IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Citizens Telecommunications Company of Minnesota, LLC, Petitioner, v. FCC, et al., Respondents.	No. 17-2296
Ad Hoc Telecommunications Users Committee, et al., Petitioners, v. FCC, et al., Respondents.	No. 17-2342
CenturyLink, Incorporated, Petitioner, v. FCC, et al., Respondents.	No. 17-2344

RESPONSE OF AT&T, CENTURYLINK, AND USTELECOM TO MOTION FOR STAY FILED BY AD HOC TELECOMMUNICATIONS USERS COMMITTEE, BT AMERICAS, INC., INCOMPAS, AND WINDSTREAM SERVICES, LLC

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INTRODUCTION

The *Order* under review eliminates unnecessary regulatory burdens and spurs investment by modifying outmoded rules governing certain Business Data Services ("BDS") offered by incumbent telephone companies over legacy technologies. New entrants have been deploying fiber-based networks for decades to offer competing services, and nearly two decades ago the FCC adopted a "pricing flexibility" regime that eliminated *ex ante* price cap regulation in many geographic areas where incumbents face robust competition. The new *Order* incrementally extends the same relief to additional geographic areas, based in part on the most detailed collection of industry-wide competitive data in the agency's history. Contrary to Movants' contentions, the FCC did not "totally deregulate" these services: the Communications Act's substantive rate standards continue to apply even where *ex ante* price caps have been lifted, and those standards remain enforceable through expedited complaints.

The FCC denied Movants' stay request below in a thorough and well-reasoned order,[1] and this Court should deny their stay request here. First, Movants have no likelihood of succeeding on the merits of their challenge to the FCC's incremental regulatory reforms. To the contrary, Movants seek to dial the regulatory clock back

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[1] *Bus. Data Servs. in an Internet Protocol Env't*, WC Docket No. 16-143 et al. (FCC) (Wireline Competition Bur. July 10, 2017) ("*Stay Order*").

to the mid-1990s so that they can enjoy highly regulated terms, conditions, and rates whenever they opt to lease incumbent facilities instead of investing in their own networks. The FCC reasonably rejected their position. After examining the massive record collected here, the FCC balanced a number of competing factors, including competition, administrability, and investment incentives, in determining which geographic areas warrant incremental relief from *ex ante* regulation. Under established precedent, BDS customers' ability to "bring complaints under 47 U.S.C. § 208" that "will be investigated and resolved within five months" provides adequate protection against any excessive rates charged in the wake of the type of partial deregulation adopted here. *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 909-10 (D.C. Cir. 2009). Movants' criticisms are nothing more than meritless quibbles with the *Order*'s technical findings and frustration with the FCC's decision not to enshrine their business plans as the basis for regulation.

Likewise, Movants cannot show irreparable harm. Movants speculate that incumbents may raise rates in the additional areas where price caps have been removed. But the mere removal of price caps does not permit incumbents to implement *unlawful* rate increases. Movants retain all statutory protections and remedies, including fast-track complaints for damages. Movants also ignore other protections—both from the *Order* itself, which prohibits certain rate increases for six months, and from their own negotiated contracts, which must be honored for the remainder of their terms.

Finally, the balance of equities and public interest favor implementing the *Order*, which removes unnecessary regulation, promotes more vigorous competition, and eliminates disincentives for all-important investment in more advanced BDS services.

BACKGROUND

The services at issue here are lower-capacity "DS1" and "DS3" (collectively "DSn") services provided by incumbent telephone carriers. These services offer dedicated point-to-point transmission of data using legacy technologies developed for the voice telephone networks of the 1960s. These services are purchased, on a rapidly declining basis, by both end-user retail customers and by wholesale customers that use BDS as an input for their retail offerings.

Sections 201 and 202 of the Communications Act require these services to be offered on just, reasonable, and nondiscriminatory rates and terms. 47 U.S.C. §§201-202. These requirements are enforceable through Section 208's "fast-track" complaint procedures, which provide for money damages. 47 U.S.C. §208. Since 1990, the FCC has used a "price cap" system to regulate the incumbent local carriers' provision of such services as a tool to ensure that incumbents' rates comply with Sections 201 and 202.

