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

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

PETITION FOR STAY PENDING JUDICIAL REVIEW OF DANIEL BERNINGER, FOUNDER OF THE VOICE COMMUNICATION EXCHANGE COMMITTEE

Richard E. Wiley
Bennett L. Ross
Brett A. Shumate
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000

Counsel for Daniel Berninger, Founder of the Voice Communication Exchange Committee

April 27, 2015

TABLE OF CONTENTS

PAGE

INTRODUCTION AND SUMMARY

Pursuant to 47 C.F.R. §§ 1.41, 1.43, and 1.44(e), Petitioner Daniel Berninger, founder of the Voice Communication Exchange Committee ("VCXC"),[1] respectfully requests a stay pending judicial review of the Commission's order captioned *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, GN Docket No. 14-28 (rel. Mar. 12, 2015) ("*Order*"). Due to the impending effective date of the *Order*, Petitioner asks that the Commission resolve this Petition no later than May 8, 2015.

Petitioner is an entrepreneur and architect of new communications services. Having devoted his professional career to helping facilitate the transformation from traditional circuit switched services to Internet Protocol ("IP") services, Petitioner has been involved in a number of industry firsts in IP communications.[2] These firsts include: (1) the first call completed between the Public Switched Telephone Network ("PSTN") and the Internet anywhere in the world (1995); (2) the first international calling company relying on Voice over Internet Protocol ("VoIP") (ITXC - 1997); (3) the first company to use VoIP to offer domestic unlimited calling (Vonage - 2001); and (4) the first live network multi-service provider High Definition ("HD") voice call (2013). Petitioner helped found Free World Dialup ("FWD"), co-founded the VON Coalition, and is a recipient of the VON Pioneer Award. Berninger Declaration ¶ 4.

Since 2012, Petitioner has devoted his time and resources to speeding the transition to all-IP networks and HD voice, founding VCXC as a home for these efforts. *Id.* ¶ 5. Petitioner is currently investing in deploying new HD voice offerings, which require prioritization by network operators to ensure voice quality and preserve the value proposition of HD service. *Id.* ¶ 17.

---

[1] Petitioner participated in the proceeding in his individual capacity and in his capacity as founder of the VCXC. *See* Letter from Daniel Berninger, founder, VCXC, *et al.*, to Tom Wheeler, Chairman, FCC, GN Docket No. 14-28 (Jan. 23, 2015).

[2] Declaration of Daniel Berninger ¶ 3 ("Berninger Declaration").

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

Since the decommissioning of the National Science Foundation Network ("NSFNET") backbone on April 30, 1995, the United States has enjoyed a 1000-fold expansion of communications capacity and services over the intervening 20 years. The development of the Internet occurred as a result of a consistent policy of non-regulation of computing and computing networks, which originated with the prohibition against AT&T entering the computing market in 1956 and was preserved through the Commission's *Computer Inquiry* proceedings.[3]

Policymakers have preserved non-regulation of the computing and larger information technology industry as well as the Internet ecosystem for decades. Indeed, Congress enshrined this principle into law in enacting the Telecommunications Act of 1996, noting its intent "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). The Commission has embraced this principle on a bipartisan basis for nearly 20 years, consistently determining that Internet access service is an information service immune from regulation under Title II.[4]

---

[3] *See, e.g., United States v. Western Electric Co.*, 1956 Trade Cas. (CCH) 68,246 (D.N.J. 1956)**;** *Second Computer Inquiry*, 77 FCC 2d 384, ¶ 96 (1980); *Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier 1 Local Exchange Company Safeguards*, Notice of Proposed Rulemaking and Order, 6 FCC Rcd 174, ¶ 9 (1990).

[4] *See, e.g., Fed.-State Joint Bd. on Universal Serv.*, 13 FCC Rcd 11501, ¶ 27 (1998) ("*Stevens Report*"); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14855, ¶ 1 (2005) ("*Wireline Broadband Order*"), *aff'd, Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

In declining to subject IP networks to Title II, the Commission expressly invited greater investment in broadband networks and related IP services that entrepreneurs such as Petitioner have created. Petitioner and the communications industry responded, investing in IP services and networks with the expectation that the Internet would remain free from Title II regulation.

