

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

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

**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**

Pursuant to 47 C.F.R. § 1.45(d), Public Knowledge, Free Press, and the Open Technology Institute at New America (jointly, “Public Interest Organizations”) file this Opposition to the Petition for Stay Pending Judicial Review of Daniel Berninger, Founder of the Voice Communication Exchange Committee, submitted on April 27, 2015 (“Petition”).¹

SUMMARY

As the Commission has consistently emphasized, a stay is “extraordinary relief”² that should not be routinely granted, and parties asking for a stay must show that their case meets the stringent standard established in the Commission’s and the courts’ precedents. Here, Petitioner

¹ Petition for Stay Pending Judicial Review of Daniel Berninger, Founder of the Voice Communication Exchange Committee, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28 (Apr. 27, 2015) (“Petition”).

² See *Arizona Public Service Company and Nextel Communications, Inc.*, WT Docket No. 02-55, Memorandum Opinion and Order, ¶¶ 8, 10 (2015); *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Order Denying Stay Petitions and Petition to Hold in Abeyance, 28 FCC Rcd. 15,927, 15,931, 15,943 (2013); *Amendment of Parts 73 and 74 of the Commission’s Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, MB Docket No. 03-185, Second Memorandum Opinion and Order, 28 FCC Rcd. 14,412, 14,415 n.34 (2013); *Improving Public Safety Communications in the 800 MHz Band*, WT Docket No. 02-55, Order, 20 FCC Rcd. 1560, 1563, 1565 (2005); *Establishment of a Class A Television Service*, MM Docket No. 00-10, Order, 16 FCC Rcd. 15,053, 15,054 (2001).

has failed to show that a stay is warranted on any of the four factors of the Commission's analysis.

After months of deliberation and millions of public comments, the Commission decided to (1) reclassify broadband Internet access services as telecommunications services under Title II of the Communications Act; (2) forbear from applying several provisions in Title II to such broadband Internet access services; and (3) implement strong net neutrality rules for such broadband Internet access services.³ Accompanying the Commission's new rules was a comprehensive Order documenting and responding to the many arguments and evidentiary claims raised throughout the course of the proceeding. Petitioner's arguments fail to justify the extraordinary action of upending that status quo while lawsuits challenging the Open Internet Order are still pending.

In evaluating a Petition for Stay, the Commission considers: (1) whether Petitioner is likely to succeed on the merits; (2) whether Petitioner will be irreparably injured in the absence of a stay; (3) whether a stay will harm other parties; and (4) whether the public interest supports a stay.⁴ Petitioner has failed to show that any of these factors favor the grant of a stay, and so the Commission should deny Petitioner's request for a stay.

ARGUMENT

Petitioner largely uses its stay motion to reargue its single filing in this docket, an *ex parte* dated January 23, 2015.⁵ Petitioner provides no new evidence of any irreparable harm that

³ See *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order (rel. Mar. 12, 2015) ("Open Internet Order").

⁴ See, e.g., *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

⁵ See Letter to Tom Wheeler, Chairman, FCC, of VCXC, GN Docket No. 14-28 (Jan. 23, 2015), available at <http://apps.fcc.gov/ecfs/document/view?id=60001016194>.

Petitioner would suffer as a consequence of the Commission’s Order going into effect pending resolution of ongoing litigation. Petitioner has neither sought judicial review nor filed a Petition for Reconsideration before the Commission, raising further questions as to whether Petitioner genuinely seeks relief from imminent and irreparable harm or merely wishes to continue making his rejected arguments.

As an initial matter, it would appear Mr. Berninger’s Petition for Stay should be dismissed as procedurally defective. Because Mr. Berninger has not filed either a Petition for Reconsideration with the Commission, or a Petition for Review in an appropriate court, it is unclear how Petitioner can hope to “prevail on the merits” of his substantive appeal when no appeal has been made on which to prevail. Although the Commission’s rules do not explicitly require a filing of a Petition for Reconsideration or an appeal to an appropriate court as a precondition of filing a motion for stay, it would appear axiomatic that one seeking a stay must file for review of the underlying Order in *some* forum, given that the first prong Petitioner must satisfy is success on the merits of the underlying formal challenge to the Order. To permit a party to file a motion for a temporary stay without first filing some underlying challenge to the pending order (or certifying it will file such a challenge) would allow a temporary stay to become a permanent stay with no chance for resolution.

