. Case-by-case adjudication is not an injury—Petitioners repeatedly allege that they are injured by "uncertainty" because the FCC has announced it will proceed through case-by-case adjudication. *See* Mot 26 (general conduct rule and sections 201 and 202); Mot. 29 (privacy protections of section 222); Mot. 31 (inter-

connection). But case-by-case adjudication under an established standard cannot itself be irreparable injury. The "choice between rulemaking and adjudication lies … within the [agency's] discretion." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974). Such a permissible exercise of discretion by an agency cannot constitute irreparable injury because it is well established that "[n]ot every principle…should be cast immediately into the mold of a general rule. Some principles…must be adjusted to meet particular, unforeseeable situations." *SEC v. Chenery*, 332 U.S. 194, 202 (1947). In fact, as the *Order* points out, the FCC has applied the Title II unjust and unreasonable standard to wireless voice service for over a decade, and explosive growth and consumer choice have resulted. *See Order* ¶409.[21] Nor do petitioners even allege that the "unreasonable discrimination" standard of the 2010 *Order* caused such harm when it was in effect.

2. A stay would not address the alleged harms to capital investment— Petitioners frame much of their alleged injury in terms of the *Order*'s effect on their ability to raise capital and to invest in expansions of broadband service. Mot. 4, 27. If the *Order* really is a disincentive to invest, petitioners cannot credibly claim that they are likely to invest during a stay when the rules may later be upheld. In any event, the FCC made extensive findings that the *Order* will promote, not hamper, infrastructure investment, relying in part on the Commission's experience with the wireless telephony market and this Court's discussion of the virtuous

[21] The *Order* itself also provides extensive guidance on, *e.g.*, the factors that will guide its application of the general conduct standard. *Id.* ¶¶138-49 (explaining seven factors); *see also* p. 29 *infra* (discussing guidance on privacy protections).

cycle that drives investment. *Order* ¶¶409, 412.

3. The alleged harms are unrepresentative—Petitioners seek an industry-wide stay largely on the basis of declarations from the very smallest providers. *E.g.* Mot. 27-28 (describing allegations from carriers with 475 and 8000 customers). But equitable relief "must be narrowly tailored to remedy the specific harm shown." *State of Nebraska Dep't of Health & Human Servs. v. Dep't of Health & Human Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006) (internal quotations omitted). Large carriers provide the vast majority of broadband service.[22] Tellingly, those large carriers do not make the same claims of harm,[23] and it is overwhelmingly the customers of those large entities that would be injured by a stay. Importantly, even the smaller providers that petitioners showcase do not make a convincing case for irreparable harm. All of these smaller fixed wireless, telco, and cable providers were subject to case-by-case adjudication under the "no unreasonable discrimination" standard in effect from 2011 to 2014, yet they fail to show that any harm occurred during this time. Moreover, representatives of nearly 900 other small, rural broadband providers have supported the Commission's exercise of Title II authori-

[22] One analyst recently found that 75% of broadband customers are served by just six carriers. Indeed, 94% of that market is served by the 17 largest carriers, the smallest of which serves over 250,000 customers. *See* Leichtman Research Group, Inc., *Research Notes*, at 4, 7 (1st Qtr. 2015), available at goo.gl/Ev3dtW.

[23] For example, petitioners claim that Title II reclassification and the general conduct standard will stifle investment and cite to declarations from very small entities. The *Order* noted that "major infrastructure providers have indicated that they will in fact continue to invest under the framework" despite new regulation. *Order* ¶416 (quoting Verizon executive: "this does not influence the way we invest").

ty. *Order* ¶425 (quoting comments of NTCA—The Rural Broadband Association). To the extent small carriers could demonstrate any differential effect from the *Order*, they may seek a waiver from the Commission, which can and does grant waivers where a small entity cannot bear a burden appropriate to larger entities. *See Order* ¶530 (citing waiver possibility for Title II obligations); *see, e.g.*, *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 17 FCC Rcd 14841 (2002) (extending compliance deadline for smaller providers only).

