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

UNITED STATES TELECOM ASSOCIATION, *et al.*, *Petitioners*, v. FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA, *Respondents*.	No. 15-1063 (and consolidated cases)

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

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INTRODUCTION AND SUMMARY

The FCC's reclassification of broadband Internet access as a Title II common carriage service is a seismic departure from the status quo that has prevailed for more than two decades. It will expose Petitioners and their members to a host of new, ill-defined requirements, and it immediately threatens them with class-action litigation and enforcement actions.

The FCC's reclassification is likely to be set aside because it is contrary to the Communications Act and was promulgated in violation of the Administrative Procedure Act. As we demonstrate in detail below, the FCC misinterprets the statutory text, disregards the regulatory scheme that Congress codified, and demonstrably misconstrues *Brand X*. The FCC likewise cannot justify its abrupt about-face as to the statutory classification of mobile broadband. Nor does its decision meet well-established standards for reasoned decision-making or public notice.

This is thus a paradigmatic case for granting a stay pending appeal. The "purpose of granting interim injunctive relief" is "to maintain the status quo pending a final determination of the merits of the suit."[1] That is all Petitioners seek here. Contrary to the FCC's distortion of Petitioners' request (at 1), granting this motion will leave in effect the Order's three bright-line rules — rules that address the only specific behaviors the FCC identified as contrary to the public interest.

[1] *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).

Petitioners have not sought interim relief, or claimed irreparable harm, from those rules. A stay, therefore, will leave providers subject to more stringent regulations than ever before.

This result is all the more sensible because, as the Order itself trumpets, both fixed and mobile broadband deployment and usage have boomed without Title II regulation.[2] The Internet economy has thrived without Title II mandates, to the immense benefit of the public. Although Intervenors labor to show harms from a stay, they rely entirely on hypothetical concerns about conduct (such as market-based interconnection arrangements or broadband plans with usage-based pricing) that the Order expressly declined to find contrary to the public interest.

The FCC's remaining arguments are no more substantial. Invoking Justice Holmes, the FCC claims (at 4) that case-by-case adjudication cannot cause harm. That is a straw man. Petitioners object not to case-by-case adjudication itself, but to a massive regulatory sea change, accompanied by potential class-action litigation and multi-million dollar forfeitures, without any intelligible guidance as to what "rates" and "practices" are "just" and "reasonable" in the broadband context, and what conduct the newly concocted Internet conduct standard proscribes. Jus-

[2] "In 2000, only 5 percent of American households had a fixed Internet access connection with speeds of over 200 kbps"; "as of December 2013, 60 percent of households have a fixed Internet connection with minimum speeds of at least 3 Mbps." Order ¶ 346. Likewise, mobile "connection speed and data consumption have exploded" without common-carrier regulation. *Id.* ¶ 89.

tice Holmes never sanctioned such a regime. He said that "any legal standard" must "be capable of being known," so liability rests on "fixed and uniform standards."[3] The FCC's actions fail that basic test, thereby exposing thousands of providers to immediate and irreparable harm. All providers face injury, but the situation is most dire for the hundreds of small broadband providers. Although the FCC seeks to diminish their injuries, it declined specific requests to exempt them from its rules. Small providers make up much of Petitioners' memberships, and they frequently serve rural and less populated areas where broadband choice is most limited. The FCC's speculation as to the Order's effects cannot refute their many sworn demonstrations of imminent and irreparable harm.

ARGUMENT

I. PETITIONERS ARE LIKELY TO PREVAIL ON THE MERITS

A. The FCC's Reclassification Contravenes the Statutory Language, Regulatory History, and the Agency's Own Precedent

1. Broadband Internet access service "offer[s]" the "capability" to acquire, make available, store, and retrieve information. 47 U.S.C. § 153(24). The capability of acquiring and interacting with information is the reason why consumers purchase the service. *See* Mot. 11-12. Broadband Internet access services are thus "information services," as Congress defined them. If that statutory text were not enough, Congress made clear, in the same 1996 Act in which it adopted the

[3] Oliver Wendell Holmes, *The Common Law* 89 (Belknap Press ed. 1963).

"information service" definition, that among the "interactive computer services" that must remain "unfettered by Federal or State regulation" are "information services," which "*includ[e] specifically a service . . . that provides access to the Internet*." 47 U.S.C. § 230(b)(2), (f)(2) (emphasis added); *see* Mot. 12.

The FCC barely mentions the statutory definition of information service. *See* FCC Opp. 6 n.4, 14-15 & n.15. It argues instead (at 12) that broadband "'provides the capability *to transmit data*'" and thus "includes a transmission service offering." That claim answers nothing under the statute. *All* information services are, by definition, provided "via telecommunications," which is "transmission" of data at a user's request. 47 U.S.C. § 153(24), (50). Where, as here, a service offers the capability to store, retrieve, process, and make available information via that transmission, it is an information service.

The FCC next asserts (at 14) that § 230 "has no bearing on the classification of the capability to transmit data to and from the Internet." Congress, however, "specifically" identified services that "provide[] access to the Internet" as "information service[s]." 47 U.S.C. § 230(f)(2). The FCC thus violates the "normal rule of statutory construction that identical words used in different parts of the same act . . . have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (internal quotation marks omitted).[4]

[4] Nor can the FCC minimize § 230 because one subsection, § 230(c), ad-

Petitioners' interpretation is fortified by the regulatory background against which Congress passed the 1996 Act. The FCC previously held that the 1996 Act codified the pre-existing regulatory regime, so that "all of the services" that the FCC "previously considered to be 'enhanced services' are 'information services.'" *Non-Accounting Safeguards Order* ¶ 102. And the FCC has likewise found that "the functions and services associated with Internet access" — known then as "provision of gateways . . . to information services" — "fell squarely" within the pre-existing enhanced/information services categories. *Stevens Report* ¶ 75.