Petitioner faces a further difficulty in that the reclassification of broadband Internet access service (BIAS) does not directly impact Petitioner. Petitioner’s alleged harms, in addition to being previously rejected by the Commission in the Open Internet Order, are therefore indirect, highly speculative, and cannot constitute the imminent, irreparable harm that would justify issuing a stay. Furthermore, as discussed in more detail below, Petitioner is unlikely to prevail on the merits, Public Interest Organizations and other beneficiaries of the Open Internet

Order will suffer irreparable harm if the Order does not go into effect, and the public interest favors denial of the requested stay.

I. PETITIONER IS UNLIKELY TO SUCCEED ON THE MERITS.

Petitioner fails to point to any argument that is likely to succeed in challenging the Commission’s Open Internet Order on appeal. As the D.C. Circuit has held, an intrusion into the “ordinary processes of administration and judicial review” should be justified by “a substantial indication of probable success.”⁶

First, Petitioner fails to show that the Commission acted outside of the authority granted to it by Congress. Indeed, Petitioner fails to even mention the fact that courts have repeatedly found that Congress delegated to the Commission the authority to interpret ambiguous terms, along with the fact that the Commission’s choice between two reasonable usages of a term warrants deference.⁷

Petitioner also contends that in this Order the Commission “arrogates unto itself the power” to regulate Internet applications or content.⁸ To the extent that Petitioner is implying that the Commission has given itself authority to regulate applications and content under Title II, Petitioner fails to provide any support for that assertion, and the Order provides none. To the contrary, one reason that many (including Public Interest Organizations) have advocated for Title

⁶ See *Virginia Petroleum Jobbers Ass’n*, 259 F.2d at 925 (“Without such a substantial indication of probable success, there would be no justification for the court’s intrusion into the ordinary processes of administration and judicial review”).

⁷ See *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Services*, 545 U.S. 967, 980-81, 986-1000 (2005); *Verizon v. FCC*, 740 F.3d 623, 637-39, 652 (D.C. Cir. 2014); Open Internet Order ¶¶ 43, 276, 295, 314, 322, 331-32; see also *id.* ¶ 359 (citing *Brand X*) (“If the Commission had concluded that the transmission component of cable modem service was a telecommunications service, and provided a reasoned explanation for its decision, it is evident that the Court would have deferred to that finding.”).

⁸ Petition at 8.

II authority is precisely because such authority is focused on the *transmission* service that BIAS entails, not the content sent or received by the customer using that service.

Petitioner also demonstrates a thorough misunderstanding of the very definition of “telecommunications,”⁹ a term that the Commission reviews in detail in its Order.¹⁰ This misunderstanding most prominently manifests itself in Petitioner’s mischaracterization of an Internet video edge service, Netflix, as a telecommunications service. Petitioner’s claim that Netflix provides a telecommunications service is incorrect because Netflix does not transmit data at the direction of the user, nor do so without change in form or content. When a user sends data to Netflix, that data necessarily travels via a BIAS. When that user requests a video, Netflix responds not by simply passing that data on to someone else and forgetting about it, but by sending a video back to the user who sent the original request. This is where Petitioner’s logic falls apart: a request for a video is different from the actual video. A response to a message is different from the original message. Content is different from transmission. The Order explains this analysis in depth,¹¹ and Petitioner’s contention that the Commission has failed to make these distinctions sufficiently clear is wholly without merit.

Petitioner’s arguments that the Order is arbitrary and capricious are similarly unconvincing.¹² As the D.C. Circuit reminded us in *Verizon v. FCC*, “so long as an agency ‘adequately explains the reasons for a reversal of policy,’ its new interpretation of a statute cannot be rejected simply because it is new.”¹³ When a court reviews a Commission order under

⁹ 47 U.S.C. § 153(50) (defining “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received”).

¹⁰ Open Internet Order ¶¶ 355-364.

¹¹ Open Internet Order ¶¶ 331-408.

¹² See Petition at 12-15.

