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

DANIEL BERNINGER, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA, Respondents.	Case No. 15-1128 (and consolidated cases)

MOTION FOR STAY OF DANIEL BERNINGER

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INTRODUCTION AND SUMMARY[1]

The Court should stay the FCC's *Order*, which – for the first time – purports to authorize the agency to regulate computing and computer networks. Claiming that the Internet and the traditional Public Switched Telephone Network are one and the same, the FCC asserts authority under Title II of the Communications Act over all communications networks and services that rely upon public Internet Protocol addresses. The Commission uses this newly invented authority to proclaim regulatory domain over the Internet by, for example, regulating broadband Internet access services, overseeing Internet exchange arrangements, and prohibiting broadband providers from prioritizing traffic.

Petitioner is an entrepreneur and architect of new communications services. He has devoted his professional career to and earned his livelihood from facilitating the transformation from traditional circuit switched services to Internet Protocol services. Declaration of Daniel Berninger ¶¶ 3-4 ("Berninger Declaration") (Exhibit A). Since 2012, Petitioner has dedicated substantial time

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[1] Petitioner files this separate stay motion because his interests substantively differ from the interests of the other petitioners in this case, all of which are broadband Internet access service providers or their trade associations (collectively, "BIAS Petitioners"), and the FCC separately denied Petitioner's request for a stay to address his unique claims of irreparable injury. *See* Exhibit B ("Stay Denial"). Moreover, Petitioner did not join the BIAS Petitioners' motions to exceed page limits for their stay motions, the Court's May 8, 2015 Order denying the BIAS Petitioners' motions did not reference this Case No. 15-1128, and Petitioner did not have an opportunity to review the BIAS Petitioners' joint stay motion before it was filed on May 13, 2015.

and resources to speeding the transition to all-Internet Protocol networks and High Definition voice services, founding the Voice Communication Exchange Committee as a home for these efforts. *Id.* ¶ 5. Petitioner is currently investing in deploying new High Definition voice offerings, which require prioritization by network operators to ensure voice quality and preserve the value proposition of High Definition service. *Id.* ¶ 17.

Petitioner seeks a stay of the *Order* because it threatens his livelihood. Petitioner's investment interests in Internet Protocol services and his professional career as a communications services architect are predicated on the ability to design, develop, and deploy services that are not subject to regulation by the FCC under Title II – an ability that will be forever lost if the *Order* takes effect.

Since the decommissioning of the National Science Foundation Network backbone on April 30, 1995, the United States has enjoyed a 1000-fold expansion of communications capacity and services over the intervening 20 years. The development of the Internet occurred as a result of a consistent policy of non-regulation of computing and computing networks, which originated with the prohibition against AT&T entering the computing market in 1956 and was preserved through the intervening years. Policymakers consistently have kept computing and computing networks beyond the reach of the FCC in recognition of the harms resulting from interventionist industrial regulatory regimes such as those

associated with the long-since abolished Civil Aeronautics Board and Interstate Commerce Commission.

Congress enshrined the principle of non-regulation of the computing and larger information technology industry and the Internet ecosystem into the Telecommunications Act of 1996. First, Congress codified the distinction between non-regulated "information services" and regulated "telecommunications services," insulating the former from regulation by the FCC. Second, Congress noted its intent "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). The Commission adhered to these expressions of Congressional non-regulatory intent on a bipartisan basis for nearly 20 years, consistently determining that Internet access service is an information service immune from regulation under Title II. *See, e.g.*, *In re Federal-State Joint Board on Universal Service*, Report, 13 F.C.C.R. 11501, 11513-14, ¶ 27 (1998) ("*Stevens Report*"); *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 F.C.C.R. 14853, 14855, ¶ 1 (2005) ("*Wireline Broadband Order*").

Now, however, faced with the demise of the traditional Public Switched Telephone Network and the prospect of diminished regulatory significance in the

Internet era, the Commission adopted the *Order*, over vigorous dissents, to stake a claim to a supervisory role over the Internet. The *Order* does not contain any limiting principles, and thus the industry can only speculate about what part of the Internet ecosystem will become the next target of Commission regulation.

The Court should stay the *Order*. First, Petitioner is likely to succeed on the merits because the Commission exceeded its statutory authority by asserting regulatory command and control over the Internet under Title II. Congress has not explicitly delegated to the FCC authority to regulate the Internet under Title II or to treat the Internet as the equivalent of the Public Switched Telephone Network. In fact, Congress has ratified the FCC's consistent disclaimer of authority to regulate broadband under Title II. Congress's failure to authorize the FCC to regulate the Internet under Title II is fatal to the agency's attempt to do so in the *Order*.

Second, Petitioner will suffer irreparable harm in the absence of a stay because the *Order* threatens his livelihood. Neither entrepreneurs nor venture capitalists invest in services subject to Title II given the regulatory control and shifting requirements inherent under the Title II regime. Thus, in order to make a living as an architect of Internet Protocol communications services, Petitioner must be able to focus his entrepreneurial energies on non-Title II communications services, which necessitates being able to distinguish those services that are and are not subject to Title II regulation. The *Order* destroys both of these business

imperatives. By subjecting the Internet to Title II regulation, equating the Internet Protocol networks that comprise the Internet with the Public Switched Telephone Network, and asserting regulatory jurisdiction over networks and services utilizing public Internet Protocol addresses, the *Order* eliminates any ability to invest in IP-based communications services free from the risk of FCC oversight. As a result, Petitioner will have no choice but to abandon his chosen profession if the *Order* takes effect on June 12, 2015.

Furthermore, by prohibiting paid prioritization arrangements, the *Order* prevents Petitioner from implementing new High Definition voice offerings to which he has devoted time and resources to develop. High Definition voice service requires that network operators prioritize the traffic because latency, jitter, and packet loss in the transmission of communications threaten voice quality and destroy the value proposition of an HD service. Network operators exchanging High Definition voice traffic will reasonably expect to receive compensation or some other benefit in consideration for providing such prioritization. However, because it prohibits such arrangements, the *Order* will strand Petitioner's time and investment in his High Definition voice initiatives.

Third, other parties will not be injured if the *Order* is stayed. Because Internet Protocol networks and IP-based communications services have never before been regulated under Title II, a stay would simply preserve the status quo

pending review. Furthermore, because the *Order* represents a prophylactic step and is not a response to immediate or active risks to the Internet, a stay of the *Order* would not threaten Internet openness, even if Title II were a necessary legal predicate for the Commission's rules.

Finally, a stay will further the public interest. The unknown and unanticipated consequences of implementing the *Order* prior to judicial review represent the greatest threat to the public. A stay would avoid regulatory uncertainty for consumers, investors, and innovators while the appeal is pending. A stay also would conserve limited administrative resources in implementing Title II requirements that would be wasted if Petitioner is successful on appeal.

The Court should stay the *Order*, and Petitioner respectfully requests a ruling on this motion before June 12, 2015, the *Order*'s effective date, or as soon thereafter as practicable. Petitioner requests an administrative stay if the Court cannot rule by June 12.

BACKGROUND

On February 26, 2015, the FCC adopted the *Order*, the ostensible purpose of which was to adopt rules to protect the openness of the Internet. However, retreating from more than a half century of decisions exempting computing and computer networks from Title II regulation and abandoning nearly 20 years of precedent treating broadband Internet access services as unregulated information

services, the FCC abruptly changed course. Specifically, the *Order* reclassified broadband Internet access service as a telecommunications service subject to regulation under Title II of the Communications Act. *Order* ¶¶ 308, 330-35.