Now that investors have made these commitments to the Internet ecosystem, and despite the successes achieved in IP services and networks, the Commission changes the rules by seeking to subject the Internet to Title II. Faced with the sunset of the PSTN as the exclusive domain of Title II rules, the Commission now claims that the PSTN and the Internet are one and the same and asserts Title II authority over all communications networks and services that rely upon public IP addresses. The Commission uses this newly invented authority to regulate broadband Internet access services and Internet exchange arrangements and to prohibit broadband providers from prioritizing traffic. The *Order* does not contain any limiting principles, and thus the industry can only speculate about what part of the Internet ecosystem will become the next target of Commission regulation.

Petitioner has met the four criteria for a stay, and thus the Commission should stay the *Order* pending judicial review.

First, Petitioner is likely to succeed on the merits of his challenge to the *Order* because the Commission exceeded its statutory authority by asserting regulatory command and control over the Internet under Title II. The Commission also acted arbitrarily and capriciously in adopting the *Order* by: (1) failing to consider evidence that was inconsistent with its desired regulatory outcome; (2) refusing to take into account the interests of investors such as Petitioner who relied upon the Commission's non-regulation of the Internet; and (3) subjecting similarly situated providers to completely different regulatory obligations.

Second, Petitioner will suffer irreparable harm in the absence of a stay because the *Order* threatens his livelihood. Neither entrepreneurs nor venture capitalists invest in services subject to Title II given the regulatory control and shifting requirements inherent under the Title II regime. Thus, in order to make a living as an architect of IP communications services, Petitioner must be able to focus his entrepreneurial energies on non-Title II communications services, which necessitates being able to distinguish between Title II regulated services and non-Title II services. The *Order* destroys both of these business imperatives. Because the *Order* subjects the Internet to Title II regulation, equates the IP networks that comprise the Internet with the PSTN, and asserts regulatory jurisdiction over networks and services utilizing public IP addresses, Petitioner will have no choice but to abandon his investments in IP communications services and find a new profession if the *Order* takes effect.

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

Third, other parties will not be injured if the *Order* is stayed. Because IP networks and IP-based communications services have never before been regulated under Title II, a stay would simply preserve the status quo pending judicial review. Furthermore, because the *Order* represents a prophylactic step and is not a response to immediate or active risks to the Internet, a

stay of the *Order* would not threaten Internet openness, even if Title II were a necessary legal predicate for the Commission's rules.

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

Because Petitioner has satisfied the four requirements for a stay, the Commission should stay the *Order* pending judicial review.

DISCUSSION

"In considering requests for stay, the Commission generally considers the four criteria set forth in *Virginia Petroleum Jobbers Association*." *Telecommunications Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities*, 23 FCC Rcd 1705, 1706 (2008). These criteria are: (1) the likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of a stay; (3) the degree of injury to other parties if a stay is granted; and (4) whether a stay will further the public interest. *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). "The relative importance of the four criteria will vary depending upon the circumstances of the case. If there is a particularly overwhelming showing in at least one of the factors, [the Commission] may find that a stay is warranted notwithstanding the absence of another one of the factors." *4.9 Ghz Band Transferred from Fed. Gov't Use*, 19 FCC Rcd 15270, 15272 (2004) (footnote omitted). For example, "[i]f the petitioner makes a strong showing of likely success on the merits, it need not make a strong showing of irreparable injury." *Charter Commc'ns Entm't I, LLC*, 22 FCC Rcd 13890, 13892 (2007).

A. Petitioner Is Likely To Succeed On The Merits.

The *Order* will likely be vacated on appeal. First, the Commission exceeded its statutory authority and contravened the Act by regulating the Internet under Title II. Second, the Commission engaged in arbitrary and capricious decision-making in adopting the *Order*.