¹³ *Verizon v. FCC*, 740 F.3d 623, 636 (D.C. Cir. 2014) (quoting *Brand X*, 545 U.S. at 981).

the arbitrary and capricious standard, the court simply determines whether the agency has “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”¹⁴ Petitioner argues that the Commission failed to consider parties’ arguments that it must take into account reliance interests under *FCC v. Fox Television Stations, Inc.*, but then undermines his own argument by *citing the very paragraphs in which the Commission addressed those arguments* in the Order.¹⁵ Petitioner’s argument that the Order was so devoid of economic analysis that it rises to the level of arbitrariness overlooks an entire section of the Order, in which the Commission reviewed data from many sources to evaluate the economic impact of its decision on the Internet ecosystem.¹⁶

II. PETITIONER WILL NOT SUFFER IRREPARABLE HARM IN THE ABSENCE OF A STAY.

It is well established that “a showing of irreparable injury is generally a critical element in justifying a request for stay of an agency order.”¹⁷ As the D.C. Circuit explains, “[t]he key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.”¹⁸ An irreparable

¹⁴ *Id.* at 643-44 (quoting *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006)).

¹⁵ See Petition at 13. Indeed, many who disagree with the result have actually criticized the Commission for the length and thoroughness of its Open Internet Order. See, e.g., *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Dissenting Opinion of Commissioner Ajit Pai (rel. Mar. 12, 2015); Justin Vélez-Hagan, *FCC's net neutrality order is worse than we thought*, The Hill (Mar. 17, 2015), <http://thehill.com/blogs/congress-blog/technology/235845-fccs-net-neutrality-order-is-worse-than-we-thought>.

¹⁶ Compare Petition at 13-15 with Open Internet Order ¶¶ 409-25.

¹⁷ *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Order, 27 FCC Rcd. 10,217, 10,220 (2012) (citing *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009) and *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)).

¹⁸ See *Virginia Petroleum Jobbers Ass'n*, 259 F.2d at 925.

harm sufficient to justify a stay must be “both certain and great; it must be actual and not theoretical.”¹⁹

Importantly, Petitioner must also “provide proof indicating that the harm is certain to occur in the near future.”²⁰ “[U]nsupported and conclusory statements are not enough” to justify a stay.²¹ “Bare allegations of what is likely to occur” are not sufficient because the question is what harm “will in fact occur.”²² This is an “exacting standard.”²³ Here, Petitioner fails to meet it.

It is also important to be clear about the kind of harms with which this prong concerns itself. The question is: if the Commission’s Order is struck down in relevant parts, will the implementation of those portions of the Order during the pendency of litigation cause irreparable harm? This question is not about re-litigating whether the Commission’s reclassification decision and Open Internet Order are good policy. This question is also not about whether Petitioner agrees with the Order, or even whether the Order would harm him in some non-irreparable way. Only a showing of imminent, concrete, irreparable harms could support the extraordinary remedy of a stay.

Petitioner’s harms are even more speculative than usual, in light of the fact that none of the carriers or trade associations representing carriers have sought a stay of the non-prioritization

¹⁹ *Echostar Satellite Operating Company Application for Special Temporary Authority Related to Moving the EchoStar 6 Satellite from the 77° W.L. Orbital Location to the 96.2° W.L. Orbital Location, and to Operate at the 96.2° W.L. Orbital Location*, Memorandum Opinion and Order, 28 FCC Rcd. 5475, 5480 (2013) (quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam)).

²⁰ *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, 27 FCC Rcd. at 10,227-28.

²¹ See *Connect America Fund: High Cost Support*, WC Docket No. 10-90, 05-337, Order, 27 FCC Rcd. 7158, 7160 (2012).

²² See *Wisconsin Gas Co.*, 758 F.2d at 674.

²³ *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, 27 FCC Rcd. at 10,228.

rule,²⁴ and since its adoption major carriers have explicitly disavowed any interest in prioritizing traffic in the manner described by Petitioner. It seems more likely that the newfound but express disavowal by carriers of any interest in supporting Petitioner's hypothetical product with hypothetical prioritization has more real world impact on Petitioner than the Order does. After all, if carriers were genuinely harmed by a rule stopping them from exploring such opportunities, one would expect them to seek a stay themselves of a rule prohibiting prioritization.²⁵

Even if Petitioner had factually supported his claims of harm, which he could not do, the harms described rise only to the level of mere economic harms that do not justify a stay. In rare cases, an economic injury that amounts to the complete destruction of a business might constitute irreparable harm. Petitioner's claimed inability to potentially strike future paid prioritization deals for a technology still in development is a far cry from the examples of irreparable harm that have previously passed muster in the courts, like an agency injunction that specifically prevents a particular company from operating entirely.²⁶

