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)

OPPOSITION OF INTERVENORS TO PETITIONERS' MOTION FOR STAY

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Cable Modem Order	In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd. 4798 (2003)
Brand X	*National Cable & Telecommunications Association, et al. v. Brand X Internet Services, Inc., et al.*, 545 U.S. 967 (2005)
Comcast	*Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010)
Communications Act	Communications Act of 1934, Pub. L. No. 73–416, 48 Stat. 1064
FCC	Federal Communications Commission
Internet Tax Freedom Act	Permanent Internet Tax Freedom Act, H.R. 3086, 113th Cong. (2014)
ISP	Internet Service Provider
Motion	Joint 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 Interent Service Providers Association, *United States Telecom Association v. FCC*, No 15-1063 (D.C. Cir. May 13, 2015)
Notice of Inquiry	Framework for Broadband Internet Service, *Notice of Inquiry*, 25 FCC Rcd. 7866 (2010)
Notice of Proposed Rulemaking	Protecting and Promoting the Open Internet, *Notice of Proposed Rulemaking*, 29 FCC Rcd. 5561 (2014)

Order	Protecting and Promoting the Open Internet, *Report and Order on Remand, Delaratory Ruling, and Order*, GN Docket No. 14-28, FCC 15-24, 80 Fed. Reg. 19,738 (rel. Mar. 12, 2015; pub. Apr. 13, 2015)
2010 Open Internet Rules	Preserving the Open Internet; Broadband Industry Practices, *Report and Order*, 25 FCC Rcd. 17905 (2010)
Verizon	*Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014)
Virginia Petroleum Jobbers	*Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921 (D.C. Cir. 1958)
VoIP	Voice-over-Internet-Protocol
Wireline Broadband Order	Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd. 14853 (2005)

I. INTRODUCTION

In the *Order*, the FCC used the authority confirmed by the Supreme Court in *Brand X* and by this Court in *Verizon* to achieve an important goal. It classified broadband Internet access services as a telecommunications service and adopted rules that safeguard the public's ability to use the Internet—the indispensable communications medium of the modern era—without interference from Petitioners.

Intervenors, a diverse group of public interest organizations and private sector entities, come from all realms of the Internet economy—online video and VoIP telephone providers, competitive ISPs, Internet backbone operators, venture capitalists, and advocates for privacy, accessibility, consumers, and social justice. Their harms from a stay would dwarf the speculative injury Petitioners claim, none of which is irreparable and little, if any, of which qualifies as injury at all.

No Irreparable Injury from Rules. Petitioners delayed for nearly two months before seeking redress for their claimed injuries, creating an artificial emergency for this Court. Their litigation-driven rhetoric is belied by what many of their members have represented to the capital markets: "On Title II, it really hasn't affected the way we have been doing our business or will do our business." Comcast Corp., Q1 2015 Earnings Call Transcript at 16 (May 4, 2015). For their part, the capital markets have agreed with that business-as-usual assessment, as

Intervenors' expert economist, William Zarakas, testifies. Intervenors also submit evidence from a number of competitive ISPs such as ComSpan, DISH, Fatbeam, Google Fiber, and Sonic, showing that the incentive of ISPs to invest will not be chilled by the *Order* and may in fact be bolstered by it.

Petitioners suggest that they will be injured by the alleged vagueness of the new open Internet standards, even though many of them had advocated "case-by-case" adjudication without any bright-line rules at all. If the need to hire a lawyer for advice on a new rule were irreparable injury, all new agency rules would be stayed.[1] Petitioners claim they will not be able to charge for interconnection, even though the industry standard before the *Order* was no-charge, settlement-free peering. They say their marketing practices will be constrained by statutory requirements to protect their customers' privacy, despite evidence that strong privacy protections spur broadband adoption and therefore would appear to be a broadband marketer's ally, not her enemy.

Petitioners primarily offer protestations of injury by small ISPs. But a total of 14 ISPs provide broadband access to 80 percent of U.S. broadband households. *See* FCC, 2014 Measuring Broadband America Fixed Broadband Report at 5

[1] Nor does the cost of compliance or the risk of litigation qualify as irreparable injury. *See A.O. Smith Corp. v. FTC*, 530 F.2d 515, 527 (3d Cir. 1976); *FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232, 244 (1980).