1. The *Order* Exceeds The Commission's Statutory Authority.

"The FCC, like other federal agencies, literally has no power to act . . . unless and until Congress confers power upon it." *Am. Library Ass'n v. FCC*, 406 F.3d 689, 708 (D.C. Cir. 2005). Congress must expressly delegate authority to "regulate an industry constituting a significant portion of the American economy," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000), or take action that is "the subject of an 'earnest and profound debate' across the country," *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006). In such important areas, courts require a clear statement of Congressional authorization because they will not presume that Congress granted authority over an issue of "economic and political significance to an agency in so cryptic a fashion."[5]

Because the Internet is "arguably the most important innovation in communications in a generation," *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010) (citation omitted), a reviewing court will "be guided to a degree by common sense" in determining whether Congress delegated to the FCC such a momentous "policy decision" as to whether to regulate the Internet under Title II.[6] Here, it belies common sense to believe Congress empowered the FCC to make

---

[5] *Brown & Williamson*, 529 U.S. at 160; *see, e.g.*, *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994); *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 467 (D.C. Cir. 2005); *see also PMCM TV, LLC v. FCC*, 701 F.3d 380, 384 (D.C. Cir. 2012) ("Had Congress intended to alter this fundamental element of telecommunications policy, we doubt it would have done so without hearings and in a two-sentence rider to an entirely unrelated tax bill").

[6] *Brown & Williamson*, 529 U.S. at 133 (citation omitted); *see also Verizon v. FCC*, 740 F.3d 623, 639 (D.C. Cir. 2014) (acknowledging that "regulation of broadband Internet providers

such an important decision through an implicit delegation of authority. Indeed, the assertion of authority to regulate the Internet – in ways and to an extent unknown absent future regulatory and judicial proceedings – is the kind of nationally important issue that Congress would be expected to expressly empower the FCC to undertake.[7]

Nothing in the Act explicitly delegates to the FCC authority to regulate the Internet under Title II or to treat the Internet as the equivalent of the PSTN for regulatory purposes. Indeed, in 47 U.S.C. § 230(b)(2), Congress made plain its intent to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." The Commission makes no attempt to reconcile the *Order* with section 230(b)(2), which is mentioned only in passing in a footnote. *Order* ¶ 395, n.1141.

The Commission's claim that it is not "regulating the Internet, *per se*" is not credible. *Id.* ¶ 382. As the Commission recognized more than a decade ago, the Internet is nothing more than "a distributed packet-switched network of interconnected computers enabling people around the world to communicate with one another." *Petition for Declaratory Ruling That Pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, ¶ 4 (2004) ("*Free World Dialup Order*"). The networks that comprise the Internet are the same networks that provide broadband Internet

---

(*footnote cont'd.)*
certainly involves decisions of great 'economic and political significance'") (quoting *Brown & Williamson*, 529 U.S. at 160).

[7] *See MCI*, 512 U.S. at 231 ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion[.]"). Importantly, the legislation that led to the creation of the commercial Internet – the High-Performance Computing Act of 1991 – made no mention of and envisioned no role for the Commission in the Internet's development or oversight. *See* High-Performance Computing Act of 1991, Pub. L. No. 102-194, 105 Stat. 1594 (1991).

access services (which the Commission also construes to include any services purportedly provided to an edge provider), which the *Order* treats as the equivalent of the PSTN and subjects to regulation under Title II.

The obsolescence of the PSTN as the exclusive domain of Title II authority leads the Commission to expand the definition of the term "public switched network" "to include networks that use standardized addressing identifiers" such as public IP addresses. *Order* ¶ 391. This new expanded definition allows the Commission to claim an equivalence between telephones and modes of communications associated with the Internet. *Id.* ¶¶ 396 & 513. The Commission asserts regulatory oversight of broadband Internet access services and Internet traffic exchange arrangements, *id.* ¶ 194, n.482, but nothing in the *Order* limits the future reach of the Commission's regulatory discretion. In short, the *Order* purports to empower the Commission to exert Title II regulatory command and control over the Internet in its entirety.[8]

That the Commission disclaims any intent to regulate "any Internet applications or content" ignores that the agency arrogates unto itself the power to do so. *Id.* ¶ 382. Indeed, the breadth of the Title II authority espoused by the FCC precludes the type of limitation on which the Petitioner and larger Internet ecosystem relied prior to the *Order*. The distinctions the Commission seeks to make for regulatory purposes between edge providers and broadband Internet access providers do not exist in implementing the network of networks known as the Internet.