The FCC seeks to brush this aside in a footnote (at 13 n.13) that disavows the *Stevens Report*. But neither the FCC's brief nor its Order suggests that the *Stevens Report* misstates the relevant regulatory history. That history shows that Congress codified the pre-existing regulatory categories and that it was already established by 1996 that Internet access fit in the information/enhanced service category. *See Commissioner v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993) (noting presumption that Congress is aware of "settled judicial and administrative interpretation[s]" of terms when it enacts a statute).

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dresses the blocking and screening of offensive material on the Internet. *See* FCC Opp. 14 (citing Order ¶¶ 386, 532). Section 230(b) broadly announces "the policy of the United States" with respect to the "continued development of the Internet and other interactive computer services." 47 U.S.C. § 230(b)(1). That policy specifically declares that Internet access and other interactive computer services should remain "unfettered by Federal . . . regulation." *Id.* § 230(b)(2). The FCC's bald claim (at 13) that it is consistent with this directive to extend Title II to broadband Internet access is frivolous.

This regulatory history is also an insuperable obstacle to the FCC's attempt to reinterpret the statutory "telecommunications management" exception to encompass Internet access's inherent interaction with information. *See* FCC Opp. 14-15. Contrary to the FCC's view (at 14), information-processing features do not lose their status as information services when used for broadband Internet access service. Under the pre-1996 regulatory regime that Congress codified, these functions (and the predecessor functions used to provide gateway services) were enhanced/information services; they did not fall within any exception and were not regulated as "telecommunications services." *See* Mot. 13-14.

Even aside from that regulatory history, the computer-processing and storage functions inherent in broadband Internet access — the key "offering" to consumers — make it an information service. Those functions include the information processing necessary for the various interconnected networks that comprise the Internet to exchange traffic and to facilitate customer use of the World Wide Web.[5] They also include "caching," which occurs when a broadband provider, to improve the customer experience, stores popular information on its network so it does not have to obtain that information from distant websites when requested by a customer. The broadband provider, not the customer, determines what and where infor-

[5] *See 1997 USF Order* ¶ 789 ("ISPs alter the format of information through computer processing applications . . . , while the statutory definition of telecommunications only includes transmissions that do not alter the form or content of the information sent.").

mation is cached and when the information should be retrieved from its own network rather than from the edge provider's website. The FCC concedes that caching, when done by other providers, *see* Order ¶ 372, is an information service, even as it arbitrarily claims caching somehow is transformed into a telecommunications management function when performed by a broadband Internet access provider.[6]

2. The FCC hangs its hat on *Brand X*. That case, however, did *not* hold that cable broadband "could permissibly be classified as an information service," as the FCC claims (at 11). The Supreme Court instead held that the FCC reasonably concluded that cable broadband could be classified in its entirety as *only* an information service that did not *also* include an additional, separate telecommunications service. *See NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 989 (2005). Now, however, the FCC claims that broadband Internet access — that is, the service of providing customers with the capability of accessing the Internet and thus accessing, retrieving, and making available all of the information it contains — is *only* a telecommunications service. That was never at issue in *Brand X*.

Moreover, the FCC's assertion (at 12) that this reclassified service "*is the very same* as the transmission service discussed in *Brand X*" mischaracterizes the

[6] *See* Mot. 14 & n.9. Beyond the facial inconsistency, the FCC's theory that combining storage with transmission turns what is otherwise an information service into a telecommunications service ignores the definition of information service (which assumes a transmission component) and would allow the FCC to eviscerate the information service category. *See id.* at 14.

statutory ambiguity identified in *Brand X*. As we have explained, all nine Justices agreed that the computing functionalities offered to consumers that give them the capability to access and "manipulate[ ] information using the Internet" is an "information service." 545 U.S. at 987; *see also id.* at 1009-11 (Scalia, J., dissenting) (agreeing that the provision of "computing functionality" so customers can access the Internet is an "information service"). The dispute, and where the majority found ambiguity, was whether the portion of the service the Solicitor General described as transmission "between the user and the service provider's computers"[7] (*i.e.*, the "last-mile") was an "offering" of "telecommunications service" *separate from* the computer processing performed in the provider's facilities that allows customers to acquire information from the Internet. *See* Mot. 14-17.

To support its contrary reading, the FCC cites (at 12-13) the majority's statement that cable companies provide broadband Internet access "via the high-speed wire that transmits signals to and from [the] end user's computer." *Brand X*, 545 U.S. at 988. But that "high-speed wire" was the same wire Justice Scalia discussed in dissent, which provided transmission "downstream from the computer-processing facilities" — between "the customer's computer and the cable-company's computer processing facilities" — analogous to a pizzeria's "delivery service." *Id.* at 1010 (Scalia, J., dissenting); *see* Pai Dissent at 358-60. Indeed, the

[7] Fed. Pet'rs Br. 25 n.8, *NCTA v. Brand X Internet Servs.*, No. 04-277 (2005), *available at* http://goo.gl/9qJZwA.

quotation the FCC highlights was the Court's characterization of the FCC's *Cable Broadband Order*, where the FCC itself identified the relevant "high-speed wire" as the one used to transmit "data over the cable system between the subscriber and the headend," which is the cable equipment serving a "*local* service area."[8]

The FCC claims further (at 3) that its interpretation of "telecommunications service" is "consistent[] with the way it applies to hundreds of small broadband providers that operate successfully today under Title II, and to its historic application to Digital Subscriber Line (DSL) service . . . before 2005." The pre-2005 rules required telephone companies to offer the last-mile DSL connection as a separate telecommunications service. The complete retail Internet access service offering to consumers, however, was *always* treated as an information service. And the tariffed DSL offerings today are limited to that last mile and differ from the service the FCC reclassified, as the Order states (¶ 460). The FCC is thus being "deliberately misleading" in comparing its newfound Title II service with such offerings. Pai Dissent at 360.[9]

In sum, nothing in *Brand X* supports the FCC's attempt to define as *exclusively* a telecommunications service the service that starts from the customer's

[8] *Cable Broadband Order* ¶¶ 12 n.52, 39 n.154 (emphasis added); *see id.* ¶ 17 n.70 (explaining that the "demarcation point" that separates the cable facilities and the Internet access provider's facilities was "within the headend").