(2014). Few of those 14 supply any evidence of harm here. Petitioners appear to be presenting a front of small ISPs to divert the Court's gaze from the shrug with which the majority of the industry has greeted the *Order* below.

Injury from Stay. On the other side of the ledger, a diverse group of 16 declarants detail the harm that would result from a stay, much of it based on Intervenors' recent or current experience. These real harms stand in contrast to the hypothetical future evils postulated by Petitioners. Many Intervenors depend on the pipes controlled by Petitioners for their customers to access Intervenors' services, even as they compete with Petitioners themselves in the provision of those services. This should come as no surprise to this Court, which previously found that gatekeeper ISPs have the incentive and ability to favor their services while disadvantaging "over-the-top" competitors. *See Verizon*, 740 F.3d 623, 645-46 (D.C. Cir. 2014).

A stay would allow ISPs with this gatekeeper power to continue harming consumers and edge providers through service degradation. The notorious episodes of the degradation of Netflix's service by a number of ISPs are illustrative. And some of the harm is not only recent; it is unfolding in real time: Cogent explains how ISP refusals to augment interconnection capacity cause congestion and hamper uses of the Internet such as teleworking applications today.

In a tactical maneuver, Petitioners say they do not request a stay of the three bright-line rules (no blocking, no throttling, and no paid prioritization); rather, they request a stay "only" of the general conduct requirements and Title II rules—including the prohibitions on undue interference and unreasonable discrimination.

As Intervenors' declarants testify, however, in the absence of the general conduct standards, ISPs would have virtual *carte blanche* to circumvent the bright-line prohibitions through techniques such as degrading their connections to the Internet to impede the flow of Internet content, and using discriminatory data caps to favor an ISP's affiliated services over those of rivals.

No Substantial Likelihood of Success. Intervenors refer the Court to the FCC's discussion of the merits, but they are particularly mystified by Petitioners' argument that they lacked sufficient notice of the FCC's Title II reclassification under the Administrative Procedure Act. The FCC's belt-and-suspenders approach—a *Notice of Inquiry* as well as a *Notice of Proposed Rulemaking*—was so successful in publicizing the possibility of Title II that it attracted nearly four million comments (including substantial comments from Petitioners) and became fodder for cartoons and talk shows, leaving a claim of ignorance open perhaps to hermits, but not to Petitioners.

II. PETITIONERS DO NOT SHOW IRREPARABLE INJURY

A. Petitioners' Conduct and the Markets Contradict the Alleged Harms

Petitioners' claims of irreparable injury are belied, first of all, by their insouciant languor. Petitioners waited almost two months from the release of the *Order* to ask the FCC for a stay, leaving the agency and this Court with only one month to evaluate the stay request before the rules become effective on June 12, 2015. Courts look askance when a party claiming imminent injury takes its time in trying to avert it. *See Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975); *Newdow v. Bush*, 355 F.Supp. 2d 265, 292 (D.D.C. 2005) ("[U]nexcused delay in seeking extraordinary injunctive relief may be grounds for denial because such delay implies a lack of urgency and irreparable harm.").

Petitioners' claims are also belied by public statements of their own members. Here is Comcast Cable CEO Neil Smit: "[o]n Title II, it really hasn't affected the way we have been doing our business or will do our business." Comcast Corp., Q1 2015 Earnings Call Transcript at 14 (May 4, 2015). And Cablevision CEO James Dolan: "to be honest, we don't see at least what the [FCC] Chairman has been discussing as having any real effect on our business." *See* Shalini Ramachandran & Michael Calia, *Cablevision CEO Plays Down Business Effect of FCC Proposal*, WALL STREET JOURNAL, Feb. 25, 2015.

That view is confirmed by other ISPs. Sprint's Chief Technology Officer considers those alleging significant harm from the rules to be "representing a situation that won't play out." Malathi Nayak, *Sprint Says U.S. Telecoms Will Invest Despite Stronger Net Neutrality*, REUTERS, Feb. 11, 2015. The markets, too, seem to have shrugged off any adverse effect of the rules on the ISP industry. *See* Zarakas Decl. ¶¶ 5, 9-10.