---

[8] The FCC implicitly concedes the expanse of its regulatory power grab, going out of its way to carve out components of the Internet ecosystem from its Title II regime, including: (1) virtual private network ("VPN") services; (2) content delivery networks ("CDNs"); (3) hosting or data storage services; (4) Internet backbone services (but only when not provided as part of a broadband Internet access service); and (5) premises operators. *Order* ¶ 340. The Commission created these carve-outs based on its view that these services did not constitute "mass-market services" within the meaning of its open Internet rules, not because these offerings are not "telecommunications services" as the Commission construes that term. *See id.*, n.900.

For example, based on the Commission's reasoning, Netflix is a telecommunications carrier because: (1) it transmits information of the user's choosing between or among points specified by the user; (2) the information is transmitted without change in form or content; and (3) it offers services directly to the public for a fee. That Netflix may not always own the facilities it uses to provide service but rather relies on facilities-based providers to transmit its content to customers is irrelevant.[9] To paraphrase the FCC, the service that Netflix offers to the public is widely understood today, by both Netflix and its customers, as the ability to provide nearly unlimited video content to any device on the Internet for whatever purposes the user may choose. *Id.* ¶ 350.

The absence of any clear delegation of authority to regulate the Internet under Title II – and a specific statement of policy that the Internet should remain unregulated – is proof that Congress has "not given the [agency] the authority that it seeks to exercise here." *Brown & Williamson*, 529 U.S. at 159. The D.C. Circuit's *Verizon* decision is not to the contrary. That case involved – and the court's analysis of *Brown & Williamson* was limited to – the proper interpretation of section 706, not Title II. Furthermore, the Commission has "disclaimed authority" to regulate broadband services under Title II, *see Stevens Report* ¶ 27, and there is a "history of congressional reliance on such a disclaimer," *Verizon*, 740 F.3d at 638.

Specifically, two years after enactment of the 1996 Act that codified the historical distinction between "telecommunications service" and "information service," the Commission

---

[9] *Order* ¶ 337; *see also Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, ¶ 80 (2006) (concluding that the "origination or termination of a communication via the PSTN is 'telecommunications,' and over-the-top interconnected VoIP providers, like other resellers, are providing telecommunications when they provide their users with the ability to originate or terminate a communication via the PSTN, regardless of whether they do so via their own facilities or obtain transmission from third parties").

submitted the so-called *Stevens Report* to Congress in which the agency determined that Internet access service is an information service immune from regulation under Title II.[10] Consistent with this determination, in a series of decisions from 2002 to 2007, the Commission formally classified cable modem service, wireline broadband Internet access service, wireless broadband Internet access service, and broadband over power lines as unregulated information services immune from Title II regulation.[11] The Supreme Court upheld the Commission's classification of cable modem service in *Brand X*, and the Third Circuit affirmed the Commission's classification of wireline broadband Internet access service.

Congress was plainly aware of these Commission and judicial decisions. Yet, Congress took no action to alter the Commission's treatment of broadband services as unregulated information services, despite ample opportunity to do so. For example, Congress amended the Act in 2010 and again in 2012 by enacting the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA"), Pub. L. No. 111-260, 124 Stat. 1251 (2010), and the Middle Class Tax Relief and Job Creation Act of 2012 ("Spectrum Act"), Pub. L. No. 112-96, 126 Stat. 156 (2012). Although both statutes address broadband and use the terms "telecommunications service" and "information service," Congress did not disturb the Commission's consistent classification of broadband as an information service.

---

[10] The Commission made this determination based on its review of the pre-1996 Act history and after conducting a "de novo" review of the statutory language. *Stevens Report* ¶ 75 (noting "that the functions and services associated with Internet access were classed as 'information services' under the MFJ" and that "the Commission has consistently classed such services as 'enhanced services' under *Computer II*").

[11] *Inquiry Concerning High-Speed Access to Internet over Cable & Other Facilities*, 17 FCC Rcd 4798, 4819, ¶ 33 (2002), *aff'd, Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *Wireline Broadband Order* ¶ 5 (2005); *United Power Line Councils Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Serv. As an Info. Serv.*, 21 FCC Rcd 13281, 13281, ¶ 1 (2006); *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd 5901, 5901, ¶ 1 (2007).