The FCC has consistently recognized that price cap regulation is burdensome and stifles the incentive and ability of providers to invest and innovate. Accordingly, as competitive entry developed, the FCC adopted "pricing flexibility" rules in 1999 that reduced or eliminated price cap regulations where competitors had deployed facilities. This regime was challenged as too deregulatory, but those arguments were rejected on appeal. *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

The pricing flexibility rules permitted two "phases" of relief, assessed separately for "transport" and "channel termination" services.[2] "Phase I" relief retained price cap regulation but permitted additional contracting flexibility. "Phase II" relief removed *ex ante* price cap regulation, but the incumbent carriers' services remained governed by Sections 201 and 202, which could be enforced through complaints under Section 208. Since 2002, most transport services and a substantial portion of channel termination services were removed from price caps under the pricing flexibility rules. *See, e.g.*, *Stay Order* ¶41; *Order* ¶92 n.294.

Technology has dramatically changed the BDS marketplace since the FCC adopted pricing flexibility rules. Carriers today are investing heavily to provide

[2] "Transport" services are facilities that aggregate traffic from multiple locations and transport it between telephone company offices. "Channel terminations" are "last mile" connections between a transport network and a specific customer location (*e.g.*, building). *See Order* ¶77-78 n.256.

newer, more flexible packet-based services, especially "Ethernet" services. *Order* ¶¶23-38. Incumbent telephone carriers did not have an inherent advantage in deploying Ethernet services, and the FCC declared all packet-based BDS to be fully competitive ten years ago, in orders that were also upheld on appeal.[3] More recently, cable companies have entered the market by deploying new technologies over their ubiquitous local cable-and-fiber networks. These newer packet-based services are rapidly replacing incumbents' antiquated DSn services. *See, e.g.*, *Order* ¶¶3, 25. Demand for legacy DSn services is in precipitous and irreversible decline, and these legacy technologies are expected to become obsolete early in the next decade. *Id.* ¶¶69, 229.

In the rulemaking below, the FCC sought to accommodate these new competitive realities. The FCC conducted the largest data collection in the agency's history, which provided an extraordinarily granular picture of competitive conditions as of 2013. *Order* ¶¶103-107. The agency also collected multiple rounds of comment and received extensive economic testimony analyzing the data collection. These analyses confirmed that numerous competitors have blanketed the U.S. with fiber-based networks to provide Ethernet services that compete with and are rapidly replacing legacy DSn services. *Id.* ¶¶23-38, 44-46, 55-73, 77-81. On this record,

[3] *See, e.g.*, *Petition of AT&T Inc. for Forbearance*, 22 FCC Rcd 18,705, ¶ 23 (2007) (Ethernet-based services are "highly competitive"), *aff'd*, *Ad Hoc*, 572 F.3d 903.

the FCC eliminated *ex ante* price cap regulation from DSn transport services nationwide. *Id.* ¶90. The FCC also adopted a new "Competitive Market Test" ("CMT") for determining where Phase II relief will be provided for last-mile DSn channel terminations. *Id.* ¶¶94-144. That test determines, on a county-by-county basis, where incumbent rates are subject to competitive pressure from the existence of competitive facilities-based networks. *Id.* ¶¶109-112. Application of this test expands the geographic areas currently with Phase II pricing flexibility. *Id.*

ARGUMENT

Movants must show that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of a stay, that the balance of equities tips in their favor, and that a stay is in the public interest. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). All four factors disfavor a stay.

I. MOVANTS ARE UNLIKELY TO SUCCEED ON THE MERITS.

1. Movants challenge the *Order* as arbitrary under the APA, 5 U.S.C. §706(2)(A). This "standard of review is a narrow one and the court is not permitted to substitute its judgment for that of the agency." *United States v. Massey*, 380 F.3d 437, 440 (8th Cir. 2004). This standard is especially deferential when, as here, the "issue involves the agency's specialized knowledge and Congress has vested the agency with discretion in a technical area." *Wilson v. CFTC*, 322 F.3d 555, 559 (8th Cir. 2003).

The *Order* easily satisfies this standard. The FCC explained its factual determinations, predictive judgments, and policy choices, and grounded those conclusions in substantial record evidence. Indeed, the FCC's prior BDS rules involving similar determinations have been upheld on appeal even though they were based on less extensive and granular analysis than the FCC undertook here. *Ad Hoc*, 572 F.3d at 911; *WorldCom*, 238 F.3d at 452.