In reclassifying mobile broadband Internet access as a commercial mobile service, the FCC redefined the "public switched network" as including "public IP addresses." *Id.* ¶ 391. The use of Internet Protocol addresses as opposed to traditional telephone numbers under the North American Numbering Plan has been the traditional demarcation line between unregulated information services and regulated communications services. *See, e.g., In re Petition for Declaratory Ruling That Pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 F.C.C.R. 3307, 3309, ¶ 4 (2004) ("*Free World Dialup Order*").[2] In establishing its interconnected Voice over Internet Protocol regime, the Commission was persuaded that the ability of users to connect to the Public Switched Telephone

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[2] In its *Free World Dialup Order*, the FCC found the offering to be an unregulated information service because users "must have an existing broadband Internet access service," "must acquire and appropriately configure Session Initiation Protocol (SIP) phones or download software that enables their personal computers to function as 'soft phones,'" and must utilize an assigned number rather than a North American Numbering Plan number to make free Voice over Internet Protocol or other types of peer-to-peer communications to others. 19 F.C.C.R. at 3309, ¶ 5. The FCC specifically declined to extend its classification decision to offerings that involved in any way communications that originate or terminate on the public switched telephone network, or that may be made via dial-up access. *Id*. at 3308, ¶ 2 n.3.

Network was a critical factor in imposing Title II-like regulations. *See generally In re IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 F.C.C.R. 10245, 10258, ¶ 24 n.78 (2005). Indeed, the FCC's definition of interconnected Voice over Internet Protocol requires the ability of users to receive calls from and terminate calls to the Public Switched Telephone Network. 47 C.F.R. § 9.3.

The *Order* eliminates this demarcation line by adopting a new definition of the "public switched network" that treats telephone numbers and Internet Protocol addresses as the same. By adopting this new definition, the FCC has crossed the regulatory Rubicon. Prior to the *Order*, no activity associated with Internet Protocol addresses had ever been subject to Title II regulation. Now, if the *Order* takes effect, computing networks and communications services that rely upon public Internet Protocol addresses will be subject to FCC oversight.

The FCC recognizes the breadth of its *Order* by viewing the Internet and traditional telephone networks as one and the same. Consistent with this view, the *Order* seeks to regulate Internet traffic exchange arrangements under Title II – arrangements that previously were unregulated. *Order* ¶ 195. Furthermore, by classifying the entirety of broadband Internet access service as a telecommunications service rather than an information service, the FCC fails to articulate any limiting principle that preserves the integrity of unregulated

information services. Because, by definition, all information services are provided "via telecommunications," 47 U.S.C. § 153(24), the FCC's view would allow the agency to regulate almost any Internet-based service.

Further, the *Order* adopted new rules regulating broadband Internet access service. Among the new rules is a flat ban on paid prioritization, which the *Order* defined as "the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic . . . either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity." *Order* ¶ 18.

Petitioner requested a stay of the *Order* from the Commission on April 27, 2015. The FCC's Bureaus separately denied Petitioner's request for a stay on May 8, 2015. *See* Exhibit B. The *Order* will become effective on June 12, 2015 absent a stay from this Court.

ARGUMENT

The Court should stay the *Order* because Petitioner is likely to succeed on the merits and will suffer irreparable harm in the absence of a stay. Staying the *Order* will not harm others or the public interest. *See, e.g., Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Davenport v. Int'l Bhd. of Teamsters, AFL-CIO*, 166 F.3d 356, 361 (D.C. Cir. 1999).

A. Petitioner Is Likely To Succeed On The Merits Because The *Order* Exceeds The Commission's Statutory Authority.

The *Order* is unlawful because nothing in the Communications Act explicitly delegates to the FCC authority to regulate the Internet under Title II or to assert oversight of computing networks or communications services that rely upon public Internet Protocol addresses. *See Am. Library Ass'n v. FCC*, 406 F.3d 689, 708 (D.C. Cir. 2005) ("The FCC, like other federal agencies, literally has no power to act . . . unless and until Congress confers power upon it"). The assertion of authority to regulate the Internet or IP-based networks and services – in ways and to an extent unknown absent future regulatory and judicial proceedings – is the kind of nationally important issue that Congress would be expected to empower expressly the FCC to undertake. *See MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994) ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion[.]").

In the absence of an express delegation of authority to regulate the Internet, "an industry constituting a significant portion of the American economy," the FCC cannot lawfully impose such regulations. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 123 (2000); *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006). Congress went to great lengths to insulate computing and computer networks from regulation by codifying the mutually exclusive categories of "information services"

and "telecommunications services" in the 1996 Act and by exempting the former from Title II regulation. 47 U.S.C. §§ 153(24), (53). Congress did not authorize the FCC to regulate computing and computer networks – long free from government control – simply by the agency claiming that there exists ambiguity in the settled interpretations of statutory terms that would justify its treating the Internet as part of the traditional telephone network.

The FCC's attempt to subject the Internet and computing networks to regulation under Title II is inconsistent with Congress's intent to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). The FCC makes no attempt to reconcile the *Order* with section 230(b)(2), which is mentioned only in passing in a footnote. *Order* ¶ 395 n.1141.

The Bureaus' claim that the *Order* "applied only to broadband Internet access service, leaving untouched IP-based services that do not constitute telecommunications services" is both unpersuasive and circular. Stay Denial ¶ 7. First, in classifying the entirety of broadband Internet access service as a telecommunications service, the FCC failed to articulate any limiting principle that would insulate other information services from regulation. Because every information service is provided "via telecommunications," 47 U.S.C. § 153(24),

the *Order* purports to authorize the FCC to regulate almost any Internet-based service. Second, the FCC's new definition of "public switched network" – which now includes public Internet Protocol addresses and which treats the Internet and the Public Switched Telephone Network as the same – necessarily "touches" IP-based services by subjecting them to regulation as Title II telecommunications services.

The Bureaus' assertion that the FCC's new "public switched network" is limited "solely to the provision of mobile services" provides no comfort to entrepreneurs such as Petitioner. Stay Denial ¶ 7. Given the importance of mobile services to the communicating pubic, the FCC's regulation of IP-based mobile services is hardly inconsequential. Furthermore, the FCC's rationale for expanding its regulatory reach to public Internet Protocol addresses is not limited to the provision of mobile services. *See Order* ¶ 391. Quite simply, the *Order*'s embrace of Internet Protocol addresses as the hook for Title II regulation of mobile broadband services sets the stage for Title II regulation of nearly any Internet Protocol service.

The FCC's and the Bureaus' reliance upon *NCTA v. Brand X Internet Services*, 545 U.S. 967, 990 (2005), to support the agency's Title II power grab is misplaced. As the BIAS Petitioners persuasively point out, the *Order* is premised upon a misreading of *Brand X*. *See* Joint Motion for Stay at 14-16, No. 15-1063

(D.C. Cir. filed May 13, 2015). And, nothing in *Brand X* can remotely be read to endorse the FCC's decision to regulate the Internet and IP-based services under Title II under the misguided view that the Internet and the Public Switched Telephone Network are one and the same.