[9] The comments and treatise the FCC cites (at 14 n.13) date from the period when telephone companies were forced to sell last-mile DSL service as a wholesale telecommunications service, but cable companies had no such duty.

premises (or mobile device), extends through the provider's computer-processing facilities and over the provider's Internet backbone network, and finally to the handoff point to another network or a content provider. *See, e.g.*, Order ¶ 336.[10]

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

CTIA and AT&T are likely to prevail on their argument that reclassification of mobile broadband is unlawful. The FCC concedes that, in trying to avoid the statutory bar on common-carrier regulation of private mobile radio services, 47 U.S.C. § 332(c)(2), it reversed itself on multiple, long-held statutory interpretations. Mot. 17-19; FCC Opp. 17-19.

The FCC seeks to defend its redefinition of "the public switched network" to include both the telephone network *and* the Internet on the ground that § 332(d) does not say "public switched *telephone* network." FCC Opp. 17-18. But, both before and after the enactment of the statute, Congress, the FCC, and the courts consistently used the phrase "*the* public switched network" to refer exclusively to one *telephone* network, and, just recently, Congress explicitly distinguished between "the public Internet [and] the public switched network." 47 U.S.C. § 1422(b)(1); *see* Mot. 17-18 & nn.13-14. The FCC claims that all this is "beside

[10] The FCC does not dispute that its assertion of Title II authority over broadband providers' interconnection arrangements is derivative of its reclassification of broadband Internet access service. And it offers only the Order's *ipse dixit* to justify its effort to evade *Verizon v. FCC*, 740 F.3d 623, 653 (D.C. Cir. 2014), which forecloses that gambit. *See* Mot. 17 n.12; FCC Opp. 12 n.11.

the point," FCC Opp. 18 n.16, but "subsequently enacted provisions" are "relevant" where, as here, they "confirm that [a statutory phrase] is a term of art," *Ne. Hosp. Corp. v. Sebelius*, 657 F.3d 1, 9 (D.C. Cir. 2011). Moreover, even if "the public switched network" were "a somewhat elastic phrase, it is not infinitely so"[11] — even the FCC agrees it lacks "boundless discretion," Order ¶ 396 — and cannot be stretched to include the entire Internet and the billions of inanimate devices connected to it. *See* Mot. 19-20 & n.15.[12]

The FCC does not even try to defend the Order's fallback theory that mobile broadband service is "interconnected" with the public switched network, even defined as the telephone network, based on the use of third-party Voice-over-Internet-Protocol applications. *See* Order ¶ 401. In 2007, the FCC found those same applications did not render mobile broadband "interconnected" with the public switched network. *See* Mot. 18-20. Nothing has changed technologically since then, and the FCC does not contend otherwise.

Finally, the FCC defends (at 19 & n.17) the Order's declaration that mobile broadband is the "functional equivalent" of wireless voice services based on an entirely new test applicable *only* in this context. The FCC does not deny that it left in

[11] *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 232 (1994).

[12] The FCC's current willingness to "soften" its statutory interpretation "by regulatory grace," *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 391 (1999), and exempt those devices from Title II, *see* FCC Opp. 18 n.16, is no defense of the sweeping redefinition of "the public switched network."

place its longstanding test for functional equivalence,[13] but claims that only "outside parties" are bound by that test. The agency, however, is bound by its precedent, *see Comcast Corp. v. FCC*, 600 F.3d 642, 658-59 (D.C. Cir. 2010); it cannot simply invent new tests in order to reach its desired result. In any event, the overbreadth of the new test — both services "allow users to communicate with the vast majority of the public," FCC Opp. 19 — is plain: talking to somebody on a wireless phone is *not* the same as sending them an email over the Internet. The FCC's standard thus drains the statutory phrase "functionally equivalent" of all meaning.

C. The Reclassification Ruling Is Arbitrary and Capricious

Even if the Order's reading of the Communications Act were plausible, Petitioners are likely to succeed on the merits because the FCC arbitrarily abandoned its own prior factual findings and longstanding position — which, by design, induced hundreds of billions of dollars in investment — without providing the "more substantial justification" that the APA requires. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015); *see* Mot. 20-23. The FCC does not attempt to show that the Order meets this standard. Instead, it recites (at 15) the truism that agencies are allowed to change course, while denying that an agency must make *any* special showing before throwing its long-settled policy out the window. But that

[13] That test requires that a service be, in economic terms, a "close[] substitut[e]" for mobile voice service — a test mobile broadband plainly fails. 47 C.F.R. § 20.9(a)(14); *see* Order ¶ 408; Mot. 20.

ignores *Perez*'s teaching that "the APA requires an agency to provide more substantial justification" if either "its new policy rests upon factual findings that contradict those which underlay its prior policy" or "its prior policy has engendered serious reliance interests that must be taken into account," *both* of which are true here. 135 S. Ct. at 1209 (internal quotation marks omitted).[14]

The FCC fails to demonstrate that the abrupt abandonment of its decades-old position was rational under any plausible standard. It points (at 15) to the Order's self-serving conclusion that reclassification comports with the "factual record" (Order ¶ 47), but does not identify any changed facts that could explain the FCC's about-face. The FCC (at 13, 16) invokes the supposedly changed consumer "perception" of broadband on which the Order relies. But the agency never answers Petitioners' showing that the facts from which the Order purported to infer that changed perception are neither new nor relevant to consumer perception regarding the "capability" of the "offer[ed]" broadband service to allow consumers to "acquir[e]" and "retriev[e]" "information via telecommunications." *See* Mot. 21-22.[15]

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[14] The FCC disputes (at 15) that this "more substantial justification" requirement amounts to a "heightened standard," citing a pre-*Perez* case that did not involve changed factual findings or reliance interests, as is the case here. *See Mary V. Harris Found. v. FCC*, 776 F.3d 21, 24-25 (D.C. Cir. 2015). However phrased, *Perez* leaves no doubt that an agency must confront its own prior findings and policy and the reliance predicated upon them.