4. Compliance with law and the possibility of future litigation costs are not injuries—Many of petitioners' asserted injuries amount to compliance costs—the costs of understanding and complying with regulations, such as hiring lawyers. Mot. 26-27 (compliance with Title II and general conduct rule); Mot. 30 (compliance with privacy protections); Mot. 33 (pole attachment notification). Without more specific proof of significant damage, such costs do not constitute irreparable injury. "Any time a corporation complies with a government regulation that requires corporation action, it spends money and loses profits; yet it could hardly be contended that proof of such an injury, alone, would satisfy the requisite for a preliminary injunction." *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 527 (3d Cir. 1976); *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005); *American Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980).[24] Otherwise, any new-

[24] The cases relied on by petitioners (Mot. 27 n.27) have nothing to do with compliance costs. *Sottera, Inc. v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010) (injury where rule would bar importation of petitioner's products); *Brendsel v. OFHEO*, 339 F. Supp. 2d 52, 66 (D.D.C. 2004) (injury where stock options could expire).

ly regulated entity could always make a showing of irreparable harm.

Even if compliance costs could constitute irreparable injury, almost none of the declarants attempt to quantify their alleged new compliance costs or demonstrate that they are "serious in terms of [their] effect." *Hi-Tech Pharmacal*, 587 F. Supp. 2d at 11; *see Am. Meat Inst. v. USDA*, 968 F. Supp. 2d 38, 78-79 (D.D.C. 2013) (finding that petitioners had not shown imminent injury even though "declarants speak earnestly about what they truly 'expect' to happen in the marketplace").[25]

Moreover, the declarants cannot plausibly claim to be unfamiliar with regulatory compliance generally. Many declarants, including smaller companies such as Bluegrass Cellular and Silver Star Communications, provide phone service and so are *already regulated under Title II*. *See* Smith Decl. ¶1 (Mot. Ex. 4); McCue Decl. ¶1 (Mot. Ex. 8). Many other declarants are cable companies also regulated by the FCC, albeit under a different statutory title.

Petitioners also frequently rely on a fear of litigation arising out of the *Order*. Mot. 26 (litigation from section 201 and 202); Mot. 31 (administrative interconnection complaints); Mot. 33 (pole attachment litigation); Mot. 34 (state tax disputes). Such fears are inherently speculative, but in any case, "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable

[25] One of the few providers that does provide a numerical estimate asserts that "compliance costs" will constitute over 10% of its operating budget, but provides no context or explanation. Stooke Decl. ¶¶4-7 (Mot. Ex. 1). It is unclear, for example, whether this estimate includes litigation over whether its current practices comply with the rules, which the declarant anticipates without support. *Id.* ¶6.

injury." *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (quoting *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974)); *see also Morgan Drexen, Inc. v. CFPB*, 2015 WL 1947469, at *10 n.3 (D.C. Cir. May 1, 2015) (litigation costs "cannot constitute irreparable injury").

5. Petitioners ignore alternative sources of relief and intervening factors—Petitioners' allegations of imminent harm omit intervening steps that would need to occur: *e.g.*, the Commission must bring an enforcement action; a party must file a class action lawsuit; a state must attempt to impose taxes; or a utility must attempt to raise pole attachment rates. Petitioners also ignore existing procedural protections and other remedies that could forestall such harms. Any enforcement proceeding in court or before the Commission, for example, would be subject to judicial review (and might itself be stayed pending that proceeding). *See* 47 C.F.R. § 1.43 (administrative stays). Broadband providers may also apply to the Commission for waiver, which may be appropriate for a small entity that requires an exception from a general rule. *See* pp. 24-25 *supra*.

B. Each alleged harm is speculative or insubstantial.

Petitioners' specific claims of injury are also unavailing.

1. Title II and the general conduct standard—Although petitioners allege they must now review their service offerings for compliance with Title II's "just" and "reasonable" requirements to forestall an enforcement action by the FCC or a class action lawsuit (Mot. 26), they introduce no evidence that an enforcement action or lawsuit is "imminent." To the contrary, petitioners are confident that their "existing rates and practices are not unjust or unreasonable." Mot. 26. They point

to no evidence that the FCC disagrees, nor do they describe a feasible basis for a successful class action. Nor do the very small declarants substantiate their apparent belief that they might be defendants in any class action litigation. Petitioners also fail to estimate the specific cost should such an action occur and result in actual injury—much less demonstrate that the cost is "great." Again, the FCC has applied a very similar regulatory approach—a just and reasonable requirement without tariffs or price setting—to wireless phone service for over a decade, and petitioners can point to no evidence that an avalanche of lawsuits or enforcement actions has irreparably harmed that market.