B. The Rules Are Likely to Bolster, Not Chill, Infrastructure Investment

Petitioners assert that complying with the new rules will result in "diminished investment," citing testimony from only three small, rural ISPs able to show specific examples. Motion at 28; Wisper ISP Decl. ¶ 14; KWISP Internet Decl. ¶ 13; Aristotle Inc. ¶ 13. This bleak view is not shared by all Petitioners: none of the other declarations provides concrete allegations of decreased investment incentives. In fact, AT&T and Time Warner Cable seem to be actively pursuing significant network upgrades, even in the face of this purported regulatory uncertainty.[2]

[2] Press Release, AT&T, AT&T Eyes 100 U.S. Cities and Municipalities for its Ultra-Fast Fiber Network (Apr. 21, 2014); James Aldridge, *Time Warner Cable Deployed $1 Billion in Capital on Digital TV, Faster Internet*, SAN ANTONIO BUSINESS JOURNAL, Apr. 30, 2015. Nor has the *Order* dampened enthusiasm for acquisitions of broadband ISPs. *See, e.g.*, Liana B. Baker, *Altice Eyes U.S. with TWC, Suddenlink Buys*, REUTERS, May 19, 2015.

In any event, Intervenors submit evidence that the claimed harm to broadband investment is unlikely to materialize. The FCC's reclassification of broadband access under Title II will not chill DISH Network's willingness to continue investing in broadband access networks. DISH Decl. ¶ 6. Similarly, ComSpan, a small ISP in rural Oregon, does "not view the FCC's new rules as creating any new substantial burdens for [it]," but rather believes "that the rules will . . . help promote competition among [ISPs]." ComSpan Decl. ¶¶ 5, 10. ISP Fatbeam "intends to continue to expand its networks, deploy fiber and provide smaller third and fourth tier markets with competitive fiber optic broadband options." Fatbeam Decl. ¶ 6. In the words of ISP Sonic CEO Dane Jasper: "[w]ith the new rules in place, Sonic intends to continue to expand its network footprint." Sonic Decl. ¶ 9. And Brad Burnham testifies that a stay would make his venture capital firm, Union Square Ventures, "reluctant to invest in web companies that rely heavily on ISPs to carry traffic to and from customers." Union Square Ventures Decl. ¶ 13; *see also* Vonage Decl. ¶ 23.

C. Petitioners Claim to Be Hurt by Vague Standards Even Though Many Had Previously Asked for No Bright-Line Rules at All

Petitioners claim to be irreparably harmed by the "sweeping yet indeterminate 'Internet conduct standard,'" Motion at 26, and would prefer a Napoleonic Code of precise, granular prohibitions, with no "catch-all." Previously, however, many Petitioners and their members had emphatically requested the

opposite—case-by-case adjudication with no bright-line rules. ACA supported an assessment on a "case-by-case basis rather than adherence to . . . 'one-size-fits-all' prescriptions"; AT&T supported a "'commercial reasonableness' requirement"; CenturyLink supported "a rigorous *ex post* process," as "opposed to overly prescriptive rules"; NCTA supported a "multi-factor, case-by-case standard"; TWC opposed a "prescriptive technical standard which will quickly become outdated," and supported a "case-by-case review . . . in contrast to the categorical ban"; and Verizon opposed a "prescriptive approach."[3] All of these approaches would have relied on case-by-case adjudication to a greater extent than the *Order* below, because they would not have been aided by any bright-line rules, suggesting that Petitioners have seized on vagueness as a pretext.

Moreover, as the *Order* notes, the carefully tailored general conduct standards are designed to account for the fact that the bright-line rules are in fact narrower than the 2010 rules, which included a broad prohibition against discrimination based on a four-factor test. *Order* ¶ 138.

[3] ACA, Comments, GN Docket No. 14-28, at 27-28 (July 17, 2014); Letter from Henry Hultquist, AT&T, to Marlene Dortch , GN Docket No. 14-28, at 4 (Oct. 24, 2014); CenturyLink, Comments, GN Docket No. 14-28, at 36 (July 17, 2014); NCTA, Reply Comments, GN Docket Nos. 14-28, 10-127, at 24-25 (Sept. 15, 2014); Time Warner Cable, Inc., Reply Comments, GN Docket No. 14-28, at 5, 15 (Sept. 15, 2014) (citations omitted); Verizon, Comments, GN Docket Nos. 10-127, 14-28, at 18 (July 15, 2014).