[15] Contrary to the FCC's claim (at 16), Petitioners never asserted that actual changes in consumers' perceptions are irrelevant. Instead, the supposed changes *the Order cited* are irrelevant because (in addition to not being changes at all) they

As was true at the time of *Brand X*, the central function of Internet access service today is to allow customers to obtain and manipulate information. The FCC points to no facts indicating a change in how consumers view those capabilities.

Unable to substantiate any supposed factual change, the FCC retreats to the Order's fallback claim that, *even if* "no facts had changed," the FCC would have reclassified broadband anyway. FCC Opp. 16. That concession is jarring and telling, as the Order is premised on the supposed need for unprecedented regulation for a brave new era of the Internet. In any event, absent some change in the relevant facts, the FCC could not rationally reject its prior classification *unless* the applicable law had changed. Yet the FCC does not offer any interpretation of the statute that would lead to a different conclusion on unchanged facts.

The FCC also brushes aside (at 16) Petitioners' massive reliance interests and reclassification's harmful effect on them, echoing the Order's claims that broadband providers did not rely on the FCC's prior statutory understanding in investing in broadband, so reclassification will not deter investment going forward. The FCC's assertion that broadband's classification was "far from settled," *id.*, is hard to take seriously. The explicit purpose of the FCC's classification of broadband as an information service was, consistent with Congress's intent, to induce such investment, which it achieved with stunning success. *See* Mot. 22. And

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do not bear on consumers' perceptions of broadband's *capabilities*.

broadband's classification was only unsettled — by the FCC — at most for the six months between the *2010 Notice* (which raised the possibility of reclassification) and the *2010 Order* (which rejected it).[16]

D. The Order Is Not a Logical Outgrowth of the FCC's Proposal

Petitioners also are likely to succeed on the merits because the FCC radically changed course from the NPRM without affording sufficient notice and opportunity to comment. *See* Mot. 23-25; Pai Dissent at 334-50; O'Rielly Dissent at 385-87. The APA flatly forbids agencies from "pull[ing]" such "a surprise switcheroo on regulated entities," *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996-97 (D.C. Cir. 2005), a "'fundamental flaw'" that "almost always requires vacatur," *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (citation omitted).

[16] The FCC's assurance (at 16) that reclassification will not deter investment going forward is even less credible. Subjecting a cutting-edge, capital-intensive industry to heavy-handed, utility-style regulation is antithetical to fostering investment; that is precisely why Congress and the FCC decided against that course for broadband in the first place. The meager "evidence" the FCC invokes, *id.*, does not come close to proving otherwise. The Order cites stock prices and statements by executives following the *2010 Notice*, *see* Order ¶¶ 360 n.986, 414 & n.1215, but that Notice proposed a far less intrusive approach than the Order adopted here — never suggesting *ex post* rate regulation or regulating traffic exchange — and in any event was soon abandoned. The Order also claims that mobile providers continued to invest despite mobile *voice's* classification as a telecommunications service, *id.* ¶¶ 421-423, but ignores that mobile broadband — where investment in mobile was primarily focused — was *not* subject to Title II. The FCC's assertion (at 16) that the Order's forbearance from some of Title II will avoid undermining reliance interests ignores the many burdensome provisions it left in place. Notably, the Order declines to apply the open Internet rules to premises owners offering Internet access on the ground that such rules "would have a dampening effect on these entities' ability and incentive to offer these services." Order ¶ 191.

The FCC claims (at 20) that it afforded sufficient notice of the Order's reclassification ruling because the NPRM mentioned reclassification and asked a few open-ended questions about it. Agencies, however, "must describe the range of alternatives being considered with reasonable specificity," *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994) (per curiam) (internal quotation marks omitted), and "make [their] views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible," *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977). Otherwise, an agency could evade the APA by "issu[ing] broad NPRMs only to justify *any* final rule it might be able to devise by whimsically picking and choosing within the four corners of a lengthy notice." *CSX Transp., Inc. v. STB*, 584 F.3d 1076, 1082 (D.C. Cir. 2009) (internal quotation marks omitted).

That is what happened here. None of the highly detailed discussion of reclassification that consumed 128 paragraphs of the Order (¶¶ 306-433) was even hinted at in the two paragraphs of the NPRM (¶¶ 149-150) that discussed reclassifying broadband. Those paragraphs instead merely asked "general and open-ended questions" about whether to reclassify. Courts have made clear that is not good enough; an agency must identify not just *what* issues it plans to address, but *how*.[17]

[17] *See Prometheus Radio Project v. FCC*, 652 F.3d 431, 450-51 (3d Cir. 2011) (notice insufficient because, even though "it was clear . . . that the [FCC] was planning to" revisit a given policy, NPRM containing "two general questions"

All that the NPRM revealed about the FCC's intended approach to reclassification was the agency's purported purpose in doing so, but that advertised objective only exacerbates the lack of notice because the Order reclassified broadband to pursue a *different* aim. The NPRM explained that the FCC was considering reclassification *solely* to cement its legal authority for the three Open Internet rules, not as an end in itself. *See* NPRM ¶¶ 4, 142, 149-150. The FCC even assured commenters that, if it reclassified broadband, it "would forbear from applying all but a handful of core statutory provisions." *Id.* ¶ 154. The Order abandoned that approach and undertook the entirely different project of crafting a "Title II tailored for the 21st Century," Order ¶ 5 — a set of massive new, undefined obligations.

The FCC also fails to refute the inadequacy of the NPRM with respect to reclassification of mobile broadband. *See* Mot. 24-25. As with fixed broadband, the NPRM asked only an open-ended question — whether mobile broadband "fit[s] within" a certain statutory category ("commercial mobile service"). NPRM

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about the policy "did not contain enough information about what [the FCC] was planning to do, or the options it was considering"). The FCC denies (at 20 & n.18) that the NPRM's discussion of reclassifying broadband was confined to these two paragraphs. But the passages it cites either concerned *other* subjects, *see* NPRM ¶¶ 151-152 (reclassifying separate service to edge providers); *id.* ¶¶ 153-155 (forbearance), made only summary or passing references to reclassification with no substantive discussion, *see id.* ¶¶ 4, 10, 65, 96, 138, 142, or asked similarly abstract questions that shed no light on how the agency might ultimately *answer* them, *see id.* ¶¶ 89, 112, 121. Certainly none afforded notice of the hundred-plus paragraphs of detail contained in the final Order.