"Where 'an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.'"[12] "[C]onsistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has congressional approval." *Kay v. FCC*, 443 F.2d 638, 646-47 (D.C. Cir. 1970). The courts regularly enforce such clear signs of Congress's intent.[13] If Congress has clearly spoken in this way, an agency is no longer free to change its interpretation.[14] As a result, "the legislative intent ha[d] been correctly discerned" by the Commission when it classified broadband services as unregulated information services. *N. Haven Bd. of Ed.*, 456 U.S. at 535 (quoting *Rutherford*, 442 U.S. at 554 n.10 (internal quotation marks omitted)).

---

[12] *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 535 (1982) (quoting *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) (internal quotation marks omitted)); *see also Negusie v. Holder*, 555 U.S. 511, 546 (2009) ("Congress is aware of a judicial interpretation of statutory language and 'adopt[s] that interpretation when it re-enacts a statute without change.'") (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).

[13] *See, e.g., Contract Mgmt., Inc. v. Rumsfeld*, 434 F.3d 1145, 1149 n.6 (9th Cir. 2006) ("We note, as well, that the SBA's regulations are presumptively correct given that Congress amended the Small Business Act in 2000 without altering the statutory language in a way that would affect the SBA's interpretation of the HUBZone Program."); *Nat'l Fed'n of the Blind v. F.T.C.*, 420 F.3d 331, 338 (4th Cir. 2005) (holding "Congress intended for all conduct now encompassed under the broadened definition of 'telemarketing' to be subject to [prior] FTC regulations"); *Kay*, 443 F.2d at 646-47 ("Congress on two recent occasions has taken action to amend section 315 without making any change in the provisions which the Commission has interpreted . . . . [This] is almost conclusive evidence that the interpretation has congressional approval.").

[14] *Brown & Williamson*, 529 U.S. at 143-44 (concluding that Congress's enactment of "six separate pieces of legislation" "against the backdrop of the FDA's consistent and repeated statements" precluded the agency from changing positions because Congress had "directly spoken"); *see also Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1874 (2013) ("Where Congress has established a clear line, the agency cannot go beyond it[.]").

The CVAA further evinces Congress's intent that broadband Internet access service not be regulated as a telecommunications service under Title II. Specifically, in directing the Commission to adopt "rules that define as eligible for relay service support those programs that are approved by the Commission for the distribution of specialized customer premises equipment … accessible by low-income individuals who are deaf-blind," Congress distinguished between "*telecommunications service*" and "*Internet access service*." 47 U.S.C. § 620(a) (emphasis added). Obviously, such a distinction would have been unnecessary had Congress intended Internet access to be regulated as a Title II telecommunications service.[15]

2. The *Order* Is Arbitrary And Capricious.

In justifying Title II regulation of the Internet, the Commission concludes that "[c]hanged factual circumstances" have caused the agency to revisit its classification of broadband Internet access service. *Order* ¶ 330. This conclusion is arbitrary and capricious because nothing at all has changed in the way broadband Internet access service is offered to the public and because subscribers' reliance upon third-party services has been a feature of the commercial Internet since its inception. *Id.* at 356 (Dissenting Statement of Commissioner Ajit Pai).

---

[15] In the CVAA, Congress, for the first time, granted the Commission limited authority over IP-based communications services that are not connected to or do not otherwise rely upon the PSTN. Specifically, in defining the term "Advanced Communications Services," Congress incorporated the Commission's definition of "interconnected VoIP" but also created a new category called "non-interconnected VoIP service." 47 U.S.C. § 153(53). Congress defined this latter term to include any IP-based communications service that did not enable calling to and from the PSTN. 47 U.S.C. § 153(58). However, under the CVAA, the Commission's authority over non-interconnected VoIP service is limited to ensuring access by individuals with disabilities. This limited delegation belies the Commission's view that it has unilateral authority over all public IP addresses and that the Internet and the PSTN are one and the same.

In reaching its conclusions on these points, the Commission completely ignored contrary evidence that did not fit its views.[16] As a result, a reviewing court is likely to conclude that the agency acted arbitrarily and capriciously by failing "to consider an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), and by "opportunistically fram[ing]" the data, *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011). A reviewing court also is likely to conclude that the Commission "offered an explanation for its decision that runs counter to the evidence." *State Farm*, 463 U.S. at 43. In short, the Commission failed to draw "a rational connection between the facts found and the choice made" and therefore acted arbitrarily and capriciously in classifying broadband Internet access service as a telecommunications service. *Id.*

The Commission also acted arbitrarily and capriciously in failing to address the reliance interests resulting from its policy – affirmed over nearly two decades on a bipartisan basis – that the Internet should be unregulated. Precisely because the Commission's prior policy was intended to "engende[r] seriously reliance interests," those reliance interests "must be taken into account." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Yet the *Order* refused to do so. *Order* ¶¶ 358-60.