Furthermore, Congress was plainly aware of *Brand X* and the consistent line of FCC decisions interpreting broadband services as unregulated information services. Yet, Congress did not seek to alter that interpretation, even though it had ample opportunity to do so when it amended the Act in 2010 and again in 2012. *See* Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA"), Pub. L. No. 111-260, 124 Stat. 1251 (2010); Middle Class Tax Relief and Job Creation Act of 2012 ("Spectrum Act"), Pub. L. No. 112-96, 126 Stat. 156 (2012). That Congress did not disturb the Commission's decisions classifying broadband as an information service confirms Congress's approval of that classification. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982); *Negusie v. Holder*, 555 U.S. 511, 546 (2009). "[C]onsistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has congressional approval." *Kay v. FCC*, 443 F.2d 638, 646-47 (D.C. Cir. 1970).

The Bureaus' claim that the "information service classification has hardly been static" misses the mark. Stay Denial ¶ 9. In ascertaining Congress's intent, it is only important that "an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects," in which case "the legislative intent has been correctly discerned." *N. Haven Bd. of Educ.*, 456 U.S. at 535 (quoting *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) (internal quotation marks omitted)).[3]

In short, if Congress intended for the FCC to regulate broadband Internet access service as a Title II telecommunications service – as the FCC now claims is the case – Congress could have made that intent clear when it amended the Act by adopting the CVAA and the Spectrum Act. That Congress did not do so is fatal to the FCC's claim that the *Order* is consistent with its statutory authority.

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[3] While the CVAA and the Spectrum Act may be "silent" on the FCC's decisions to treat broadband Internet access services as unregulated information services, Stay Denial ¶ 9, such silence only confirms Congress's approval of those decisions. *See, e.g.*, *Contract Mgmt., Inc. v. Rumsfeld*, 434 F.3d 1145, 1149 n.6 (9th Cir. 2006) ("We note, as well, that the SBA's regulations are presumptively correct given that Congress amended the Small Business Act in 2000 without altering the statutory language in a way that would affect the SBA's interpretation of the HUBZone Program."); *Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 338 (4th Cir. 2005) (holding "Congress intended for all conduct now encompassed under the broadened definition of 'telemarketing' to be subject to [prior] FTC regulations"); *Kay*, 443 F.2d at 646-47 ("Congress on two recent occasions has taken action to amend section 315 without making any change in the provisions which the Commission has interpreted . . . . [This] is almost conclusive evidence that the interpretation has congressional approval.").

B. Petitioner Will Suffer Irreparable Harm In The Absence Of A Stay.

If the *Order* takes effect, Petitioner will suffer irreparable injury because "adequate compensatory or other corrective relief will [not] be available at a later date, in the ordinary course of litigation." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297-98 (D.C. Cir. 2006) (citation omitted). For almost 20 years, Petitioner has earned his livelihood as an architect of unregulated IP-based communications services, which hold the greatest potential for investment and innovation. Indeed, communications services classified as unregulated information services (the entire information technology sector) or beyond classification by the Commission have achieved dramatic success, as compared to services subject to Title II regulation, which have a woeful record of innovation. Berninger Declaration ¶ 7.

Title II regulation is so toxic that neither entrepreneurs nor venture capitalists invest in Title II services because of the regulatory control and shifting requirements inherent under Title II regulation. *Id.* ¶¶ 14 & 22. Indeed, Petitioner is not aware of – and the Commission cannot point to – a single start-up success within the domain of Title II services. *Id.* ¶ 23.[4]

[4] That some *broadband providers* may have invested or have expressed their intent to invest in their networks under a Title II regime does not mean that startups will make such investments, nor do such claims undermine Petitioner's position that Title II is antithetical to investment by *entrepreneurs*. Stay Denial ¶ 15.

In order to make a living as an architect of Internet Protocol communications services, Petitioner must be able to design, develop, and ultimately profit from new and innovative Internet Protocol services without risk that such services will be subject to FCC oversight. In developing any communications service attractive to end users, Petitioner must employ a rapid process of trial and error, adapting to conditions based on available technology, competitive alternatives, and customer interest. The challenges of this development process are daunting enough without adding to the list the prospect of Title II regulation. *Id.* ¶ 14.

To illustrate this point, the *Order* sweeps away the traditional line distinguishing unregulated information services from regulated communications services – recognized since the AT&T Consent Decree in 1956 – based on whether such services rely upon the Public Switched Telephone Network. *Free World Dialup Order*, 19 F.C.C.R. at 3309, ¶ 5; 47 C.F.R. § 9.3. The *Order* renders the distinction irrelevant by defining the "public switched network" to include public Internet Protocol address and by treating the Internet and the Public Switched Telephone Network as one and the same. Berninger Declaration ¶ 15. Indeed, the *Order* appears written with the explicit intent to avoid any limitation on the Commission's regulatory discretion – an intent confirmed by the Bureaus' claim that the *Order* only "expressly regulates" broadband Internet access services. Stay Denial ¶ 15.

The *Order* eliminates any ability for Petitioner to distinguish between unregulated IP-based communications services and Title II regulated services, and thus any means to decide whether to invest in the former while avoiding the latter. Indeed, by defining services that use public Internet Protocol numbers as regulated telecommunications services, the *Order* does not recognize any category of communications services beyond the FCC's Title II reach. Consequently, if the *Order* takes effect, Petitioner will have no choice but to avoid new and abandon existing investments in IP-based communications services, which is the essence of irreparable harm. *Id.* ¶ 14.

Petitioner also is irreparably harmed by the Commission's rule that prohibits broadband Internet access providers from entering into paid prioritization arrangements. Petitioner has devoted substantial resources to developing IP-based communications services that have nothing to do with the Public Switched Telephone Network, including: (1) the HD Network, which allows end users to elect, and for network operators to provision, High Definition voice functionality on an individual end-user by end-user basis; and (2) a voice hosting offer giving website visitors the ability to communicate with each other through High Definition voice. Berninger Declaration ¶¶ 18-20.

However, the *Order* prevents broadband Internet access providers from prioritizing High Definition voice "in exchange for consideration (monetary or

otherwise) from a third party." Because the benefits of High Definition voice resulting from Petitioner's offerings will not be realized without prioritization and because such prioritization will necessitate some consideration or benefit, the *Order* eliminates possible business models that would support Petitioner's High Definition voice offerings, which constitutes irreparable harm.[5]

C. Third Parties Will Not Be Harmed By A Stay.

Staying the *Order* and postponing the FCC's plans to experiment with regulation of the Internet poses no harm to third parties, particularly as compared to the leap into the regulatory unknown contemplated by the *Order*. Internet Protocol networks and services, which have not previously been regulated under Title II, would simply remain unregulated pending judicial review, and thus a stay would merely preserve the status quo. Furthermore, because the *Order* represents a prophylactic step and is not a response to immediate or active risks to the Internet, a stay of the *Order* would not threaten Internet openness during an appeal,

[5] The Bureaus claim Petitioner's harms stemming from the rule prohibiting paid prioritization are "theoretical and misplaced," Stay Denial ¶ 16, because (1) paid prioritization is not the only means to bring High Definition voice applications to the market, and (2) the *Order* permits broadband providers to engage in reasonable network management. But the Bureaus fail to explain what possible incentive a broadband provider would have for facilitating Petitioner's High Definition offerings absent some consideration in exchange, which the paid prioritization rule prohibits. Furthermore, the prohibition against paid prioritization is not subject to a reasonable network management exception, notwithstanding the Bureaus' suggestion to the contrary.

even if Title II were a necessary legal predicate for the Commission's Open Internet rules.