D. Petitioners' Other Claimed Injuries Are Hypothetical or Nonexistent

Privacy. Many Petitioners complain that the need to respect their customers' privacy will constrain their marketing efforts and harm sales. Motion at 29-30. These complaints, most of which are hedged by the telltale "[t]o the extent that" qualifier, *see, e.g.*, WinDBreak Decl. ¶¶ 7-8, 14, 19; Bagley Util. Decl. ¶¶ 7-8, 14, do not establish irreparable harm.

First, it would appear that greater respect for privacy is a potential asset, not a liability, for an ISP's marketing team: increased privacy protections have the potential to "overcome some obstacles that consumers face in the adoption and use of broadband." PRC Decl. ¶ 7.

Second, Petitioners try to manufacture an injury out of a gift. They complain that the privacy requirements are vague because the FCC forbore from applying the full set of its detailed rules applicable to voice telephony in favor of a more streamlined treatment—relief in which Petitioners, once more, see injurious vagueness. In fact, the Public Notice issued this past Wednesday by the FCC specifies that, should ISPs have questions, they need only ask. *See* FCC, Public Notice, Enforcement Advisory No. 2015-03, DA 15-603 (May 20, 2015).

Third, Petitioners must abide by at least comparable—if not more stringent—privacy requirements today. ISPs' telephone or cable businesses must comply with FCC privacy protections. And all of the declarants' broadband

Internet access offerings are currently subject to the FTC's broad Section 5 jurisdiction. 15 U.S.C. § 45. Petitioners cannot fairly claim irreparable injury as a result of transitioning from the jurisdiction of one regulator to another. AT&T, for its part, prefers to find itself in a regulatory no-fly zone: it is asking another Court of Appeals to dismiss an FTC action regarding broadband access on the ground that the FTC is preempted by the FCC's oversight while also asking this Court to exempt it from the FCC oversight after all. *See FTC v. AT&T Mobility LLC*, No. C-14-4785 (N.D. Cal. May 15, 2015) (order granting AT&T's motion to certify to the Ninth Circuit the question of whether the FCC's *Order* stripped the FTC of jurisdiction over AT&T's mobile broadband services).

State Burdens and Pole Attachments. Petitioners raise the specter of additional state taxes and fees or new franchise requirements as a result of reclassification. But no Petitioner shows that such burdens depend on the FCC's determination, as opposed to state or local law. In any event, the Internet Tax Freedom Act prohibits states and localities from imposing taxes on Internet access; on that basis, the *Order* specifically prohibits the imposition of new state taxes and fees as a result of reclassification.

Petitioners look a gift horse in the mouth once again in their claims regarding pole attachments. The FCC's *Order* makes it easier for ISPs to obtain access to the utility poles at issue—providing a significant, new benefit to ISPs.

Google Decl. ¶ 7. Petitioners merely speculate that increased pole attachment fees are contractually possible, but they provide no contracts and no evidence that such increases will actually occur, let alone that they would be unable to recoup those costs in the unlikely event they succeed on the merits here.

Interconnection. Petitioners make only one claim of current, as opposed to potential future, harm. They maintain that the FCC's oversight of an ISP's connection to the Internet—which was not addressed by the *2010 Open Internet Rules*—has resulted in demands for significant changes to so-called interconnection agreements.

Here is the reality: 99% of ISPs have not, and do not, seek to charge Internet companies when those companies deliver content requested by the ISPs' own subscribers.[4] Only a handful, the especially dominant ones that cover a large portion of the nation's population, have recently embarked on an effort to extract payment for access to their networks to deliver content requested by their own customers. Cogent Decl. ¶¶ 10-11; Level 3 Decl. ¶ 12; Vimeo Decl. ¶ 12. That small minority of dominant ISPs could eliminate the possibility of FCC review of their interconnection practices simply by adhering to the historical norm of

[4] *See, e.g.*, Netflix, Inc., Amended Petition to Deny, MB Docket No. 14-57, at 49 (Aug. 27, 2015); Declaration of Kevin McElearney, MB Docket No. 14-57, ¶ 3 (Sept. 19, 2014) (Exhibit 4 to Comcast Corp., Opposition to Petitions to Deny and Response to Comments, MB Docket No. 14-57 (Sept. 23, 2014)).

maintaining sufficient interconnection capacity and allowing customers to access the content for which they have already paid. Cogent Decl. ¶ 18. And so, when Petitioners complain they are asked to agree to interconnection without payment, their real grievance is that they do not want to maintain the historical status quo of no-charge interconnection. Level 3 Decl. ¶¶ 6, 12.