The Commission's reasoning – that regulation of the Internet has "at most, an indirect effect" on investment – is flawed. First, as the Commission previously recognized, investment levels are impacted by regulatory burdens. *See, e.g., Wireline Broadband Order*, ¶ 1 (noting that the Internet has prospered in "a minimal regulatory environment" that has "promote[d] innovative and efficient communication"). Second, as Petitioner can attest, Title II is noxious to

---

[16] *See, e.g.*, Reply Comments of AT&T Services, Inc., at 30-31, GN Docket No. 14-28 (Sept. 15, 2014); Comments of CTIA – The Wireless Association®, at 3-4, GN Docket No. 14-28 (Mar. 21, 2014); Reply Comments of Comcast Corporation, at 21-24, GN Docket No. 14-28 (Sept. 15, 2014).

entrepreneurs, who do not invest in communications services subject to Title II regulation. This lack of investment is confirmed by a complete lack of innovation in Title II communications services in the past 20 years and the failure to improve the voice quality of a telephone call since Title II was enacted in 1934. Berninger Declaration ¶ 12. Third, forbearance cannot resolve these reliance concerns, particularly when forbearance is indicative of the "shifting regulatory foundations" that makes Title II distasteful to entrepreneurs and when the *Order* prohibits business arrangements with broadband providers that could increase investors' return on their investment. *Id.* ¶¶ 14 & 17.

The *Order* also invents artificial distinctions that lead to arbitrary and capricious anomalies by subjecting similarly situated providers to completely different regulatory obligations.[17] For example, as a result of the *Order*, an Internet backbone provider that also offers broadband Internet access services is subject to regulation by the Commission under Title II. By contrast, an entity that provides Internet backbone services on a standalone basis is immune from such regulation (at least for now). Likewise, broadband services offered to mass-market customers are subject to Title II regulation, while enterprise broadband Internet access services remain unregulated. While there may be legitimate reasons for such differences in regulatory treatment, the Commission does not even acknowledge let alone rationally explain these differences.[18]

---

[17] *Etelson v. OPM*, 684 F.2d 918, 926 (D.C. Cir. 1982); *see also Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005) (an agency acts arbitrarily and capriciously when it "applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record").

[18] While enterprise broadband services may be individually negotiated, the Commission found that mass-market broadband services also are subject to "individualized negotiations"; but, according to the Commission, it has "long held" individualized commercial agreements "to be common carriage telecommunications services subject to Title II. *Order* ¶ 364.

In sum, the *Order* exceeds the Commission's statutory authority, and the Commission acted arbitrarily and capriciously in adopting it. Thus, a reviewing court is likely to vacate the *Order*.

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

The second requirement the Commission considers in deciding whether to grant a stay is "the threat of irreparable harm absent the grant of preliminary relief."[19] An injury is irreparable if "adequate compensatory or other corrective relief will [not] be available at a later date, in the ordinary course of litigation."[20] This requirement is satisfied here.

For almost 20 years, Petitioner has earned his livelihood as an architect of unregulated IP communications services, which hold the greatest potential for investment and innovation. Indeed, communications services classified as unregulated information services (the entire information technology sector) or beyond classification by the Commission have achieved dramatic success, as compared to services subject to Title II regulation, which are destined to fail. Berninger Declaration ¶ 7. Because Title II disserves customers and is antithetical to innovation, it is no surprise that companies subject to the Commission's regulatory authority achieve valuation multiples that are a fraction of companies not subject to Commission oversight. *Id.* ¶¶ 7-8 & 22.

Title II regulation is so toxic that neither entrepreneurs nor venture capitalists invest in Title II services because of the regulatory control and shifting requirements inherent under Title

---

19 *Telecommunications Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities*, 23 FCC Rcd at 1706; *see also Virginia Petroleum Jobbers Association*, 259 F.2d at 925.