The Bureaus' rejoinder is unpersuasive. While the Bureaus insist that the *Order* "maintains the *status quo* of an open Internet," Stay Denial ¶ 19, the FCC cannot point to a single incident threatening the openness of the Internet after the agency's 2010 rules were vacated by this Court. Thus, the argument that a stay "would leave consumers and innovators unprotected" is belied by the facts. *Id*.

Nor would consumers be harmed by a stay of the FCC's transparency rule. *Id*. ¶ 20. Although Petitioner supports transparency, the enhancements to the transparency requirements to which broadband providers will be subject under the *Order* will not go into effect on June 12, 2015, whether or not the Court grants a stay. As the FCC has acknowledged, *Order* ¶ 585, its transparency requirements must be approved by the Office of Management and Budget under the Paperwork Reduction Act, and it not clear when such approval will occur, if at all.

D. The Public Interest Favors A Stay.

Finally, the public interest will be served by staying the *Order* pending judicial review. For nearly 20 years, the Internet has thrived in an environment of non-regulation, which the *Order* will irreparably disrupt absent a stay. Because the unknown and unanticipated consequences of implementing the *Order* prior to judicial review represent the greatest threat to the public, a stay would avoid the

regulatory uncertainty for consumers, investors, and innovators while the appeal is pending.

A stay also would serve the public interest by conserving limited administrative resources. To implement the *Order*, the FCC must determine the precise parameters of Title II applicable to the Internet, which will require conducting various rulemakings. For example, the Commission has already announced its intention to adopt new rules under section 222 for broadband Internet access services and to consider the impact of its reclassification decision on universal service contribution obligations. Conducting these proceedings and expending the associated resources to complete them would be wasteful, disruptive, and unnecessary if Petitioner's appeal is successful. The *Order* also will subject the Internet ecosystem to a complex regime of taxes and assessments associated with telecommunications services, which will create enormous complications that may only need to be unwound after judicial review.

CONCLUSION

For all these reasons, the Court should stay the *Order* pending review.

Respectfully submitted,

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May 19, 2015

CERTIFICATE OF SERVICE

I hereby certify that, on May 19, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Bennett L. Ross
Bennett L. Ross

EXHIBIT A

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

DANIEL BERNINGER, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA, Respondents.	Case No. 15-1128

DECLARATION OF DANIEL BERNINGER

I, Daniel Berninger, declare as follows:

1. My name is Daniel Berninger. I was born in Wilmington, Delaware USA. I am an entrepreneur, founder of the Voice Exchange Communication Committee ("VCXC"), and an architect of new communications services since 1991. I submit this Declaration in support of my Motion for Stay Pending Review of the Commission's order captioned *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, GN Docket No. 14-28 (Mar. 12, 2015) ("*Order*").

2. I am an honors graduate of Villanova University, where I earned a Bachelor of Electrical Engineering and a Master of Electrical Engineering. I

completed the classwork for a Doctorate of Philosophy in Systems Engineering at the University of Pennsylvania, where my degree remains pending completion of a dissertation on the mathematical analysis of complex systems.

3. I have devoted my professional career to transforming the communications industry from traditional circuit switched services to the Internet Protocol ("IP") services upon which customers increasingly rely today. I served as a Member of the Technical Staff and developer of new telephone network services at Bell Laboratories in the early 1990's. However, over the past 20 years, I have been involved in a number of industry firsts in IP communications.

4. I was appointed to the first Voice over IP ("VoIP") deployment team at AT&T (1995) and led the first VoIP deployments for NASA (1997), Verizon (1997), and HP (1998). I co-founded the VON Coalition, which was the first VoIP policy advocacy organization. I also participated with friends and partners in or otherwise contributed to the first call completed between the Public Switched Telephone Network ("PSTN") and the Internet anywhere in the world (1995), the first international calling company relying on VoIP (1997), the first company to use VoIP to offer domestic unlimited calling (2001), and the first live network multi-service provider High Definition ("HD") voice call (2013). During my career, I was involved in the founding of Free World Dialup ("FWD"), ITXC, and Vonage, helped recruit the CEOs for each of these companies, and participated in

developing their initial business models. I received the VON Pioneer Award in 1999.

5. I founded VCXC in 2012 as a non-profit organization to provide a home for initiatives working to speed the transition to all-IP networks and HD voice. I gave the IP transition its name and kicked off the transformation of the communications sector at a Grand Challenge event on June 15, 2012 hosted by VCXC. The founding of VCXC reflects a desire to raise awareness about opportunities for the communications services enabled by all-IP networks. I agree with other technologists who believe that frictionless global communications promise a Knowledge Age transformation of life on the planet. The communications capacity of unregulated information services already expands at a pace consistent with Moore's Law, doubling capacity every 18 months. The recent achievement of a 1000-fold expansion of capacity becomes a billion-billion expansion opportunity by the end of the century.

6. My 25 years of experience in the communications sector leaves me with four certain conclusions. First, the degree of regulation is the primary factor in the success or failure of a communications service. Second, services subject to Title II of the Communications Act, which allows regulators to take advantage of their regulatory powers to intervene in markets, are destined to fail. Third, non-Title II communications services may achieve some success, but only if regulators

can resist their natural tendency to overregulate them. Fourth, communications services classified as unregulated information services (the entire information technology sector) or that are simply beyond classification by the Federal Communication Commission ("FCC") achieve dramatic success.

7. Because a regulated company cannot serve two masters – regulator and customer – the regulatory requirements to which a regulated company is subject always trump customer needs. For example, regulatory lawyers played a prominent role in product and service development meetings at Bell Laboratories. During my tenure at Bell Labs, every new service or change in an existing service had Title II implications, which the development teams needed lawyers to interpret. Not surprisingly, the goal of the lawyers, whose opinions were given considerable weight by the development teams, was to ensure regulatory compliance, not meet customer needs. The result was a process by which Title II services were shaped to appease non-customer regulatory issues.

8. Because Title II disserves customers and is antithetical to innovation, I have worked for more than two decades in opposing Title II regulation of the Internet. After nearly a decade of advocacy in which I, my colleagues, and the larger information technology community were involved, the Commission classified the service offered by FWD as an unregulated information service in a ruling known as the "Pulver Order" in 2004. Beginning in 2002, the Commission

also issued a series of rulings in which it classified broadband Internet access services as an unregulated information services. In the intervening years, the expansion of Internet capacity accelerated, and IP communications services began rapidly displacing PSTN services.

9. After years of success under this unregulated approach, I never considered Title II regulation of the Internet a serious possibility until President Obama released a YouTube video in November 2014 endorsing Title II. Like many of my colleagues in the entrepreneurial community, I was amazed at the prospect that the Commission would reverse more than a decade of bipartisan, pro-innovation decisions by extending Title II to the Internet.