Petitioner includes a number of sweeping assertions, including a proclamation that all Title II services "are destined to fail,"²⁷ which are obviously and demonstrably false. For one thing, basic phone services, both wireline and wireless, as well as enterprise broadband and rural

²⁴ See 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 1-2 (May 1, 2015) ("Telco Stay Petition"); Petition of American Cable Association and National Cable & Telecommunications Association for Stay Pending Judicial Review, GN Docket No. 14-28, at 1 n.3 (May 1, 2015) ("Cable Stay Petition"); *see also* Verizon Policy Blog, *A Response To Senator Patrick Leahy* (Oct. 29, 2014) <http://publicpolicy.verizon.com/blog/entry/a-response-to-sen.-patrick-leahy>.

²⁵ The Telco carriers explicitly do not acknowledge the legality of the rule prohibiting prioritization. *See Telco Stay Petition* at 2 n.2. But they have not sought to have these rules stayed so that they can negotiate with Petitioner or other parties seeking prioritization.

²⁶ *See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n.2 (D.C. Cir. 1977).

²⁷ Petition at 15.

LEC DSL, have operated under Title II for decades and still do so today. Title II upholds common carriage’s basic universal service and nondiscrimination principles. That framework fostered a reliable, affordable, universally available network whose openness supported the development of technologies like the Internet—one of the United States’ great success stories, and about as far from a failure as one could imagine. It did so both when Title II expressly applied to the underlying transmission service, as it did for dial-up and as it did for all DSL services prior to 2005; and when the same principles were applied to broadband access through other frameworks supposed by the Commission.

Petitioner also claims that investors will only invest in non-Title II technologies. This is incorrect, as the Commission explained clearly in its Order.²⁸ Real world examples of carriers expanding services and investment even in the few short weeks since the release of the Order also belie the notion that no investor would support a Title II service.²⁹ Moreover, the fact that Petitioner “is not aware” of investments being made in the industry does not in the least amount to a showing that Petitioner *himself* is facing imminent and concrete irreparable harms.³⁰ And to the extent that Petitioner threatens to himself withdraw from the sector in response to the Order, even if such threats were supported, they are not sufficient if they are not paired with a showing of the concrete harms to Petitioner that would lead to that result.³¹ In fact, Petitioner himself describes the harm he faces as the elimination of “*possible* business models that would support

²⁸ See Open Internet Order ¶¶ 409-25.

²⁹ See, e.g., *AT&T Expands High-Speed Internet Service for Businesses to More than 180 Cities*, AT&T Newsroom (Apr. 30, 2015), http://about.att.com/story/att_expands_high_speed_internet_service_for_businesses.html; *Comcast Begins Rollout of Residential 2 Gig Service in Atlanta Metro Area* (Apr. 2, 2015), <http://corporate.comcast.com/comcast-voices/imagine-where-2-gigabit-speeds-will-take-you>.

³⁰ See Petition at 15-16.

³¹ See *id.* at 18.

Petitioner’s HD voice offerings.”³² If even the Petitioner admits that his speculative harms are but a mere possibility, it is clear they do not justify a stay.

Petitioner’s general allusions to Title II requirements slowing the development of new technologies are both too vague to constitute an actual showing of harm and not serious enough to justify a stay.³³ To the extent that Petitioner’s confusion over the regulatory status of various VoIP services inhibits his business, that is a separate question from those addressed in the Order and a stay would therefore offer no relief.³⁴ And Petitioner has also seemingly failed to consider whether any of the Order’s enforcement mechanisms that were specifically designed to prevent confusion and quell uncertainty could be of use to him.³⁵

III. A STAY WOULD HARM OTHER PARTIES.

When evaluating a stay request, the Commission will consider whether, “despite showings of probable success and irreparable injury on the part of petitioner, the issuance of a stay would have a serious adverse effect on other interested persons.”³⁶ Here, the question is whether other parties will sustain harm if the Order is stayed pending litigation and the Commission later prevails in court. Contrary to Petitioner’s suggestion, the question is not whether the Order preserves the “status quo.”³⁷ Indeed, giving any weight to this notion—that agency action changing the status quo merits a stay—would mean this factor inherently *always* weighs in favor of a stay. That is a nonsensical result.

³² See *id.* at 19 (emphasis added).

³³ See *id.* at 16.