¶ 150.[18] It never mentioned the rules defining "public switched network" and "functional equivalent," let alone that they might be amended. "Something is not a logical outgrowth of nothing." *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994). Although, as the FCC notes (at 21), the NPRM cited a rule containing the former definition (not the latter), that only shows that the FCC took the definitions as a given; rewriting them was not a logical outgrowth of the NPRM, but a completely different tack.

Similarly, contrary to the FCC's claim (at 21), nothing in the NPRM suggested that the FCC was contemplating the nebulous Internet conduct standard it adopted. The FCC rejoins (at 21) that the NPRM proposed a "commercially reasonable standard" and contemplated, without providing any more detail, "adopt[ing] a different rule." NPRM ¶ 121. Such a "general notice that a new standard will be adopted," without any clue as to that rule's content, is insufficient, because it "affords the parties scant opportunity for comment." *Horsehead*, 16 F.3d at 1268.

The FCC offers even less on the NPRM's misdirection with respect to interconnection. *See* Mot. 24. The FCC's denial (at 21) that the NPRM assured that the Order would not address interconnection cannot be squared with Chairman

[18] The FCC also notes (at 21) that the NPRM cited the *2010 Notice*. But the FCC offers no authority for the illogical view that an agency can fulfill its APA duties by referring to other, past notices in other dockets. And the *2010 Notice* never asked whether the FCC should change its relevant definitions.

Wheeler's statement that interconnection *would not be* addressed in this proceeding.[19] The APA forbids that type of bait-and-switch.[20] The FCC claims (at 21) that its intention not to address interconnection was merely "tentative[ ]," NPRM ¶ 59, but that tentativeness was limited to extending the open Internet rules to interconnection, not whether to apply Title II *itself*.

The FCC attempts (at 22) to paper over all of these shortcomings by referring to the filed comments. But the record shows that commenters were addressing all kinds of potential regulatory outcomes in attempting to guess what the FCC might be considering. It was not until the President voiced his own view, and reports surfaced that the FCC was considering a very different course, that parties on all sides rushed to weigh in on that prospect. In any event, the "fact that some commenters actually submitted comments addressing the final rule is of little significance" because "the agency must *itself* provide notice of [its] proposal," *Ass'n of Priv. Colls. & Univs. v. Duncan*, 681 F.3d 427, 462 (D.C. Cir. 2012) (quotation marks and brackets omitted), and "cannot bootstrap notice from a comment," *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

[19] NPRM, 29 FCC Rcd at 5647 (stating that the "question of interconnection" is "a different matter that is better addressed separately" from "[t]oday's proposal," which is "all about what happens on the broadband provider's network").

[20] *See Envtl. Integrity Project*, 425 F.3d at 998 ("If the APA's notice requirements mean anything, they require that a reasonable commenter must be able to trust an agency's representations about which particular aspects of its proposal are open for consideration.") (emphasis omitted); *see, e.g., Int'l Union, UMW v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1260 (D.C. Cir. 2005).

II. THE EQUITIES AND THE PUBLIC INTEREST SUPPORT A STAY

A. Title II Reclassification and the Vague Conduct Standard Will Cause Irreparable Harm to Providers and Consumers

Petitioners' sworn declarations show that, specifically because of this Order, providers — especially, but not exclusively, smaller ones — will suffer significant and unrecoverable losses. These providers, in turn, will reduce investment. They will cancel build-outs and upgrades, require more customer orders before deploying, and even uninstall existing consumers — injuring the providers and the public.

Seeking to overcome this concrete, detailed evidence, the FCC airily suggests (at 22-23) that "case-by-case" adjudication cannot cause injury. To be sure, Petitioners are already subject (and do not object) to other well-established regulatory schemes that apply through adjudication. Here, however, the FCC has endeavored to impose a massive regulatory sea change — enforceable through class actions and multi-million-dollar enforcement forfeitures — with no intelligible roadmap for regulated parties to follow. Indeed, as to the conduct standard, there is so little guidance that not even the Chairman knows what it means (Mot. 29 & n.31), and the FCC cannot say whether the hypothetical behavior *discussed in its own brief* violates it. *See* FCC Opp. 34 & n.28.[21] This lack of clarity will irrepara-

[21] As Petitioners explained, the existence of the FCC's 2010 rule banning "unreasonable discrimination" (vacated in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014)) does not show that the new "Internet conduct standard" cannot cause irreparable injury. *See* Mot. 28-29. The 2010 rule is not a fair analogy to the sweeping,

bly harm providers of all sizes.

Small companies in particular are ill-prepared for such a cataclysm.[22] The FCC chose to regulate *all* Internet access providers, regardless of size, despite explicit requests that it not do so. *See, e.g.*, Aristotle Letter at 2 (Exh. 1). Although the FCC (at 24) now seeks to downplay the costs that reclassification will impose, it told the Supreme Court in *Brand X* that the cost of complying with Title II's "heightened regulatory obligations could lead cable operators to raise their prices and postpone or forego plans to deploy new broadband infrastructure, particularly in rural or other underserved areas." Fed. Pet'rs *Brand X* Br. 31.[23]

Nor are these injuries run-of-the-mill compliance burdens. As the FCC's

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ill-defined Internet conduct standard. Indeed, the FCC expressly declined to readopt the 2010 rule in favor of the new, broader standard. *See* Order ¶ 137. The FCC's prior rule, moreover, was focused on "paid prioritization," *see 2010 Order* ¶ 76, which no Petitioner offers. And that rule could not lead to class actions because the FCC did not assert authority under Title II. Finally, the rule never applied to mobile broadband providers *at all*.