10. Because of our direct experience with the innovation deadening effect of Title II, I convened a group of friends and tech elder entrepreneurs to help educate the communicating public about the risk of subjecting the Internet to Title II regulation. This group includes: John Perry Barlow, lyricist and activist; Mark Cuban, Founder, AXS TV; Tim Draper, founder, Draper Fisher Jurvetson; Tom Evslin, founder & former, CEO ITXC; Dave Farber, Professor Emeritus, CMU and Board Member ISOC; Charlie Giancarlo, Senior Advisor, Silver Lake; George Gilder, author; John Gilmore, activist; Brian Martin, Chairman and CTO, 8x8; Scott McNealy, co-founder, SUN Microsystems; Bob Metcalfe, Professor, University of Texas and inventor of Ethernet; Ray Ozzie, creator Lotus Notes,

former CTO Microsoft; Jeff Pulver, co-founder, Zula and Vonage; Michael Robertson, CEO, MP3.com; and Les Vadasz, former EVP, Intel.

11. This group recognizes that America was the only country in the world to explicitly protect the unregulated status of computing and computer networks in the 20th century. This fact accounts for the global dominance of the United States information technology sector. The *Order* eliminates these decades-old protections by subjecting the Internet to Title II regulation. In my view, nothing useful will result from the regulation of 21st century computer networks pursuant to a law addressing a monopoly voice telephone market signed by President Franklin Delano Roosevelt in 1934 before the invention of the transistor or computing. Indeed, the category of telecommunications services subject to Title II regulation has experienced a complete lack of innovation and presently attracts less than half the usage of the pre-commercial Internet period. The failure to improve the voice quality of a telephone call over a period of 80 years represents an unprecedented technology anomaly that traces to Commission implementation of Title II regulation.

12. The *Order*, which does not even recognize the entrepreneurial value of new communications services that rely upon IP networks, threatens my livelihood. By seeking to benefit entrepreneurs that use communications, the *Order* favors one type of entrepreneur over another. This represents an inevitable

consequence of the Commission's market intervention approach. Market interventions designed to serve the interests of one group (users of communications services) necessarily undermines the prospects of another group of which I am a member (architects of communications services).

13. The *Order* dramatically alters my investment interests in IP communications services and causes irreparable harm to my career as an architect of new communications services if allowed to take effect pending judicial review.

14. First, my ability to design, develop, and ultimately profit from new and innovative IP communications services requires preserving their nonregulated status. Communications services subject to Title II regulation are toxic to entrepreneurs such as me. In developing any communications service attractive to end users, I must employ a rapid process of trial and error, adapting to conditions based on available technology, competitive alternatives, and customer interest. The challenges of this development process are daunting enough without adding to the list the prospect of shifting regulatory foundations inherent under Title II regulation. If the *Order* takes effect and the Internet falls within the FCC's Title II jurisdiction, I will be unable to continue my chosen profession as an IP communications services architect. Title II regulation of the Internet will leave me with no option but to abandon my investments in IP communications services and devote my time and resources to another sector of the economy.

15. Second, because of the entrepreneurial imperative to avoid investing in communications services subject to Title II regulation, the entrepreneurial community relies on the existence of an operationally practical means of distinguishing between regulated and unregulated services. However, such an understanding is rendered impossible by virtue of the breadth of the *Order* and the absence of any limiting principle to FCC discretion regarding the regulation of IP communications services.

16. For example, in adopting a new definition of the "Public Switched Network" to include "public IP addresses," the FCC was persuaded that this definition better "reflects the emergence and growth of" IP networks, which "use standardized addressing identifiers other than NANP numbers for routing of packets" and which "give users a universally recognized format for sending and receiving messages across the country and worldwide." *Order* ¶ 391. The FCC also recast the PSTN as a "single network" that comprises the Internet, rather than two separate networks as had been understood before. *Id.* ¶ 396. Even worse, the nature of the regulatory process relieves the Commission of any obligation to make a precise statement regarding limitations in the exercise of its new found authority. These limitations, if any, will only become clear over time through litigation and additional regulatory proceedings. This approach obliterates the historical and

clearly defined mechanism for determining the regulated status of a communications service by virtue of its connectivity to the PSTN.

17. Third, by prohibiting paid prioritization arrangements, the *Order* prevents me from implementing new HD voice offerings, which I have devoted time and resources to developing in order to take advantage of the economic opportunities created by the retirement of the PSTN in favor of all-IP networks. Because latency, jitter, and packet loss in the transmission of a communications will threaten voice quality and destroy the value proposition of an HD service, it is imperative that network operators prioritize this traffic. And, for network operators exchanging HD voice traffic, they will reasonably expect and demand to receive compensation or some other benefit in consideration for providing such prioritization.

18. One HD offering threatened by the *Order*, which was announced as the HD Network ("HDN") on January 6, 2015, allows end users to elect and for network operators to provision HD voice functionality on an individual end-user by end-user basis. A number of operators support HD voice on their networks, but the HDN, demonstrated through trials in 2013, provides a means to move HD calls between networks.

19. Another HD service I am developing involves a voice hosting offer giving website visitors the ability to communicate with each other through HD

voice. This project establishes HD voice as a new means of conversation without the need for telephone numbers or traditional dialing. Visiting a web page provides the triggering mechanism to initiate an HD voice conversation with others sharing interest in the web page topic. This business model features a subscription-based destination for customers as well as provides an affiliation model and new revenue stream encouraging website owners to promote HD voice conversations between members of their audience.

20. My work on the architecture of new communications services supporting HD voice relies on IP devices and IP networks, with no dependency or reliance on the PSTN. VCXC exists to help the communications sector navigate the retirement of the PSTN, which does not support HD voice. In order to compete with competitive alternatives in terms of reliability and consistency of performance, the implementation of HD voice requires IP interconnection agreements with network operators to support the type of paid prioritization options the *Order* prohibits. The best efforts model associated with existing IP interconnection agreements does not enable the relevant implementation requirements necessary to support HD voice.

21. Although options for HD voice exist in the over-the-top arena of proprietary services as in the example of Viber and Facebook Messenger, the new FCC rule 8.9 would prevent broadband Internet access providers from prioritizing

HD voice "in exchange for considering (monetary or otherwise) from a third party." The benefits of HD voice resulting from my offerings will not be realized without prioritization. And, by prohibiting a broadband Internet access service provider from receiving any consideration or benefit for prioritizing HD voice traffic, the possible business models that would support my HD voice offerings shrink to zero.

22. Fourth, I am not aware of any sources of venture capital available for investment in new communications services subject to the type of open ended regulatory risk posed by the Commission's Title II authority as contemplated by the *Order*. The loss of funding options owes to the easily observable correlation between enterprise value and the extent of regulatory obligation. Companies subject to the Commission's regulatory authority achieve valuation multiples that are a fraction of companies not subject to Commission oversight. The loss of funding sources as a result of the change in policy strands my time and investment in the HD voice start-up initiatives described above.

23. Fifth, I am not aware of a single start-up success within the domain of Title II telecommunications services regulated by the FCC. The lack of any attempt to review or hold the Commission accountable for prior market interventions leaves the plans described in the *Order* entirely untested and with potential to create yet another collapse of telecom investment.