When a consumer attempts to access an Internet video, for example, a small message travels from her home over an ISP's network to the point at which the ISP connects to the Internet. Cogent Decl. ¶ 5; Netflix Decl. ¶ 6; Vimeo Decl. ¶¶ 8-9. From there, the request can travel over countless routes to an OVD such as Hulu. The OVD responds by sending the video over the Internet using any number of the competitive Internet transit providers or CDNs to the ISP's doorstep. Cogent Decl. ¶ 14; Netflix Decl. ¶ 8. It is at this doorstep that the competitive ecosystem of the Internet terminates, Cogent Decl. ¶ 14; Level 3 Decl. ¶ 10, Netflix Decl. ¶¶ 9-10, and the ISP has total control over whether it will open its door to allow the video to travel the "last mile" to its customer. Level 3 Decl. ¶¶ 10-11; Netflix Decl. ¶¶ 9-10.[5]

[5] Nor does the FCC's oversight of interconnection extend to the vast and complex web that represents the Internet backbone, as CenturyLink implies. CenturyLink Decl. ¶¶ 10-13. Rather, it extends only to the ISP's doorstep. Netflix Decl. ¶ 11, Figure 1.

Moreover, Petitioners' claim that the possibility of a *future* dispute at the FCC already is resulting in irreparable harm fails because every ISP has adequate defense measures at its disposal: for example, it can seek a declaratory ruling from the FCC or a stay of an FCC action based on those particular and definite circumstances and in an as-applied challenge to the FCC's authority. Even if no stay is obtained, the ISP can easily reverse any previously required system upgrades if it ultimately prevails on the merits. The only risk of harm in such a case is that the ISP's customers might have become accustomed to receiving better service for a period of time. Cogent Decl. ¶ 16.

III. GRANTING A STAY WOULD RESULT IN SUBSTANTIAL HARM TO OTHER PARTIES

Petitioners give short shrift to the idea that anyone else would be harmed by grant of a stay, stating that a stay would not harm third parties or the public because it would preserve a regulatory regime that has "greatly benefited consumers." Motion at 34-35. Not so.

Degradation of Consumers' and Businesses' Internet Access. Consumers and businesses today are being harmed by ISPs that continue to degrade their points of interconnection. Cogent Decl. ¶¶ 11-12; Level 3 Decl. ¶ 13. This behavior threatens the very fabric of the Internet—which works precisely because it allows consumers and businesses to have unfettered access to "all or

substantially all Internet endpoints," *Order* ¶ 25, and is at odds with the ISPs' promise to consumers of high-speed access to the Internet.

This harm is tangible and continues today. The graph from the attached declaration of Cogent CEO Dave Schaeffer demonstrates that Time Warner Cable's facilities in Dallas, Texas are congested to the point where a consumer's ability to access content is degraded for substantial portions of the day. Cogent Decl. ¶¶ 8-9. This harms consumers, who cannot access content using bandwidth for which they have paid, and also harms the Internet companies originating and delivering the content to the consumer. *Id.* ¶¶ 11-12.

The best-documented examples of such harm involve online video. Many ISPs have the incentive to harm distributors of online video content, which threaten the ISPs' video distribution businesses. *Order* ¶ 20; *see also* Vonage Decl. ¶ 21. Although the online video industry is nascent, traffic from existing online distributors represents over 50 percent of all Internet traffic requested by the ISPs' customers. *Id.* ¶ 197 n.490. It is not surprising, therefore, that the FCC concluded that "anticompetitive and discriminatory practices in this portion of broadband Internet access service can have a deleterious effect on the open Internet." *Id.* ¶ 195. Declarations from DISH Network, Netflix, and Vimeo demonstrate that the threat of disruption continues to loom over the heads of all OVDs—both big and small. DISH Decl. ¶ 13; Netflix Decl. ¶¶ 18-19; Vimeo Decl. ¶¶ 12-13. In essence,

Petitioners ask the Court to eliminate the FCC's ability to protect against harms to half of all traffic that their broadband subscribers request and for which they pay.