[22] *See* Mot. 25-28 & nn.25-29 (collecting sworn testimony); Pai Dissent at 330-32 (quoting numerous statements, including one from 142 providers). The FCC's application of Title II with forbearance to mobile *voice* provides no analogy to the present circumstance. *Compare* FCC Opp. 23. Title II has long applied to voice services, so there was not the same lack of guidance. Nor was there anything like the undefined § 222 obligation and the Internet conduct standard.

[23] "[T]he small infrastructure players will be hit the hardest since their already thin returns will make it harder for them to expand to take on the big guys. . . . [A]t least 90 percent of the businesses that will be burdened by the new utility-style network neutrality regulations will be small businesses." Will Rinehart, *The Real History of Title II and Investment* (May 20, 2015), *available at* http://goo.gl/nBUCVL.

own cited case (at 25) emphasizes, there is irreparable injury where the "cost of compliance would be so great . . . that significant changes in a company's operations would be necessitated." *AO Smith Corp. v. FTC*, 530 F.2d 515, 527 (3d Cir. 1976). That is this case. For companies with no legal staff and no Title II experience, these costs will require providers to cancel or cut back on specific planned deployments or even stop serving customers. *See* Mot. 27-28.[24]

B. Vague Section 222 Duties Cause Irreparable Harm

Petitioners demonstrated that, absent a stay, providers' need to comply with § 222's duties, especially in the absence of any regulatory guidance, will create large, immediate, and unrecoverable losses. *See* Mot. 29-30.

The FCC claims (at 29) that these injuries are addressed by the Enforcement Bureau's two-page "Enforcement Advisory" (Exh. 2), issued after Petitioners filed their stay motion. *Cf. Young v. UPS*, 135 S. Ct. 1338, 1352 (2015) (declining to defer to agency guidance issued only after certiorari was granted). The FCC notably declines to say, however, whether any party's *current* practices are protected from liability under that document. That is because the document provides no real guidance. Rather, it exacerbates the vagueness of the regulatory scheme by stating

[24] Intervenors wrongly claim (at 5) that Petitioners have not moved with alacrity to protect their rights. Petitioners sought a stay from the FCC on May 1, little more than two weeks after the Order's April 13 Federal Register publication. When the FCC denied relief on May 8, Petitioners sought relief in this Court five days later — a month before the Order's effective date.

only that companies are subject to forfeitures (which have recently run to many millions of dollars even for small companies, *see* Mot. 30 n.33) if they take actions that the FCC concludes after the fact are not "reasonable," in "good faith," or consistent with unspecified "core tenets." Such vacuous statements are particularly troubling given that the FCC Enforcement Bureau sees its role as seeking penalties in such "'gray area[s].'" Mot. 26 (quoting Enforcement Bureau Chief).

Nor is the offer of Enforcement Bureau advisory opinions meaningful. *See* FCC Opp. 29; Intervenors Opp. 9 ("[S]hould ISPs have questions, they need only ask."). Such guidance cannot be obtained for any *existing* conduct or for conduct that is the subject of a pending investigation, litigation, or rulemaking. *See* Order ¶¶ 232-233. There is no deadline for providing guidance, any guidance is subject to revocation at any time, and it is not binding on the FCC itself. *See id.* ¶¶ 234-235. Indeed, merely seeking guidance can lead to an FCC enforcement proceeding. *See id.* ¶ 232. And, of course, providers with a few hundred customers and no in-house counsel lack the resources even to engage in this process. *See id.* ¶ 238 (noting WISPA's objection to the expense of the process).

Moreover, *even if* the FCC determines after the fact that a company has acted reasonably, that will not prevent irreparable harm. Smaller providers, many of which have never been subject to Title II, will not be able to recover the money they must divert from serving customers and deploying new facilities to develop-

ing § 222 compliance capabilities. *See* Mot. 30 & n.33. Larger providers like AT&T likewise will face substantial compliance costs and lost revenues, and/or the risk of liability, as a result of the FCC's § 222 decisions.[25]

C. Reclassification Distorts Interconnection Negotiations

The FCC does not dispute that it has imposed a one-sided regime where Internet access providers, but not the parties with which they negotiate interconnection agreements, can be the subject of FCC or court complaints and damages. The FCC also does not contest that it has again provided no guidance as to what actions will be considered "unjust" or "unreasonable" in this context. *See* Mot. 31.

As the declarations establish, that imbalanced and nebulous regime is already causing negotiating parties to threaten that, if Internet access providers do not accede to their demands for "free" upgrades (at real costs to the providers), they "will initiate an enforcement action at the FCC rather than agree to the sort of arrangements that have been standard in the industry." Poll Decl. ¶ 10 (Mot. Exh. 10); *see also* da Silva Decl. ¶¶ 6-7 (Mot. Exh. 14). And Intervenors confirm (at 11, 14) that these parties are now asserting a right to such benefits regardless of how

[25] The FCC (at 28-29) continues to quibble with AT&T's $400 million estimate, but it does not dispute that § 222(c) applies under the Order or provide any assurance that AT&T's current practices are compliant. The argument is thus solely as to the extent of injury. The declarations show that (1) the estimate comes from existing revenue from marketing that might require customer approval, and (2) other methods would be "substantially less effective." AT&T Decl. ¶¶ 20-24 (Mot. Exh. 9).

much more traffic they send to the Internet access provider than they receive.[26] Thus, though the specific FCC rule here is different, the Order is warping negotiated outcomes in precisely the way that justified a stay in *Iowa Utilities Board v. FCC*, 109 F.3d 418 (8th Cir. 1996). There, the court found "unrecoverable economic loss" because "[i]f the FCC's rules are later struck down, it will be extremely difficult for the parties to abandon the influence of their previous agreements that were based on" the challenged rules. *Id.* at 425-26.