24. While I agree there exists a need to defend the promise of the Internet from would- be gatekeepers, the 80-year track record of the FCC exposes Title II regulation as the primary gatekeeper risk. The Commission's exercise of "command and control" regulation left communication services unimproved for decades before the arrival of the Internet. By contrast, the success of the Internet is due to the independence that entrepreneurs such as myself have enjoyed in creating and deploying new services – without government approval or oversight. By bringing the Internet within the Title II jurisdiction of the Commission, the *Order* destroys this regime of Internet independence and places the Commission in the role of gatekeeper for IP communications services. In short, the *Order* forecloses my ability to continue earning a living as an architect of new communications services and strands my investment in previously unregulated IP services with no possibility of remediation.

* * * *

I, Daniel Berninger, hereby declare under penalty of perjury that the foregoing is true and correct.

Daniel Berninger

Executed this 19th day of May 2015

EXHIBIT B

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Protecting and Promoting the Open Internet	)	GN Docket No. 14-28

ORDER DENYING STAY PETITION

Adopted: May 8, 2015 **Released: May 8, 2015**

By the Chiefs, Wireline Competition Bureau and Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On April 27, 2015, Daniel Berninger (Petitioner) filed a petition for stay of the *2015 Open Internet Order* (*Order*), pending judicial review.[1] On May 4, 2015, Public Knowledge, Free Press, and the Open Technology Institute filed an opposition to the stay petition.[2] For the reasons discussed below, we deny the request for stay.

II. BACKGROUND

2. The Commission recently adopted new Open Internet rules, responding to the D.C. Circuit's remand of the Commission's 2010 no-blocking and antidiscrimination rules.[3] The *Order* adopts three "bright-line" rules applicable to both fixed and mobile broadband Internet access service (BIAS) prohibiting blocking, throttling, and paid prioritization. The *Order* defined BIAS 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, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service."[4] Under the no-blocking rule, BIAS providers are prohibited from blocking lawful content, applications, services, or non-

[1] Petition for Stay Pending Judicial Review of Daniel Berninger, Founder of the Voice Communication Exchange Commission, GN Docket No. 14-28 (filed Apr. 27, 2015) (Petition), http://apps.fcc.gov/ecfs/comment/view?id=60001030095. Two other petitions for stay also were filed, which are being addressed separately. Joint Petition for Stay of United States Telecom Association, CTIA – The Wireless Association, AT&T Inc., Wireless Internet Service Providers Association, and CenturyLink, GN Docket No. 14-28 (filed May 1, 2015); Petition of American Cable Association and National Cable & Telecommunications Association for Stay Pending Judicial Review, GN Docket No. 14-28 (filed May 1, 2015).

[2] Joint Opposition of Public Knowledge, Free Press, and the Open Technology Institute at New America to Petition for Stay Pending Judicial Review of Daniel Berninger, Founder of the Voice Communication Exchange Committee, GN Docket No. 14-28 (filed May 4, 2015) (Opposition), http://apps.fcc.gov/ecfs/comment/view?id=60001030860. Because we deny the request for stay on grounds discussed herein, we need not reach other arguments raised in the Opposition, such as its contention that the petition should be dismissed as procedurally defective. *See, e.g.*, *id.* at 3.

[3] *Protecting and Promoting the Open Internet,* Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, FCC 15-24 (rel. March 12, 2015) (*2015 Open Internet Order*); *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

[4] *2015 Open Internet Order*, at para. 25. The definition "also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part." *Id.*

harmful devices, subject to reasonable network management.[5] The no-throttling rule prohibits providers from impairing or degrading lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.[6] Paid prioritization is also prohibited. "Paid prioritization" means the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either in exchange for consideration (monetary or otherwise) from a third party, or to benefit an affiliated entity.[7]

3. The *Order* also includes a standard that prohibits BIAS providers from unreasonably interfering with or unreasonably disadvantaging the ability of consumers to select, access, and use the lawful content, applications, services, or devices of their choosing; or of edge providers to make lawful content, applications, services, or devices available to consumers.[8] Under this standard, the Commission will have a mechanism to address questionable practices on a case-by-case basis, and to provide guidance as to how it will be applied in practice. The *Order* also enhances the transparency rule adopted in 2010, including by making clear that broadband providers always must disclose promotional rates, all fees and/or surcharges, and all data caps or data allowances; adding packet loss as a measure of network performance that must be disclosed; and requiring specific notification to consumers that a "network practice" is likely to significantly affect their use of the service.[9] In addition, the *Order* establishes that the Commission can hear complaints and take appropriate enforcement action if it determines the traffic exchange activities of BIAS providers violate sections 201 or 202 of the Act.[10]

4. The *Order* is grounded in multiple sources of legal authority, including section 706 of the Telecommunications Act of 1996 and Title II and Title III of the Communications Act of 1934. The *Verizon* court held that section 706 is an independent grant of authority to the Commission that supports adoption of Open Internet rules, however, use of section 706 alone included a common carriage prohibition that flowed from the earlier "information service" classification. "Taking the *Verizon* decision's implicit invitation," the *Order* "revisit[s] the Commission's classification of the retail broadband Internet access service as an information service" and "[b]ased on the updated record . . . conclude[s] that retail broadband Internet access service is best understood today as an offering of a 'telecommunications service.'"[11] In finding that broadband Internet access service is a telecommunications service, the Commission forbore from many provisions of Title II with respect to that service, including those that could have required *ex ante* rate regulation, tariff filing, and unbundling, but the Commission did not forbear from sections 201, 202, and 208 (or from related enforcement provisions), "which are necessary to support adoption of . . . open Internet rules."[12]

III. DISCUSSION

5. To qualify for the extraordinary remedy of a stay, a petitioner must show that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent the grant of preliminary relief; (3)

[5] *Id.* at para. 112.

[6] *Id.* at para. 119.

[7] *Id.* at para. 125.

[8] *Id.* at para. 136.

[9] *Id.* at paras. 162-81.

[10] *Id.* at paras. 202-05.

[11] *Id.* at para. 308 (internal citations omitted).

[12] *Id.* at paras. 440-536.

other interested parties will not be harmed if the stay is granted; and (4) the public interest would favor grant of the stay.[13] For the reasons described below, Petitioner has failed to meet the test for this extraordinary equitable relief.

A. Likelihood of Success on the Merits

6. Petitioner raises two basic arguments: that the Commission exceeded its statutory authority in classifying broadband internet access service as a telecommunications service, and that the Commission acted arbitrarily and capriciously in that reclassification.[14] For the reasons discussed below, we find that Petitioner has failed to demonstrate that he would be likely to succeed on the merits even if he challenged the *Order*.

7. *Statutory Authority*. Petitioner's assertion that the Commission classification of BIAS is "regulat[ing] the Internet"[15] is unpersuasive. The Commission stated in the *Order* that the classification undertaken applied only to broadband Internet access service, leaving untouched IP-based services that do not constitute telecommunications services.[16] Petitioner argues that defining the "public switched network" to include public IP addresses "empower[s] the Commission to exert Title II regulatory command and control over the Internet in the entirety."[17] The Commission's conclusion regarding the public switched network was limited to its implementation of the definitions in section 332 of the Act, which apply solely to the provision of mobile services.[18] In fact, the Commission classified only broadband Internet access service[19] and adopted rules applicable to that service.