2. Privacy—The Commission found that it would not be in the public interest to forbear from section 222 of the Act, which requires carriers to protect the confidentiality of their customers' private information and restricts carriers' use and disclosure of that information. 47 U.S.C. § 222; *Order* ¶463. But the agency *did* forbear from applying the existing FCC regulations that implement section 222, because those regulations were developed to target harms specific to phone service, *id.* ¶467, "pending the adoption of rules to govern broadband Internet access service in a separate rulemaking proceeding." *Id.* ¶462. This is a help to petitioners, not a harm.

Petitioners' claim that they are nonetheless irreparably harmed by application of section 222 is highly speculative. As they concede, the *Order* did not find that providers' existing practices are inadequate, and petitioners contend only that they "may" need to change some practices. Mot. 29-30 (AT&T's estimated loss of $400 million would apply "if" AT&T ceased existing marketing programs); AT&T

Decl. ¶¶21-27 (Mot. Ex. 9) (predicting this loss under one of three "options" for conduct). Only AT&T even estimates its *potential* loss, and because it provides no explanation for how it derived this estimate, it is not possible to evaluate whether it is reasonable. For example, the declaration concedes the estimate does not account for substitute marketing methods. *Id.* ¶24. Nor does AT&T attempt to show that, even if correct, this loss is "great"—indeed, it would account for roughly 0.3% of the company's annual revenue. *See* AT&T 2014 Annual Report at 11, *available at* http://goo.gl/RGbA54 (revenue of $132.4 billion in 2014); *see also Coal. for Common Sense in Gov't Procurement v. United States*, 576 F. Supp. 2d 162, 169-70 (D.D.C. 2008) (alleged loss of 1.5% of company's annual revenue insufficient).

Petitioners' only specific concern regarding section 222 is "uncertainty" as to whether they must cease using a customer's private information for marketing without the customer's consent. Mot. 29-30. But the FCC's Enforcement Bureau recently announced it intends to target only bad faith, unreasonable behavior pending the promulgation of section 222 rules or similar guidance. *See* Public Notice, *Enforcement Bureau Guidance: Broadband Providers Should Take Reasonable, Good Faith Steps To Protect Consumer Privacy*, DA 15-603 (rel. May 20, 2015). The Bureau also reminded entities they can come to the FCC for clarification on whether a particular practice is permissible through an advisory opinion process as well as by seeking informal guidance. *Id.*; *see Order* ¶¶229-39.[26]

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[26] Any concern about class action litigation under section 222 is equally speculative. *See Conboy v. AT&T Corp.*, 241 F.3d 242, 250-51 (2d Cir. 2001) (finding no injury for customer privacy violation in part because plaintiff "must allege and prove specific damages flowing from violations of the Act").

AT&T also contends that, if it asks consumers for their consent to these marketing programs and the *Order* is later overturned, it will not then be able "to put the genie back in the bottle" because customers will still expect AT&T to honor their requests about the use of private information. AT&T Decl. ¶27. That only highlights the magnitude of the public interest at stake for consumers' privacy.

3. Interconnection—Petitioners allege that the *Order*'s light-touch regulatory framework for interconnection has imbalanced their interconnection negotiations, but this claim does not withstand scrutiny. *See* pp. 7-8 *supra* (describing interconnection framework). As petitioners concede, their interconnection partners "have long been seeking better deals." Mot. 32. Indeed, these interconnection disputes, which often result in degraded service for customers, were at a fever pitch when the Commission opened this proceeding. *Order* ¶¶199-201 & n.499 (citing reports of prior Internet traffic exchange disputes, some lasting over a year, that harmed consumers). Petitioners claim that the *Order* gives exchange partners unfair negotiating leverage, but the declarations offered in support do not bear this out. CenturyLink, for example, claims that a traffic exchange partner is threatening to bring a complaint before the Commission unless CenturyLink agrees to a "settlement-free" (*i.e.*, no-cost) peering arrangement, apparently premised on the partner's belief "that the FCC will implement the Order … as requiring ISPs to accede to their demands." Poll Decl. ¶10 (Mot. Ex. 10). But the FCC gave no such indication in the *Order*, and indeed specifically declined "to draw policy conclusions concerning new paid Internet traffic exchange arrangements," *Order* ¶¶199, 202. Moreover, interconnection agreements continue to be made. *See, e.g.*, News Re-