Movants (at 1) mischaracterize this case as a choice between heavy prescriptive regulation (their preference) and "almost total[] deregulat[ion]." But this case does not present that binary choice. Instead, the FCC assessed the relative costs and benefits of two distinct methods—an *ex ante* price cap system and alternative reliance on *ex post* complaints—of ensuring the Communication Act's requirement of just and reasonable rates, which will remain fully in effect either way. *Order* ¶101. The FCC's cost-benefit analysis turned on many factors, including the costs of *ex ante* regulation, the strength of competition in different contexts, the administrability of the proposed rules, and the effects on investment incentives. *Id.* ¶¶100-101. How to balance those factors is within the FCC's discretion, and the issue before this Court is simply whether the agency, in striking the balance that it did, articulated a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Contrary to Movants' suggestion (at 8-9), antitrust merger principles, which typically apply in the absence of *any* regulation, cannot support a challenge to a regulatory authority's decision to replace a more intrusive scheme of regulation with an incrementally less intrusive one. *See Stay Order* ¶5. As the FCC explained, "[t]he ultimate goal of the [*Order*] is not to definitively determine competitive market conditions but rather to determine on balance which areas are best positioned to benefit" from a shift from *ex ante* to *ex post* price regulation. *Order* ¶100. And in measuring that "balance," the FCC was rightly concerned that excessive *ex ante* rate regulation of legacy DSn services would prolong industry's reliance on outmoded technologies and retard investment in next-generation networks. *See* 47 U.S.C. §1302; *Order* ¶25; *see also Nat'l Ass'n of Telecomms. Officers & Advisors v. FCC*, No 15-1295, 2017 WL 2883738, at *4 (D.C. Cir. July 7, 2017) ("*NATOA*") ("Rate regulation of a firm in a competitive market harms consumers: Prices set below the competitive level result in diminished quality, while prices set above the competitive level drive some consumers to a less preferred alternative"). The APA allows the FCC to make that call, and the FCC's judgments here are "rationally based." *Wilson*, 322 F.3d at 559.

2. Movants' specific APA challenges to the CMT are likewise meritless.

First, Movants argue (at 8-12) that the CMT is arbitrary because it counts competitive carriers that have built networks *near*, but not necessarily into, a given building. The FCC rejected these arguments for good reason. BDS are typically sold to sophisticated customers through a competitive bidding process, and as the *Order* explains, competitors routinely bid for customers in buildings near their existing networks and then deploy connections to that building if they win the business. *Order* ¶¶45-46, 50, 67. That is why both the FCC and the Justice Department, in prior telecommunications mergers, have always treated such "nearby competitors" as *current*, active competitors that place competitive pressure on BDS prices in buildings where they have not yet deployed a connection.[4]

Movants allege that the CMT counts providers as competitors that are too far away to serve the relevant location, but agencies are entitled to the greatest judicial deference when they engage in line-drawing based on such expert technical judgments. Here, the FCC was not only reasonable but plainly correct when it found that "buildouts are common within a half mile from a competitor's facilities, [and] the subsequent record shows buildouts of half mile and farther often occur." *Order* ¶41 (footnote omitted). Competitive providers' routine willingness to deploy

[4] *See, e.g.*, *AT&T Inc. & BellSouth Corp.*, 22 FCC Rcd. 5662, ¶¶41-42, 46 & nn.111-14 (2007) ("*FCC BellSouth Order*") (agreeing with Justice Department that there is no basis for regulatory intervention where at least one alternative provider has deployed facilities near a building). *See also WorldCom*, 238 F.3d at 458-60; *Order* ¶13 ("we find that a nearby potential business data services supplier ... generally tempers prices in the short term"); *Stay Order* ¶¶8-10 ("[c]ompanies with facilities within a half mile are already market participants").

facilities within a half mile of existing competitive facilities, *id*. ¶45—coupled with the FCC's predictive judgments about the continuing decline in deployment costs (*id*. ¶44) and explosive growth of cable alternatives (*id*. ¶43)—provide more than ample support for the FCC's expert decision to count nearby competitors within a half-mile. *See generally Order* ¶¶39-47.[5]

Movants are also wrong to assert (at 12) that cable operators "admit" that they will not provide any significant BDS. Cable companies' submissions and other evidence detail their multi-billion-dollar BDS investments and marketplace success. *Order* ¶¶56-62. The record contains extensive evidence that the "entry of cable into business data services provisioning has been the most dramatic change in the market over the past decade." *Id.* ¶¶55-62. As the *Order* notes, "[b]usiness services will reportedly generate more than $12 billion for U.S. cable providers in 2015, up 20 percent or so from their milestone total of $10 billion in 2014," and cable companies are expected to "almost double their 2014 total by 2019," *id.* ¶62. Cable companies have become leading BDS competitors, *id.* ¶¶27-31, 55-62, and the FCC's conclusions and predictive judgments concerning cable are well-grounded in the record. *See also Stay Order* ¶¶11-14.