D. New Pole-Attachment Requirements, Fees, and Taxes Will Irreparably Harm Cable Petitioners

Cable Petitioners have shown that, absent a stay, they will suffer irreparable harm from reviewing pole attachment agreements with utilities across the country, notifying those utilities that Cable Petitioners now offer a telecommunications service, and facing demands for increased rates in return. *See* Mot. 32-33. The FCC acknowledges (at 31) that reclassification will impose these burdens, but criticizes Cable Petitioners for not estimating the costs of notification and the inevitable rate increases that follow. But Cable Petitioners cannot reasonably estimate the cost of

[26] The Intervenors are wrong as to industry practice. Internet interconnection has always been the product of unregulated, commercial negotiations, and arrangements that include payment have been common since its inception. "Settlement-free peering," which Intervenors mischaracterize as the industry standard, is a "barter transaction[]" under which each "network agrees to exchange roughly equivalent amounts of traffic." Poll Decl. ¶ 6. When traffic is out of balance, other interconnection mechanisms, typically requiring payment, are appropriate. *See id.* ¶ 4 (there are a "variety of commercially negotiated arrangements" and, "[i]n all cases, . . . companies obtain these arrangements for *compensation*").

dispatching notices tailored to each agreement's specific terms without first suffering the irreparable burden of reviewing all of these detailed agreements.

Nor is it reasonable to require Cable Petitioners to calculate the difference between the likely rates under the two formulas — which include variables that are unknown to attachers, such as the "capital costs of the utility attributable" to each pole — for thousands of poles. 47 U.S.C. § 224(d). No precise estimates are required to show that Cable Petitioners will suffer substantial unrecoverable losses. And those losses will be particularly severe for rural cable providers, which must traverse more territory — and use more poles — to reach fewer customers.

The FCC claims (at 32) that Cable Petitioners may seek a stay before any rate increase takes effect, but provides no indication that it would grant such a request. Nor is it clear the FCC could do so. Section 224 and its implementing regulations establish one rate formula for pole attachments used "solely" for "cable service," 47 U.S.C. § 224(d)(3), and a generally higher one for attachments used for "telecommunications services," *id.* § 224(e)(1). And the FCC itself states (at 33) that increased rates will "apply" to Cable Petitioners "until the agency has reduced any disparity" between the cable and telecommunications rates.

Reclassification also will pave the way for states and localities to impose new taxes and fees that Cable Petitioners will have to spend unrecoverable resources disputing, paying, or both. *See* Mot. 33-34. Although the Order dismissed

such concerns, in part, based on the Internet Tax Freedom Act, the FCC now acknowledges (at 33) there are "certain exceptions" to that statute's protection. It is hardly "speculative," *id.*, to expect local authorities to take advantage of those exceptions and to extend taxes and fees to cable broadband providers.

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

Far from demonstrating the need for immediate, seismic change, the Order highlights that, under the existing regulatory regime, deployment and usage have boomed. *See supra* note 2. As the FCC notes (at 35), the Internet is "a powerful engine of economic growth," and it has become such a force *without* Title II regulation, FCC regulation of interconnection, or the new Internet conduct standard.

The FCC fails to show why maintaining the status quo, *plus* the three new bright-line rules that prohibit the only specific conduct the FCC has identified as contrary to the public interest, will harm third parties or the public. With those rules in place, the prudent course is to delay implementing Title II reclassification, and the dislocation it will cause, until the Court can review this matter.

The FCC and Intervenors confirm this conclusion. The only conduct they cite in seeking to show injury is conduct that the *FCC has not even determined to be problematic*. Intervenors assert primarily (at 13-16) that Internet access providers have intentionally caused congestion and that they may do so again, to the harm of video providers and perhaps others. Independent third parties have reviewed

and rejected Intervenors' characterization of the facts, concluding that congestion has not been a significant problem on Internet networks and that Intervenor Cogent itself intentionally slowed down Netflix's traffic — creating just the kind of "slow lane" for Netflix that would have been unlawful if done by Petitioners.[27] The Order itself notably failed to accept Intervenors' contentions or to endorse their preferred policy. *See* Order ¶¶ 200, 202 (the "record reflects competing narratives"). Inaccurate factual assertions used to support a conclusion the FCC has not accepted provide no basis to deny a stay. The FCC similarly speculates (at 34 & n.28) that a carrier "might" "circumvent[]" its rules by exempting an affiliated entity from a data cap, but does not suggest either that such a "hypothetical" arrangement is likely or that Title II or the Internet conduct standard would proscribe it.[28]

CONCLUSION

The Court should grant the requested stay. At a minimum, the Court should grant expedition, which the FCC (at 5, 35) and Intervenors (at 20) support, and direct the parties to propose an expedited briefing schedule within seven days.

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[27] Dan Rayburn, *Cogent Now Admits They Slowed Down Netflix's Traffic, Creating a Fast Lane & Slow Lane* (Nov. 5, 2014), *available at* http://goo.gl/jxoKXX (citing an M-Lab study); *see also* MIT Information Policy Project, *Measuring Internet Congestion: A Preliminary Report* 2, *available at* https://goo.gl/FOKckI ("Our data does not reveal widespread a congestion problem among the U.S. providers.").

[28] Finally, Intervenors stress (at 19) the importance of privacy rules but concede (at 9) that there are already other established privacy regimes. They never explain why reliance on those regimes is inadequate during the Court's review.

Dated: May 28, 2015

Respectfully submitted,

/s/ *Michael K. Kellogg*

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RULE ECF-3(B) ATTESTATION

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

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

May 28, 2015

Exhibit 1

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February 10, 2015

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: GN Docket No. 14-28: Protecting and Promoting the Open Internet

Dear Ms. Dortch:

Aristotle.Net Inc. ("Aristotle"), hereby respectfully requests the Commission to defer any action on new Open Internet rules until it has had an opportunity to assess the impact on small businesses and to give Congress an opportunity to adopt legislation.

Aristotle is the largest WISP in Arkansas and has been in business since 1995, offering Internet access and connectivity – both dial-up and wireless broadband – managed website hosting, domain hosting and email filtering and hosting. Located in the heart of downtown Little Rock, Aristotle has a dedicated staff of 11 people and serves approximately 700 customers in rural communities surrounding Little Rock.