20 *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297-98 (D.C. Cir. 2006). (quoting *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam)); *see, e.g., R.J. Reynolds Tobacco Co. v. FDA*, 823 F. Supp. 2d 36, 38 (D.D.C. 2011); *Smoking Everywhere, Inc. v. U.S. Food & Drug Administration*, 680 F. Supp. 2d 62, 63 (D.D.C.), *aff'd sub nom. Sottera, Inc. v. Food & Drug Administration.*, 627 F.3d 891 (D.C. Cir. 2010).

II regulation. *Id.* ¶¶ 14 & 22. Indeed, Petitioner is not aware of a single start-up success within the domain of Title II services regulated by the Commission. *Id.* ¶ 23.

In order to make a living as an architect of IP communications services, Petitioner must be able to focus his entrepreneurial energies on non-Title II services. His ability to design, develop, and ultimately profit from new and innovative IP services requires preserving their nonregulated status. In developing any communications service attractive to end users, Petitioner must employ a rapid process of trial and error, adapting to conditions based on available technology, competitive alternatives, and customer interest. The challenges of this development process are daunting enough without adding to the list the prospect of Title II regulation. *Id.* ¶ 14.

In order to invest in unregulated IP communications services, Petitioner must be able to distinguish which services are and are not subject to Title II regulation. *Id.* ¶ 15. Since the AT&T Consent Decree in 1956, the Commission has recognized a line distinguishing unregulated information services from telecommunications services regulated under Title II. For IP-based communications services, the Commission consistently has drawn that line based on whether such services rely upon the PSTN.

For example, in its *Free World Dialup Order*, the Commission found FWD's offering to be an unregulated information service because users "must have an existing broadband Internet access service," "must acquire and appropriately configure Session Initiation Protocol (SIP) phones or download software that enables their personal computers to function as 'soft phones,'" and must utilize an assigned number rather than a NANP number to make free VoIP or other

types of peer-to-peer communications to other FWD members.[21] Likewise, in establishing its interconnected VoIP regime, the Commission was persuaded that the ability of users to connect to the PSTN was a critical factor in imposing Title II-like regulations. *See generally IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, ¶ 24 n.78 (2005). Indeed, the FCC's definition of interconnected VoIP requires the ability of users to receive calls from and terminate calls to the PSTN. 47 C.F.R. § 9.3.

Consistent with this well-established regulatory regime, Petitioner has devoted his time and energy to developing and facilitating IP communications services with the expectation that such services are not subject to Commission regulation as long as they do not rely upon or otherwise interact with the PSTN. Indeed, Petitioner has devoted substantial resources to developing IP-based communications services that have nothing to do with the PSTN, including: (1) the HD Network ("HDN"), which allows end users to elect and for network operators to provision HD voice functionality on an individual end-user by end-user basis; and (2) a voice hosting offer giving website visitors the ability to communicate with each other through HD voice. Berninger Declaration ¶¶ 18-20.

The *Order*, however, abruptly ends the dichotomy between regulated and unregulated communications services, without regard to the irreparable harm suffered by Petitioner and other entrepreneurs. The Commission offers no rationale for this policy change, except to assert that IP networks that comprise the Internet and the PSTN are one and the same. *Order* ¶ 396. Likewise, the Commission now asserts regulatory jurisdiction over IP addresses, which it treats

---

[21] 19 FCC Rcd 3307, ¶ 5. The Commission specifically declined to extend its classification holdings to the legal status of FWD to the extent it involved in any way communications that originate or terminate on the public switched telephone network, or that may be made via dial-up access. *Id.* ¶ 2, n.3.

as the regulatory equivalent of NANP numbers. *Id.* ¶ 391. In the case of mobile broadband, claiming the equivalence between the Internet and the PSTN allows the Commission to interpret the term "interconnected service" to include the capability for subscribers to communicate "with all users of the Internet" without ever touching the traditional PSTN. *Id.* ¶ 401.