8. Petitioner's argument that the Commission exceeded its statutory authority in classifying broadband Internet access service as a telecommunications service is a notion thoroughly analyzed and rejected by the *Order*.[20] Contrary to Petitioner's assertions, the Supreme Court held in *Brand X* that the relevant statutory definitions are ambiguous and that the Commission is best positioned to resolve the ambiguity.[21] The Commission's revision of its "prior classifications of wired broadband Internet access service and wireless broadband internet access service . . . . exercise[s] the well-established power of federal agencies to ambiguous provisions in the statutes they administer."[22]

9. The *Order* also demonstrates that Congress has not precluded this interpretation of the statutory provisions to the classification of broadband Internet access service.[23] Petitioner argues that the

[13] *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (*Holiday Tours*); *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*VA Petroleum Jobbers*).

[14] Petition at 6-15.

[15] Petition at 9.

[16] *2015 Open Internet Order*, para. 340.

[17] Petition at 8.

[18] *2015 Open Internet Order*, para.391; 47 U.S.C. § 332(d).

[19] *Id.* at paras. 331-425.

[20] *See id.* at paras. 310-30.

[21] *National Cable & Telecomms. Ass'n v. Brand X*, 545 U.S. 967, 990-92 (2005); *see id.* at para. 331 & n.867 (citing *Brand X*, 545 U.S. at 980-81); *but see* Petition at 6-7 (arguing that nothing in the Act permits the Commission to undertake classification of broadband Internet access service); *see* Opposition at 4 ("Petitioner fails to show that the Commission acted outside of the authority granted to it by Congress.").

[22] *2015 Open Internet Order*, para. 331.

[23] *Id.* at para. 335.

enactment of the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA) and the Middle Class Tax Relief and Job Creation Act of 2012 (Spectrum Act) serve as a Congressional imprimatur of the Commission's prior BIAS classifications, on the theory that "[a]lthough both statutes address broadband and use the terms 'telecommunications service' and 'information service,' Congress did not disturb the Commission's consistent classification of broadband as an information service."[24] To the contrary, the information service classification has hardly been static, a fact discussed at length in the *Order*.[25] Further, the CVAA's establishment of a national deaf-blind equipment program provides no guidance as to the classification of broadband Internet access service, particularly when the provision Petitioner cites refers to "Internet access service," and "advanced telecommunications and information services."[26] Nor does the Spectrum Act shed any light on the classification question, since it was silent on BIAS classification at the time it was enacted, which was while the Commission's Notice of Inquiry seeking comment regarding the reclassification of broadband Internet access service was pending.[27]

10. *Arbitrary and Capricious*. Petitioner raises multiple arguments that the *Order* is arbitrary and capricious, many of which are assertions already addressed at length in the *Order*.[28] For example, Petitioner argues that there are no changed factual circumstances underlying the reclassification of broadband.[29] In the *Order*, the Commission fully explained that the factual basis upon which it concluded that BIAS today fits the definition of a telecommunications service was not limited to consideration of a few new developments but on an analysis of broad changes in the marketplace, including how the evolution of consumer demand and providers' marketing of services have affected the marketplace.[30] For instance, regardless of whether consumers may have had the technical capability to use third party services when the Commission first addressed the classification of BIAS, the *Order* concluded that the market for BIAS has changed dramatically since that time and that the "widespread penetration of broadband Internet access service has led to the development of third-party services and devices and has increased the modular way consumers have come to use them."[31] This line of argument also ignores the Commission's finding in the *Order* that "even assuming, *arguendo*, that the facts regarding how BIAS is offered had not changed, in now applying the Act's definitions to these facts, we find that the provision of BIAS is best understood as a telecommunications service."[32] Petitioner also asserts significant reliance interests based on the prior information service classification, but ignores the lengthy discussion in the Order of the history of BIAS classification and does not engage the *Order's* discussion of reliance interests.[33] Petitioner's bare assertion that Title II is "noxious" to investment and entrepreneurship likewise ignores the lengthy contrary analysis in the *Order*.[34] Finally, the argument that the Commission

[24] Petition at 10-12.

[25] *2015 Open Internet Order*, paras. 310-30, 360.

[26] Petition at 11-12. *See* 47 U.S.C. § 620(a) (requiring the Commission to adopt rules to fund "specialized customer premises equipment designed to make telecommunications service, Internet access service, and advanced communications, including interexchange services and advanced telecommunications and information services.").

[27] *2015 Open Internet Order*, paras. 310, 360.

[28] *See* Opposition at 5-6.

[29] Petition at 12.

[30] *2015 Open Internet Order*, paras. 346-54.

[31] *Id.* at paras. 346-47.

[32] *Id*. at para. 360 & n.993.

[33] *Id.* at paras. 310-27; 358-60.

[34] Petition at 13; *2015 Open Internet Order*, paras. 409-25.

is "subjecting similarly situated providers to completely different regulatory obligations" is not persuasive.[35] Petitioner has not identified any "similarly situated" parties that are subject to different regulatory obligations, instead making unsupported assertions about the alleged similarity of categories of services.[36]

11. As a result, we conclude that Petitioner has failed to demonstrate that he is likely to succeed on the merits.

B. Petitioner Will Not Suffer Irreparable Injury

12. Petitioner has also failed to prove that he will suffer irreparable injury absent a grant of his stay petition. Petitioner claims that under the framework adopted in the *Order*, he "will have no choice but to abandon his investments in IP communications services."[37] We reject this claim and arguments related to it for the reasons described below.

13. To justify a stay of the Commission's *Order*, the alleged injury "must be both certain and great; it must be actual and not theoretical."[38] A stay is warranted only if "[t]he injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm."[39]

14. Petitioner's vague allegations lack sufficient specificity for the Commission to determine whether he would experience any actual harm at this point. At best, the Petition only alleges theoretical harm, and is insufficient to determine what actual harm, if any, might befall the Petitioner. Petitioner's past actions under a Title I framework do not prove an immediate, irreparable harm if the stay is not granted.

15. Petitioner also fails to demonstrate why the Title II framework adopted in the *Order* is an immediate threat to his livelihood. His claim that the *Order* "ends the dichotomy between regulated and unregulated communications services" misses the point.[40] The only service expressly regulated by the *Order* is broadband Internet access service; the *Order* expressly recognizes other communications services that are not classified or subject to the rules.[41] Petitioner's general claims that investment and innovation will suffer under Title II are insufficiently particularized, meritless, and ignore significant discussion to the contrary in the *Order*.[42] Parties have indicated that they will in fact continue to invest

[35] Petition at 14.

[36] For example, Petitioner's cursory claim regarding Internet backbone services ignores the Commission's discussion of the differences between backbone services and BIAS, which informed the scope of actions taken in the *Order*. *See, e.g.*, *2015 Open Internet Order*, para. 340 ("The Commission has historically distinguished these services" including Internet backbone services, "from 'mass market' services and, as explained in the *2014 Open Internet NPRM*, they "do not provide the capability to transmit data to and receive data from all or substantially all Internet endpoints.'"). *See also id.* at para. 418 (discussing the scope of the Commission's classification decision). What Petitioner means by "enterprise broadband services" is even more opaque, and likewise ignores the *Order*'s discussion of what the Commission has referred to as enterprise broadband services, as well as its analysis of the types of negotiations that occur in the BIAS context. *Id*. at para. 364 (discussion negotiations); *id*. at 424 (discussing regulation of enterprise broadband services).

[37] Petition at 4, 18.

[38] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

[39] *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (internal quotation marks omitted).

[40] Petition at 17.