[5] Contrary to Movants' claims (at 10-11), the FCC considered the relevant factors competitors face when deciding whether to build to a location, and explained the basis for its conclusion that the test it chose best balanced a variety of competing concerns. *See Order* ¶¶41-42; *Stay Order* ¶¶15-17.

Second, Movants argue (12-14) that the FCC erred in finding one competitor within a half mile as sufficient to eliminate *ex ante* price cap regulation in favor of reliance on the *ex post* complaint process. Again, the FCC explained its reasoning and the supporting evidence, *Order* ¶¶120-124, which is entitled to judicial deference. Relying on economic testimony and literature, the FCC found that "the largest benefits from [BDS] competition come from the presence of a second provider, with added benefits of additional providers falling thereafter." *Id*. ¶120. The FCC concluded that, "consistent with other industries with large sunk costs, the impact of a second provider is likely to be particularly profound in the case of wireline network providers," because even one competitor will drive both carriers to compete by cutting prices near "the incremental cost of supplying a new customer." *Id*. The most pertinent antitrust precedents agree: the Justice Department and the FCC have consistently required divestiture or other remedies only when a merger reduces the number of BDS competitors at a building from two to one. *Id*. at n. 371 (citing *FCC BellSouth Order* ¶¶41-42 (2007) (agreeing with Justice Department approach)).

Given the specific cost structure of the BDS industry, Movants find no support in the general observation that the existence of a second competitor "does not *necessarily* preclude market power" in other settings. Motion 12-14 (quoting *NetCoalition v. SEC*, 615 F.3d 525, 542 (D.C. Cir. 2010) (emphasis added)). For example, Movants rely in vain on *Petition of Qwest Corp. for Forbearance*, 25 FCC Rcd. 8622 (2007) ("*Qwest Phoenix Order*"), which "was principally concerned with the level of competition in mass market telecommunications services, not business data services." *Stay Order* ¶21; *see Order* ¶121 (rejecting reliance on *Qwest Phoenix Order*)).[6] As the Commission found, "the high sunk cost nature of the BDS market gives providers the incentive to extend their network facilities to new locations with demand even when those locations contribute revenue only marginally above the incremental cost of the network extension," and on the current record the FCC found that the incumbent carriers' recent "substantial losses" confirmed that view. *Order* ¶121 & n.374; *see also Stay Order* ¶¶21-24. In any event, the Commission is obviously free to refine its economic analysis over time in light of changing market conditions and new economic data. *See WorldCom*, 238 F.3d at 458.

3. The *Order* also did not "conflate[]" its analysis of transport and channel terminations. Motion 14-15. As the FCC noted, "[t]ransport services are typically higher volume services between points of traffic aggregation which can more easily justify competitive investment and deployment." *Order* ¶77; *see also id.* ¶82 ("transport service represents the 'low-hanging fruit' of the business data services

[6] The *Qwest Phoenix Order* also "specifically recognized that 'under certain conditions duopoly will yield a competitive outcome.'" *Order* ¶121 n.373 (quoting *Qwest Phoenix Order* ¶30).

circuit"). As a result, competitors have overbuilt the incumbents' transport networks many times over. *Id.* ¶¶79-82 (most cities have more than a dozen competitive transport networks). That is why incumbent transport services had *already* been "largely deregulated for much of the past 15 years under the current pricing flexibility rules." *Id.* ¶92 n.294. The data collection confirmed that, as of 2013, competitors had already built competitive transport networks within a half mile of 92.1 percent of all customer locations with BDS demand. *Id*. ¶91. Contrary to Movants' suggestion (at 15), those data confirm the relative ubiquity of competitive transport, and thus justify a distinct approach—the extension of Phase II relief to the remainder of the country—rather than an approach "conflated" with channel terminations. *Order* ¶¶90-93; *see also Stay Order* ¶¶25-27.[7]