³⁴ See *id.* at 16-17. If this question does indeed pose problems for Petitioner’s business, a better course of action might be a petition for the Commission to address whether interconnected VoIP is a Title II service.

³⁵ See Order ¶¶ 225-72.

³⁶ See *Virginia Petroleum Jobbers*, 259 F.2d at 925.

³⁷ Petition at 4.

In any case, as the Order amply demonstrates, an open Internet is crucial to the public’s freedom of expression, educational opportunities, and ability to engage in civic participation. The Order protects these interests in addition to economic interests that are threatened by paid prioritization and other forms of discrimination.³⁸ Beyond broadband providers publicly announcing their incentive and ability to pursue paid prioritization arrangements absent open Internet rules,³⁹ recent real-world examples of discriminatory actions by carriers show that ISPs are willing to violate net neutrality principles to increase their own profits.⁴⁰ For these reasons, a stay would harm the public relying on the open Internet, as protected by the Order, including the millions who filed comments with the Commission attesting to that fact.

IV. THE PUBLIC INTEREST FAVORS DENIAL OF A STAY.

The public interest favors denial because a stay would deny customers the guarantee of an open Internet, and a stay would create uncertainty for companies and consumers alike. By relying on the Commission’s Title II authority, the Order both “foster[s] competition and preserv[es] the economic viability of existing public services.”⁴¹ Even strong opponents to the use of Title II purport to support net neutrality rules in general.⁴² And to the extent that pending

³⁸ See Open Internet Order ¶ 77, 545 (“[O]ur rules serve First Amendment interests of the highest order, promoting ‘the widest possible dissemination of information from diverse and antagonistic sources’ and ‘assuring that the public has access to a multiplicity of information sources’ by preserving an open Internet.”).

³⁹ *Verizon Oral Arg. Tr.* at 31 (“I’m authorized to state by my client [Verizon] today that but for these rules we would be exploring those commercial arrangements, but this order prohibits those, and in fact would shrink the types of services that will be available on the Internet.”).

⁴⁰ See Open Internet Order ¶ 79 n.123.

⁴¹ See *Virginia Petroleum Jobbers Ass’n*, 259 F.2d at 925.

⁴² See Mary Schultz, *Banks: Title II Not Right Approach for Broadband*, US Telecom (Mar. 16, 2015), <http://www.ustelecom.org/blog/banks-title-ii-not-right-approach-broadband> (quoting AT&T Vice President-Federal Regulatory as saying “It’s not the rules of net neutrality that people are concerned about. It’s the regulation under Title II.”); *USTelecom Files Protective Petition for Review*, US Telecom Media (Mar. 23, 2015), <http://www.ustelecom.org/blog/ustelecom-files-protective-petition-review> (“USTelecom strongly

litigation creates uncertainty about the Commission's reliance on Title II, a stay does nothing to resolve that uncertainty, but would only leave consumers unprotected until the Order is upheld in court.

The public interest also favors denial of a stay because staying the Commission's decision to reclassify broadband Internet access service as a telecommunications service impacts the application of other provisions of Title II from which the Commission did not forbear. Among those provisions is § 222,⁴³ which protects users' privacy in telecommunications. There is a strong public interest in ensuring that consumers' privacy interests are protected, especially when using essential communications services.⁴⁴ Consumers are uniquely dependent on telecommunications networks to communicate some of their most personal information, and so it is even more crucial that consumers' privacy is protected when they use those networks. Overturning users' privacy protections because Petitioner desires to strike hypothetical paid prioritization deals with ISPs would disserve the public interest. For this reason alone, along with the other pro-competition and consumer benefits derived from Title II reclassification, this factor weighs decidedly against granting a stay.

CONCLUSION

For these reasons, the Petition for Stay Pending Judicial Review of Daniel Berninger, Founder of the Voice Communication Exchange Committee, should be denied.

Respectfully submitted,

supports open Internet rules, but disagrees with the Federal Communications Commission's decision to reclassify broadband Internet providers as common carriers in the order adopted March 12.").

⁴³ 47 U.S.C. § 222.

⁴⁴ See *Nat'l Cable & Tel. Assoc. v. FCC*, 555 F.3d 996, 1001 (D.C. Cir. 2009).

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May 4, 2015

CERTIFICATE OF SERVICE

I certify that on May 4, 2015, I caused the foregoing Opposition to Petition for Stay to be served via electronic mail upon the following:

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