[41] *2015 Open Internet Order*, paras. 207-13.

[42] Petition at 15-16.

under the Title II framework adopted by the Commission,[43] a framework that includes forbearance from 27 statutory provisions and over 700 otherwise applicable rules.[44] Further, the highest levels of wireline broadband infrastructure investment to date occurred when wireline DSL was regulated as a common-carrier service.[45]

16. Finally, Petitioner's claims of harms stemming from the new bright-line rule against paid prioritization are both theoretical and misplaced.[46] Petitioner speculates that the only means by which he could bring HD voice applications to the market is by paying "some consideration or benefit" to BIAS providers.[47] Yet Petitioner offers no evidence to support this, particularly given that the *Order* permits BIAS providers to manage latency-sensitive traffic through reasonable network management practices.[48] The *Order* directly prohibits only "paid prioritization" — prioritization in exchange for consideration or to benefit an affiliated entity — and allows a framework for broadband providers to engage in reasonable network management.[49]

17. For above reasons, we do not find sufficient evidence of irreparable injury to warrant the extraordinary relief sought by Petitioner.

C. The Requested Stay Will Result in Harm to Others

18. Petitioner has failed to prove that third parties will not suffer if we support the grant of his stay petition.[50] We reject this claim for the reasons described below.

19. Petitioner's argument that a stay will not result in harm to others does not engage with significant contrary analysis in the *Order*. Petitioner argues that granting a stay would merely preserve the status quo regulatory regime and would not impact the Internet's openness because the rules adopted are merely prophylactic.[51] Petitioner provides no further substantive analysis, and does not engage the Commission's articulation of the need for the rules, including the positive benefits the Commission observed while the *2010 Open Internet Order* was still in effect.[52] In this respect, it is the Commission's *Order* that maintains the *status quo* of an open Internet, which the Commission has committed to protect and promote since 2005.[53] Staying those protections would leave consumers and innovators unprotected against the harm the Commission has been trying to prevent, "particularly where one provider has told the

[43] *2015 Open Internet Order*, para. 416.

[44] *Id*. at para. 5.

[45] *Id*. at para. 414; Opposition at 9 ("Real world examples of carriers expanding services and investment even in the few short weeks since the release of Order also belie the notion that no investor would support a Title II service.").

[46] Petition at 19.

[47] *Id.* Indeed, it is unclear what basis there is for concluding that Petitioner has a direct, real-world interest in HD voice service. Because we deny the Petition on other grounds, we need not reach that question.

[48] Opposition at 7-8.

[49] *Compare 2015 Open Internet Order*, paras. 125-32, *with id.* at paras. 214-23.

[50] The final stay factors "merge when the government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). However, since Petitioner has presented them separately in his petition, we analyze them separately here.

[51] Petition at 19.

[52] *2015 Open Internet Order*, paras. 75-103 (discussing in detail the benefits of an open Internet, the incentive and ability that broadband providers have to limit openness, and concluding that the Commission must act to preserve openness).

[53] *2015 Open Internet Order*, paras. 64-69.

D.C. Circuit that but for [the] 2010 rules, it would be pursuing [arrangements prohibited by the rules]."[54] In addition, Petitioner notes that he plans to pursue a paid prioritization arrangement—the very conduct that the *Order* sought to prohibit and that the *Order* made clear harmed consumers and competitors.[55] Thus, Petitioner's own representations undercut his claim that there are no "immediate or active risks to the Internet," and that "a stay of the Order would not threaten Internet openness during an appeal."[56]

20. Further, the Petitioner does not identify or analyze the harms to consumers associated with, for example, a stay of the enhancements to the transparency rule. For these and other reasons, Petitioner's assertions provide an inadequate basis to conclude that a stay will not harm others.

D. The Public Interest Does Not Support a Grant

21. Petitioner has failed to prove that the public interest supports the grant of his stay petition. He argues that the *Order* will disrupt 20 years of "non-regulation of the computing and larger information technology industry,"[57] a claim that the *Order* addressed at length.[58] Additionally, Petitioner argues that a stay will avoid regulatory uncertainty pending appeal.[59] Contrary to Petitioner's claim, the public interest is at the heart of the *Order*. The Commission's history of openness regulation—of which the *Order* is the latest in the long line of actions—is grounded in the public interest.[60] Applying a consistent set of open Internet rules to fixed and mobile BIAS was also found to be in the public interest.[61] Further, the Commission is statutorily required to take the public interest into account when it considers forbearance, a step that it took when it utilized forbearance to tailor Title II requirements to the needs of the public interest.[62] Finally, it is the very regulatory uncertainty Petitioner seeks via a stay request that the Commission sought to quash in the *Order*, finding that "a continued lack of clear rules of the road is far more likely to have a deleterious effect on investment nationwide by providers large and small."[63]

22. Petitioner also argues that administrative efficiency requires a stay, allowing the Commission to put off future rulemakings that determine how to apply the retained provisions of Title II and avoiding cumbersome judicial review of those additional rulemakings.[64] Petitioner identifies a rulemaking to implement section 222 of the Act for BIAS as the relevant example.[65] However, other parties requesting a stay have identified that very section as an area of uncertainty impacting their

[54] *Id*. at para 291 & n.478; *see* Opposition at 10-11.

[55] *2015 Open Internet Order*, para. 125 ("[W]e conclude that paid prioritization network practices harm consumers, competition, and innovation, as well as create disincentives to promote broadband deployment and, as such, adopt a bright-line rule against such practices.").

[56] Petition at 19.

[57] Petition at 2.

[58] *Id*. at 19.

[59] *Id*.

[60] *2015 Open Internet Order*, para. 60.

[61] *Id*. at para. 92.

[62] *Id.* at paras. 435-39.

[63] *Id*. at para. 425 (quotation omitted).

[64] Petition at 20.

[65] *Id*.

business decisions.[66] Regardless of the validity of those arguments, it counsels against finding the delay of a section 222 rulemaking as a public interest benefit.[67]

23. For these and other reasons we find that Petitioner's assertions provide an inadequate basis to conclude that the public interest supports a grant of a stay.

IV. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 4(i), 4(j), 5, 201, 202, and 303(r) and of the Communications Act of 1934, as amended, and the authority contained in section 706 of the Telecommunications Act of 1996, 47 U.S.C. §§ 151, 154(i)-(j), 155, 201, 202, 303(r), 1302, and the authority delegated pursuant to sections 0.91, 0.131, 0.291, and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.131, 0.291, 0.331, this Order Denying Stay Petition in WC Docket No. 14-28 IS ADOPTED.

25. IT IS FURTHER ORDERED, that the Petition for Stay Pending Judicial Review of Daniel Berninger, Founder of the Voice Communication Exchange Committee IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Julie A. Veach
Chief
Wireline Competition Bureau

Roger C. Sherman
Chief
Wireless Telecommunications Bureau

[66] Petition of American Cable Association and National Cable & Telecommunications Association for Stay Pending Judicial Review, GN Docket No. 14-28, at 24-26 (filed May 1, 2015); Joint Petition for Stay of United States Telecom Association, CTIA – The Wireless Association,, AT&T Inc., Wireless Internet Service Providers Association, and CenturyLink, GN Docket No. 14-28, at 26-29 (filed May 1, 2015).

[67] *See* Opposition at 12.