lease, *Level 3 and AT&T Enter Into Interconnection Agreement* (May 11, 2015), http://goo.gl/IdQCCX; Verizon Policy Blog, *Cogent and Verizon Enter Into Interconnection Agreement* (May 1, 2015), http://goo.gl/lRI02c.

Iowa Utilities Board v. FCC, 109 F.3d 418 (8th Cir. 1996), relied on by petitioners, actually undermines their position. There, the court found that a "proxy rate" set by the Commission acted as a price ceiling, thus hampering private rate negotiations. *Id.* at 425. In this case, by contrast, the Commission explicitly declined to adopt a bright line rule and thus provided no target on which private negotiations will anchor. A threat based on what one negotiating partner believes cannot imbalance negotiations sufficiently to create imminent and great injury.

4. Pole attachment fees—Section 224 of the Act gives the Commission authority to regulate the rates and terms by which cable and telecommunications companies may access utilities' poles, conduits, and rights of way. 47 U.S.C. § 224. In the *Order*, the Commission declined to forbear from section 224 in order to ensure access and fair rates for broadband providers that would not otherwise have access under Title II—*i.e.*, those that do not also offer phone or cable service —providing additional incentive for competitors to enter the fixed broadband market and challenge incumbents. *Order* ¶478. This serves the public interest by lowering a barrier to entry. *Id.* The cable petitioners allege that this reclassification causes them irreparable harm, but that assertion has no merit.

First, they allege harm because they must notify utilities that they are now telecommunications carriers. Mot. 33. They make no effort to estimate the cost of notification, however, much less attempt to show that it is "great" in comparison to

the size of the companies. *See, e.g.*, Bauer Decl. ¶30 (Mot. Ex. 13) (small provider has attachment agreements with two utilities); Longware Decl. ¶25 (Mot. Ex. 18) (agreements with three utilities); Morris Decl. ¶22 (Mot. Ex. 19) (NCTA's largest member has over 700 agreements, without estimate of cost of notification).

Second, they allege that utilities will rely on reclassification to charge a "telecommunication" attachment rate, which may in some instances be higher than the rate paid by cable companies. Mot. 33. The Commission has already adopted attachment rates for telecommunications carriers "designed to be substantially equivalent to its already adopted cable rates," which this Court has upheld. *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183, 188 (D.C. Cir. 2013). Cable companies have since expressed concern that, despite these actions, the cable and telecommunications rates may not be equal in all instances. *Order* ¶483. But the Commission has recognized and is addressing this concern.[27]

In fact, petitioners deny that utilities would actually be entitled to a higher rate. Mot. 33. They also omit that a utility must provide 60 days' notice before increasing a rate, during which time the provider may seek a stay of the increase from the Commission. *See* 47 C.F.R. § 1.1403(c)-(d). And petitioners do not esti-

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[27] The Commission recently sought comment to refresh the record in a pending rulemaking to address this potential disparity. *See* Public Notice, *Parties Asked To Refresh Record Regarding Petition To Reconsider Cost Allocators Used To Calculate The Telecom Rate For Pole Attachments*, DA 15-542 (rel. May 6, 2015). In the meantime, the *Order* made clear that "it is not the Commission's intent to see any increase in the rates for pole attachments paid by cable operators that also provide broadband Internet access service, and we caution utilities against relying on this decision to that end." *Order* ¶482. The Commission "will promptly take further action in that regard if warranted." *Id.* ¶483.

mate the cost if rates were raised—an increase that would only apply in those instances where the cable and telecommunications rate may differ, and then only until the agency has reduced any disparity.