The harm from degradation of Internet connectivity extends well beyond the consumption of online video, and threatens all edge providers. *See* Etsy Decl. ¶ 8. For example, companies increasingly use the Internet to give their employees the ability to work remotely. If a company uses an Internet transit provider such as Cogent to allow employees to connect through an ISP that is degrading its connectivity, the remote-work application will not function. Cogent Decl. ¶ 12. This concern is not speculative. Devan Dewey, Chief Technology Officer for NEPC, LLC, states that over the course of two months, his employees in the Boston area were often unable to telework because of degradation caused by Verizon and Comcast—the dominant ISPs for the Boston-area employees. NEPC Decl. ¶¶ 6-7, 9-11.

Similarly, a Measurement Lab ("M-Lab")[6] study concluded that customers of five of the largest ISPs—AT&T, CenturyLink, Comcast, Time Warner Cable, and Verizon—experienced sustained performance degradation when the

[6] M-Lab provides the world's largest collection of open Internet performance data, and its datasets have been used by a number of parties, including in the proceedings below, to evaluate interconnection performance. M-Lab Decl. ¶ 2.

customers' communications passed through interconnection points with Cogent, Level 3, and XO. *See* M-Lab Decl. ¶ 3.

Although the ISPs' degradation strategies harm their own customers, the lack of meaningful broadband competition, high switching costs, and opaqueness as to the degradation's cause, largely immunizes them from the possibility that their customers will terminate service or switch providers.[7] Cogent Decl. ¶ 14; Level 3 Decl. ¶¶ 13-14. Since Petitioners have failed to show irreparable harm, the stay analysis should be at an end. *Chaplaincy of Full Gospel Churches v. England*, 454 F. 3d 290, 297 (D.C. Cir. 2006) ("A movant's failure to show any irreparable harm is therefore grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus merit such relief.").

The Risk from Circumvention of Bright-Line Rules. The FCC below was faced with a challenge common to all regulators and competition authorities: how

[7] The FCC found that roughly 17% of broadband customers change providers annually, and 7% when corrected for people who moved residences. *See* FCC, *Broadband Decisions: What Drives Consumers to Switch—or Stick With—Their Broadband Internet Provider*, at 5-6 (Dec. 2010). This is true even though many ISPs remain at the bottom on consumer satisfaction surveys. Press Release, American Consumer Satisfaction Index, ACSI: Subscription TV and ISPs Plummet, Cell Phone Satisfaction Climbs (May 20, 2014).

to protect the public against known and unknown unreasonable practices that arise from Petitioners' own anticompetitive incentives.[8]

It is difficult to predict with certainty how Petitioners may implement these incentives, and how these strategies would harm consumers or competitors in the Internet ecosystem. Etsy Decl. ¶ 11. Few predicted that ISPs would degrade interconnection points. As a result, the FCC is at a disadvantage in knowing what future conduct will harm the ecosystem, making bright-line rules necessary but insufficient. Petitioners suggest that consumers will be adequately protected if the Court were to grant their motion for a stay, preserving only the FCC's bright-line rules. That is not the case.

Degradation at the interconnection point is one example. When prohibitions similar to the bright-line rules were adopted as part of the 2010 Open Internet Rules, several ISPs began to "engineer" around them to harm distributors of online video content by degrading the ISPs' points of interconnection.[9] It is precisely for

[8] The FCC has long ago identified the ability and incentive of Petitioners to engage in behavior that harms the Internet ecosystem—a finding this Court upheld. *See Verizon*, 740 F.3d at 646 (citation omitted).

[9] *See, e.g.*, Letter from Markham Erickson, Counsel to COMPTEL, to Marlene Dortch, FCC, GN Docket No. 14-28, at 2 (Feb. 19, 2015); Letter from Angie Kronenberg, COMPTEL, to Marlene Dortch, FCC, GN Docket No. 14-28, at 2-5 (Jan. 13, 2015); Letter from Christopher Libertelli, Netflix, to Marlene Dortch, FCC, GN Docket No. 14-28, at 1-2, 5-6 (Nov. 5, 2014).

this reason that the bright-line rules would become a dead letter if unaccompanied by a general conduct standard preventing Petitioners from unreasonably interfering or disadvantaging consumers and edge providers.