4. Finally, Movants' notice argument fails. Motion 16-18; 5 U.S.C. §553(b)(3). The APA requires the FCC to publish a "[g]eneral" notice of proposed rulemaking including "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. §553(b)(3). "The final

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[7] Movants erroneously suggest that incumbent BDS providers do not charge separately for channel terminations and transport. The passage Movants quote refers to Ethernet services, not DSn services. Motion 16 n.54 (quoting *Order* ¶289). The DSn transport services at issue here are offered and billed separately from DSn channel terminations. *Order* ¶78. If incumbents attempted to raise transport prices to evade caps on channel terminations, *cf*. Motion 15-16, customers could switch to competitive transport, for which there are typically many options, *Order* ¶¶91-93.

rule need not be the one proposed in the NPRM." *Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013). Instead, the agency's final rule "need only be a logical outgrowth of its notice." *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006). The "logical outgrowth" requirement is satisfied when an agency "expressly asked for comments on a particular issue or otherwise made clear that the agency was contemplating a particular change." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009).

The *Order* satisfies those standards. The *FNPRM* here did not propose any specific new CMT that would apply to any particular set of services. Rather, the FCC sketched the broad outlines of a test and invited comment on virtually all of the specific parameters of such a test, including services, geographic scope, number of competitors, and the like. *FNPRM* ¶¶270-311; *see also Stay Order* ¶¶31-38 (detailing notice). The FCC emphasized that "no issue raised by the [*FNPRM*] is locked in stone; rather the Commission seeks broad comment on the best way to execute its principles, evaluate its proposals and answer its questions[,] [and] intends to listen and to learn before it reaches final decisions." *FNPRM* ¶11. The CMT the FCC chose is easily a "logical outgrowth" of the *FNPRM*. *Order* ¶90 n.289; *Stay Order* ¶33 (Movants' "arguments, rather than stating an actual problem … simply reflect their underlying disagreement with the substance of the [FCC's] decision").

Movants also mischaracterize as "findings" the *proposals* and *preliminary* analyses on which the *FNPRM* sought comment, and then argue that the FCC reversed course without explanation. But the "logical outgrowth" rule is designed to "avoid 'the absurdity that ... the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary.'" *Shell Oil Co. v. EPA*, 950 F.2d 741, 750-51 (D.C. Cir. 1991) (per curiam). The *FNPRM* sketched out proposals and offered preliminary analyses, but invited comment from the public, and many parties submitted multiple rounds of comment, analyses of the data, economic testimony, and other evidence. The FCC acted appropriately in "learning" from this record and choosing to resolve the issues raised in the *FNPRM* in a manner that best reflected the facts and the economics.

In all events, Movants cannot show, as they must, that they were prejudiced by any lack of notice. *See* 5 U.S.C. §706 (reviewing court must take "due account ... of the rule of prejudicial error"); *Nat'l Whistleblower Ctr. v. NRC*, 208 F.3d 256, 264 (D.C. Cir. 2000) (party challenging agency action bears burden of demonstrating prejudice). Movants in fact commented extensively on the evidence and arguments for a more deregulatory approach, *see, e.g.*, *Stay Order* ¶¶31-35, and they do not point to any issue they would have raised but failed to because of lack of "notice."

II. MOVANTS CANNOT ESTABLISH IRREPARABLE HARM.

To establish irreparable injury, Movants must show that "certain and great" harm "will directly result from the action which the petitioner seeks to enjoin," *Packard Elevator v. ICC*, 782 F.2d 112, 115 (8th Cir. 1986), and that they could not later be made whole through damages, *see Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam) ("[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm"). Movants cannot begin to meet these standards.

Like their merits argument, Movants' irreparable harm theory rests on the false premise that the *Order* has "almost totally deregulated" rates for certain services in certain areas and that nothing prevents incumbents from substantially increasing those rates. Motion 1, 18-21. Again, that is incorrect. In fact, the *Order* does not even change the *substantive* statutory standards governing these rates. The rates will remain governed by "just and reasonable" standard of Sections 201 and 202, which require rates to be just, reasonable, and non-discriminatory. *Ex ante* price caps are one way to enforce compliance with these provisions, yet *ex post*, fast-track complaint proceedings are another. *See, e.g.*, *WorldCom*, 238 F.3d at 463.[8]

[8] Specifically, whether rates are tariffed or non-tariffed, a customer can file a "fast track" complaint with the FCC and obtain damages for any overcharges. 47 U.S.C.