5. State taxes and fees—Finally, the cable companies' allegation that they are now exposed to new state taxes and fees (Mot. 33-34) is likewise vague and speculative. Federal law forbids most state taxes on "internet access." *See* Internet Tax Freedom Act § 1105(a), 47 U.S.C. § 151 note. Although petitioners suggest that they may still be exposed under certain exceptions to the law, such as for property taxes, they concede that "there will be strong arguments that these taxes and fees are preempted." Mot. 34. The imposition of such taxes hinges on independent determinations under state law. Once again, petitioners are left only with the costs of fighting such taxes (if they are actually imposed), which they do not even attempt to estimate, and which cannot constitute irreparable injury in any case.

III. A Stay Would Harm Other Parties And The Public Interest.

Petitioners' claim that a stay would cause "no harm to the public interest" (Mot. 10) is not credible. This Court already held that the potential harm is real. *Verizon*, 740 F.3d at 645-49. Citing record evidence, "common sense" and "economic reality," the Court upheld the FCC's "industry-wide" findings that broadband providers have "powerful incentives" and "the technical and economic ability" to discriminate against certain edge providers (particularly those that compete with them in video and voice services). *Id.* at 645-46, 649.

Petitioners claim that their requested stay "would leave in place the three

'bright line' rules prohibiting blocking, throttling, and paid prioritization." Mot. 10. But make no mistake: If petitioners obtain a stay of the FCC's decision to reclassify broadband, then, per *Verizon*, those bright line rules will be temporarily gone. *See* p. 1 *supra*.

Moreover, a stay of the *Order*'s general conduct rule and the just and reasonable standard for interconnection practices would harm consumer and edge providers, as well as the public interest in preserving an open Internet, because it would allow the bright-line rules to be easily circumvented. *Order* ¶135. For example, a cable company barred from favoring its affiliated video service through paid prioritization might accomplish the same outcome by exempting it from a broadband data cap. *See id.* n.10.[28]

More generally, as the intervenors demonstrate in their opposition to the stay motion, any stay would harm edge providers and consumers. First, the absence of open Internet rules and standards would chill the "edge economy"[29]—the tremendous innovation that has come from web-based services and, more recently,

[28] This hypothetical does not necessarily violate the general conduct or just and reasonable standards; it simply illustrates questions that could be raised under those standards. The Commission will assess particular practices case by case.

[29] *See Order* ¶¶137, 140; Comments of Tumblr, Inc., Sept. 9, 2014, at 8 (without rules banning discrimination and paid prioritization, broadband providers with their own video services would likely "provide priority access to their own content" and "raise prices for the same access by competing services, thereby harming smaller" edge providers); Letter from Althea Erickson, Etsy, to Marlene Dortch, FCC, May 8, 2014, at 2-3 (without a ban on paid prioritization, Etsy's "business would be threatened" because it "could likely never afford an exclusive deal for ecommerce sites" and would be relegated to a "slow lane" for Internet traffic).

through the creation of "apps" that use the Internet to "drive the development of the initial innovation and ultimately the growth of the economy as a whole." *Verizon*, 740 F.3d at 644. Restrictions on "edge providers' ability to reach end users … reduce the rate of innovation." *Id.* at 645 (internal quotation marks omitted). Such edge innovation is much more fragile than the expansion plans of major broadband providers.

Any stay would also harm consumers, leaving unprotected their ability to access Internet content, applications, and services of their choosing without broadband provider interference. The resulting threat to Internet openness would seriously impair the ability of Americans to use the Internet "to conduct commerce, communicate, educate, entertain, and engage in the world around them." *Order* ¶1. Petitioners have offered no good reason to jeopardize the free flow of commerce and speech over the Internet.

The open Internet is, after all, a powerful engine of economic growth. The record here corroborates its tremendous economic value. Investment and innovation flourished while the previous open Internet rules were in effect. *Id.* ¶76. "For example, according to US Telecom, broadband providers invested $212 billion in the three years following adoption of the rules—from 2011 to 2013—more than in any three year period since 2002." *Id.* ¶2.

For these reasons, the balance of equities weighs heavily against a stay.

CONCLUSION

The Court should deny the stay but should expedite consideration of the case.

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May 22, 2015

No. 15-1063

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES TELECOM ASSOCIATION,
Petitioner,

v.

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

CERTIFICATE OF SERVICE

I, James M. Carr, hereby certify that on May 22, 2015, I electronically filed the foregoing Opposition of Respondents to Motion For Stay and Response to Motion for Expedition with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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