Data caps are another example: Petitioners are able to set a ceiling on the amount of content a consumer can access under a "data plan," and they can apply those caps in a discriminatory manner by exempting their affiliated content from such limits. DISH Decl. ¶ 12; Vimeo Decl. ¶ 13. The use of discriminatory data caps is increasingly commonplace. The FCC chose not to impose a bright-line rule against the use of data caps, relying instead upon case-by-case adjudication under its general conduct standard to police this conduct. *Order* ¶ 153.

In a marketplace where Internet companies swim or sink at an unprecedented pace, the FCC's ability to investigate complaints of behavior antithetical to an open Internet but otherwise not covered by the enumerated bright-line rules is crucial. A stay of the "no unreasonable interference/disadvantage" standard would provide ISPs with a window of opportunity for harming rivals or extracting rent from a dynamic marketplace where competitors can go from charmed to bankrupt in the span of a few months.

Accessibility. A stay of the FCC's accessibility authority will also harm the most vulnerable. The FCC's rules for telecommunications accessibility, based on Section 255 of the Communications Act, now apply to ISPs. *Order* ¶ 472. Those

rules help ensure that "network services and equipment do not impair or impede accessibility," as well as other protections that do not otherwise apply to ISPs. *Order* ¶ 474. Staying them would hinder a variety of services on which people with disabilities depend on to live full and productive lives. TDI Decl. ¶ 4, 6.

Privacy. By providing a guarantee of privacy protection, the *Order* will benefit consumers (who often lack alternatives and self-help options) and companies that serve privacy-conscious Internet users.[10] Conversely, in the event of a stay, Internet users will have little recourse to prevent their private information from being used against their will. They will thus be harmed if the FCC's protections are set aside.

Pole Attachments. Delayed application of the FCC's pole attachment authority is also likely to have a detrimental effect on broadband deployment. Costs associated with pole attachments "can total up to 20% of the cost of a fiber optic deployment." Google Decl. ¶ 8. Absent expansion of the FCC's authority over pole attachments to ISPs not offering cable or telephony services, such ISPs can face significant delays and obstacles in obtaining access to poles and similar

[10] As this Court has previously recognized, there are real harms from even the temporary loss of privacy protections—harms that would not be prevented by the bright-line rules alone. *See National Cable & Telecommunications Assocation v. FCC*, 555 F.3d 996, 1001 (D.C. Cir. 2009); *Verizon California, Inc. v. FCC*, 555 F.3d 270, 344-45 (D.C. Cir. 2009).

infrastructure, which can cause network deployment costs to increase. *Id.* ¶ 9. The *Order* thus "remove[s] unpredictability associated with negotiating for permission to use existing poles, ducts, and conduits in the absence of access rights, thus speeding and lowering the cost" of an ISP's "deployment of new broadband networks." *Id.* ¶ 10. Petitioners' stay request would therefore inhibit and delay "competition as well as broadband investment and deployment." *Id.* ¶ 8.

* * *

The harms demonstrated in each of the attached declarations submitted here are far more compelling than those asserted by Petitioners, militating against grant of Petitioners' stay request. *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977); *Comm. on the Judiciary, U.S. House of Representatives v. Miers, et al.*, 575 F.Supp. 2d 201, 208 (D.D.C. 2008) (stating that "the non-moving party . . . need only explain why it will suffer *substantial* harm.") (emphasis in original).

IV. CONCLUSION

For the reasons discussed herein, Intervenors ask the Court to deny Petitioners' request for a stay. Intervenors support expedited briefing on the merits.

* * *

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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/ Pantelis Michalopoulos
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May 22, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May 2015, I caused true and correct copies of the foregoing Intervenors' Motion of Opposition to Petitioners' Motion for Stay to be filed electronically with the Clerk of the Court using the Case Management and Electronic Case Files ("CM/ECF") system for the D.C. Circuit. Participants in the case will be served by the CM/ECF system or by U.S. Mail.

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