The availability of damages in such proceedings eviscerates Movants' assertions that removing price caps will result in unlawful and unrecoverable rate increases. Sections 201, 202, and 208 will continue to protect Movants from unlawful rates, and of course movants have no entitlement to avoid *lawful* rate increases.

Established precedent holds that these *ex post* mechanisms are sufficient to protect against unlawful rates after price caps are eliminated. In 2009, Movant Ad Hoc challenged the FCC's nationwide elimination of price caps for all packet-based BDS. The D.C. Circuit rejected that challenge because, as here, customers can still "bring complaints under 47 U.S.C. § 208" that "will be investigated and resolved within five months" and because, as here, BDS services are purchased by "sophisticated entities that presumably would not be shy about invoking available remedies." *Ad Hoc*, 572 F.3d at 909-10. Similarly, in upholding the FCC's original 1999 decision to remove price caps for certain BDS rates in certain areas, the D.C. Circuit recognized that Title II is sufficient to protect against unlawful rates, and rejected arguments that "the FCC's decision to grant immediate pricing flexibility for new services is unlawful because it compromises the [FCC's] fundamental obligation to ensure that rates are just and reasonable." *WorldCom*, 238 F.3d 462.

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§§204, 208. By statute, the FCC must complete these proceedings within 5 months. *Id.* In the case of tariffed rates, a customer can also challenge them as unreasonable under 47 U.S.C. §204 before they take effect.

Quite apart from the availability of damages, Movants also cannot demonstrate that unlawful price increases are "certain" and "great." Movants merely allege that incumbents have increased DSn prices in the past where price caps were removed, and that Movants are planning price increases in the additional areas where the *Order* removes price caps. Even if these bare allegations were true (in fact, rates have both increased and decreased in areas where price caps have been removed), they are immaterial. Movants must prove that the deregulation has led to (or definitely will lead to) *unlawful* prices. But Movants fail to cite a single instance where an incumbent's rate was challenged as unlawful in an area where price caps were previously removed, let alone an instance where the FCC or court agreed. The absence of any such historical evidence undercuts Movants' suggestion that the *Order*'s incremental extension of pricing flexibility to additional areas will lead to unlawful rate increases. *See Packard Elevator*, 782 F.2d at 115 (to establish irreparable harm, movants must "provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future").

Moreover, the potential for imminent harm is far smaller than Movants' sweeping assertions suggest. Movants ignore that "a substantial percentage of locations at issue here were relieved of price cap regulations pursuant to either grants of Phase II pricing flexibility or forbearance relief well before the action taken in the

[*Order*]." *Stay Order* ¶41. Movants obviously cannot claim harm for those areas. As to the services actually affected by the *Order*, the *Order* includes "transition" mechanisms that dramatically curtail incumbents' ability to increase rates for the bulk of Movants' purchases. For example, the *Order* "require[s] price cap incumbent[s] . . . to freeze the tariffed rates for end-user channel terminations in newly deregulated counties" "for six (6) months after the effective date of th[e] Order," *Order* ¶167, and incumbents must honor the terms of existing "contract tariffs" for the remainder of their terms, which is often more than a year.[9] Movants concede that the vast majority of the DSn services they purchase are either tariffed channel terminations or DSn services purchased under contract tariffs, which are protected from increases under these transition mechanisms.[10]

Movants' related "price squeeze" theory fails for all of the reasons above, and for additional reasons. First, the FCC reviewed these allegations in the proceedings below and found them to be unsubstantiated. *Order* ¶¶260-266. This Court has rejected a stay petition where the expert agency made similar findings. *See Packard Elevator*, 782 F.2d at 115 ("petitioners' underlying premise that CVR engaged in predatory pricing is unsubstantiated, notwithstanding petitioners' affidavits to the

[9] *See Order* ¶170 & n.450. *See also Stay Order* ¶42.

[10] Motion, Harding Decl. ¶¶13-14 (the "vast majority" of the services "purchase[d] in … counties in which price cap regulation will be eliminated are currently made pursuant to term and volume commitment plans [*i.e.*, contract tariffs]").

contrary. A similar pricing claim was rejected by the ICC in the proceedings below."). Second, even as matter of theory, the Supreme Court has rejected arguments that this type of "price squeeze" raises valid competition concerns. *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc*, 555 U.S. 438, 452 (2009) (rejecting "price squeeze" claim as "an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level"). Third, Movants admit (at 19) that no price squeeze harm is imminent because long-term contracts prevent wholesale customers from raising rates for years.