The Open Internet debate at the FCC has focused on large ISPs and large edge providers, which have different views on whether the existing "light-touch" rules adopted in 2010 are sufficient, or whether more heavy-handed, utility-style regulation is necessary. Lost in this discussion is how any new rules would affect small businesses, like mine, that serve consumers in rural areas and/or suburbs where consumers have little or no choice. For example, the options in Arkansas communities such as Scott, East End, Shannon Hills, and Alexander are satellite, dial-up, and Aristotle's fixed wireless broadband while communities such as Otter Creek, Arkansas, only have a very old copper system and have requested that Aristotle bring them broadband Internet service. Because these communities are small, the larger providers have shown little interest in bringing broadband to them. Small business providers such as Aristotle are these communities best hope.

Aristotle uses both licensed and unlicensed spectrum to serve rural Arkansas and does not receive universal service fund support. Aristotle believes in an Open Internet in which lawful content is not blocked, and we do not now nor have we ever received payment for prioritizing a particular content provider's traffic. The FCC should bear these facts in mind as they look to implementing Open Internet

principles. A "one size fits all" regulatory regime is inappropriate, as it would fail to take into account the needs of small Internet providers, especially in the absence of evidence that these small providers are "bad actors" with respect to Open Internet principles and network management. For my small business, the increase in disclosure and reporting obligations would be burdensome, and we are ill-equipped to meet the incumbent risk of enforcement in the event of non-compliance. Increased regulatory obligations will necessarily increase our costs, which costs we have to pass onto our customers. Given the rurality and relative low socio-economic status of our customer base, this will result in injury to those people least able to afford these additional costs.

Ultimately, application of Title II to broadband providers will lead to uncertainty and a chilling of investment and will serve as a barrier to entry into the broadband market. It is unclear what process the FCC will use to forebear from enforcing Title II provisions, and it is unclear which Title II rules will remain at the end of the day. This uncertainty will lead to litigation. Ultimately, Title II will discourage broadband deployment.

Therefore, Aristotle requests that the FCC ensure that small businesses are exempted from any new disclosure and reporting obligations and—should the FCC adopt Title II for broadband providers—that small businesses be exempted from all Title II regulations. The FCC has not completed its due diligence on the impact of Title II or other regulation on small broadband providers, and it should delay any rulemaking until this assessment can be completed.

Sincerely,

L. Elizabeth Bowles

L. Elizabeth Bowles
President & Chairman of the Board
Aristotle, Inc.

Exhibit 2

PUBLIC NOTICE

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DA 15-603
May 20, 2015
Enforcement Advisory No. 2015-03

FCC ENFORCEMENT ADVISORY

OPEN INTERNET PRIVACY STANDARD

ENFORCEMENT BUREAU GUIDANCE: BROADBAND PROVIDERS SHOULD TAKE REASONABLE, GOOD FAITH STEPS TO PROTECT CONSUMER PRIVACY

The Commission's *Open Internet Order* applies the core customer privacy protections of Section 222 of the Communications Act to providers of broadband Internet access service ("BIAS").[1] The Commission has found that absent privacy protections, a broadband provider's use of personal and proprietary information could be at odds with its customers' interests and that if consumers have concerns about the protection of their privacy, their demand for broadband may decrease.[2] At the same time, the Commission declined to apply its existing telephone-centric rules implementing Section 222 and indicated that in the future it may adopt implementing rules that are tailored to broadband providers.[3] As a result, the statutory provisions of Section 222 themselves will apply to broadband providers when the *Open Internet Order* goes into effect.

This Advisory provides guidance to broadband providers about how the Enforcement Bureau intends to enforce Section 222 in connection with BIAS during the time between the effective date of the *Open Internet Order* and any subsequent Commission action providing further guidance and/or adoption of regulations applying Section 222 more specifically to BIAS.

[1] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, Order, FCC 15-24, 2015 WL 1120110, at *140-41, paras. 463-64 (2015) (*Open Internet Order*).

[2] *Id.*

[3] *Id.* at *140, para. 462. Given the Commission's forbearance from the telephone-centric Section 222 rules, the Commission's prior decisions interpreting and implementing Section 222(c) in the telephone context are not binding as to BIAS.

During this period, the Enforcement Bureau intends to focus on whether broadband providers are taking reasonable, good-faith steps to comply with Section 222, rather than focusing on technical details. By examining whether a broadband provider's acts or practices are reasonable and whether such a provider is acting in good faith to comply with Section 222, the Enforcement Bureau intends that broadband providers should employ effective privacy protections in line with their privacy policies and core tenets of basic privacy protections.

Moreover, the Enforcement Bureau will provide informal as well as formal guidance to broadband providers as they consider how best to comply with Section 222. The Enforcement Bureau will provide more guidance as needed through additional enforcement advisories. In addition, as discussed in the *Open Internet Order*, broadband providers may request advisory opinions to gain further insight as to whether their anticipated future course of conduct comports with the *Open Internet Order*. Although no broadband provider is in any way required to consult with the Enforcement Bureau, the existence of such a request for guidance will tend to show that the broadband provider is acting in good faith.[4] The application of Section 222 offers an opportunity for broadband customers to increase their demand for broadband by knowing that their privacy is well-protected. In that goal, the Enforcement Bureau believes its interests and those of the great majority of broadband providers are firmly aligned.

Need More Information? Media inquiries should be directed to Neil Grace at 202-418-0506 or neil.grace@fcc.gov. Information about the FCC's Open Internet proceeding is available at http://www.fcc.gov/openinternet. For general information on the FCC, you can contact the FCC at 1-888-CALL-FCC (1-888-225-5322) or visit our website at www.fcc.gov.

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), (202) 418-0432 (TTY).

Issued by: Chief, Enforcement Bureau

[4] The decision of a broadband provider not to seek the Enforcement Bureau's views will not be relevant to a consideration of reasonableness or good faith.

CERTIFICATE OF SERVICE

I hereby certify that, on May 28, 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/ *Michael K. Kellogg*
Michael K. Kellogg