Movants' non-price arguments are also meritless. Movants assert (at 22) that incumbents "may choose not to sell low-bandwidth BDS to competitors at all." But the *Order* does not permit incumbent carriers to unilaterally discontinue common-carrier services. Section 214 of the Communications Act, 47 U.S.C. §214, remains in effect and requires all carriers to seek permission to discontinue any common-carrier services, and the FCC may grant such permission only upon a finding that discontinuance would not "adversely affect[]" the "present nor future public convenience or necessity."

Nor will the "specter" of widespread detariffing "produce enormous unrecoverable, transaction costs." Motion 23. First, although the *Order* permits detariffing of some services upon the effective date, the *Order* does not require any detariffing until February of 2019. In all events, Movants overstate the burden of replacing tariffs with negotiated agreements. Negotiated agreements are already the norm in the BDS marketplace,[11] and the carrier Movants have routinely entered into negotiated agreements with the incumbent carriers for many years. Accordingly, detariffing would typically require nothing more than extending the geographic scope of existing, negotiated contracts to areas previously governed by tariffs (to the extent contractual terms do not automatically extend to such areas upon detariffing). In other cases, detariffing will merely require conversion of an existing tariff into a contract.

Finally, Movants' reliance on *Iowa Utilities Board v. FCC*, 109 F.3d 418 (8th Cir. 1996) ("*IUB*"), is misplaced. *IUB* was a unique case in which this Court found that the FCC's rules had usurped states' authority to oversee negotiations for certain telecommunications services by effectively dictating most of the terms of the agreements. The Court found that the FCC's rules were driving negotiations toward the FCC's preferred outcomes, contrary to congressional intent. Because the petitioners' only remedy in that case was their appeal of the FCC rules themselves, the Court found that a stay was appropriate. *Id.* at 426-27. Here, by contrast, the FCC is *reducing* its involvement in private negotiations by eliminating price cap requirements in certain geographic areas. Unlike the *IUB* petitioners, Movants here

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[11] *See* Motion, Harding Decl. ¶¶13-14.

have a variety of protections and remedies they may pursue during and after the pendency of this case in the event they are unsatisfied with incumbents' rates, negotiated or tariffed. *See supra* p. 16-17.

III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST DISFAVOR A STAY.

Movants are wrong when they argue (at 24-25) that a stay of the *Order* would not harm incumbent BDS providers, consumers, or the public interest. The FCC reasonably concluded that "there are substantial costs of regulating the supply of BDS," and that "there is a significant likelihood [that maintaining] ex ante pricing regulation will inhibit growth and investment in many cases." *Order* ¶¶4, 125-129. Economists, regulators, and courts agree that *ex ante* price regulation, like price caps and tariffing, imposes substantial burdens and should be imposed only where necessary to protect against anticompetitive conduct. *See, e.g., id.* ¶¶4, 107, 125-129. Such regulation also creates economic friction that reduces investment and innovation. *See id.*; *see also, e.g., id.* ¶¶9, 162. And it prevents market participants from responding to competition and setting efficient prices, which can deter competitive entry (when incumbent prices are set too low) or invite inefficient competitive entry (when prices are set too high). *See id*; *see also NATOA*, 2017 WL 2883738, at *4. These problems are amplified where, as here, different competitors are subject to different regulations, creating an uneven competitive playing field. *See, e.g., Order* ¶157. A stay would allow these harms to continue.

CONCLUSION

For the foregoing reasons, the motion should be denied.

Dated: July 13, 2017

Respectfully submitted,

/s/ Jonathan E. Nuechterlein

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Citizens Telecommunications Company of Minnesota, LLC, Petitioner, v. FCC, et al., Respondents.	No. 17-2296
Ad Hoc Telecommunications Users Committee, et al., Petitioners, v. FCC, et al., Respondents.	No. 17-2342
CenturyLink, Incorporated, Petitioner, v. FCC, et al., Respondents.	No. 17-2344

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

This document complies with the word-count limitation of Fed. R. App. P. 27(d)(2) because it contains 5,185 words.

Dated: July 13, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2017, I will cause the foregoing document to be electronically filed through this Court's CM/ECF system. I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I further certify that I will cause one copy of the foregoing to be served by first class U.S. mail on the following movant-intervenors:

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