The collective effect of these actions causes actual and significant harm to Petitioner that is not capable of remediation. Petitioner has spent decades of time and effort in accumulating technical expertise about communications services that rely exclusively upon IP addresses and make no use of the PSTN and in deploying such services under the reasonable expectation that they would not be regulated by the Commission. However, because the *Order* sweeps these services into the Commission's regulatory orbit, Petitioner is unable to continue in his chosen profession designing, developing, and profiting from unregulated IP communications services. If the *Order* takes effect, Petitioner will have no choice but to abandon his investments in IP communications services and devote his time and resources to another sector of the economy, which qualifies as irreparable harm sufficient to warrant a stay. *Id.* ¶ 14.[22]

Petitioner also is irreparably harmed by the Commission's rule that prohibits broadband Internet access providers from entering into paid prioritization arrangements. This rule prevents Petitioner from implementing new HD voice services, including HDN and his HD voice hosting offering – services to which he has devoted time and resources developing. Because latency, jitter, and packet loss in the transmission of a communications will threaten voice quality and destroy the value proposition of an HD service, it is imperative that network operators prioritize this traffic. And, for network operators exchanging HD voice traffic, they will reasonably expect

[22] *See, e.g., Smoking Everywhere*, 680 F. Supp. 2d at 77 n.19; *R.J. Reynolds Tobacco Co. v. FDA*, 823 F. Supp. 2d 36, 38 (D.D.C. 2011).

and demand to receive compensation or some other benefit in consideration for providing such prioritization. *Id.* ¶ 17.

However, the *Order* prevents broadband Internet access providers from prioritizing HD voice "in exchange for consideration (monetary or otherwise) from a third party." Because the benefits of HD voice resulting from Petitioner's offerings will not be realized without prioritization and because such prioritization will necessitate some consideration or benefit, the *Order* eliminates possible business models that would support Petitioner's HD voice offerings, which constitutes irreparable harm.[23]

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

Staying the *Order* will not harm any other parties because a stay would merely preserve the regulatory status quo. IP networks and services, which have not previously been regulated under Title II, would simply remain unregulated pending judicial review. Furthermore, because the *Order* represents a prophylactic step and is not a response to immediate or active risks to the Internet, a stay of the *Order* would not threaten Internet openness during an appeal, even if Title II were a necessary legal predicate for the Commission's Open Internet rules.

D. The Public Interest Favors A Stay.

Finally, the public interest will be served by staying the *Order* pending judicial review. For nearly 20 years, the Internet has thrived in an environment of non-regulation, which the *Order* will disrupt. The unknown and unanticipated consequences of implementing the *Order* prior to judicial review represent the greatest threat to the public. A stay would avoid the regulatory uncertainty for consumers, investors, and innovators while the appeal is pending.

---

[23] Although the Commission has expressed a willingness to waive the ban on paid prioritization in exceptional cases, the bar is set so high that it is the regulatory equivalent of a mirage at the end of the desert that no reasonable entrepreneur would ever bother to pursue. *Order* ¶¶ 129-32.

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

CONCLUSION

For all these reasons, the Commission should grant Petitioner's request to stay the *Order* pending judicial review.

Respectfully submitted,

By: /s/ Richard E. Wiley
Richard E. Wiley
Bennett L. Ross
Brett A. Shumate
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000

Counsel for Daniel Berninger, Founder of the Voice Communication Exchange Committee

April 27, 2015

CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of April, 2015, the foregoing Petition for Stay Pending Judicial Review was served via electronic mail on the following persons:

Marlene H. Dortch, Secretary
Federal Communications Commission
Marlene.Dortch@fcc.gov

Chairman Thomas Wheeler
Federal Communications Commission
Tom.Wheeler@fcc.gov

Commissioner Mignon Clyburn
Federal Communications Commission
Mignon.Clyburn@fcc.gov

Commissioner Jessica Rosenworcel
Federal Communications Commission
Jessica.Rosenworcel@fcc.gov

Commissioner Ajit Pai
Federal Communications Commission
Ajit.Pai@fcc.gov

Commissioner Michael O'Rielly
Federal Communications Commission
Michael.O'Rielly@fcc.gov

Julie Veach
Chief
Wireline Competition Bureau
Federal Communications Commission
Julie.Veach@fcc.gov

Matthew DelNero
Deputy Chief
Wireline Competition Bureau
Federal Communications Commission
Matthew.DelNero@fcc.gov

Roger Sherman
Chief
Wireless Telecommunications Bureau
Federal Communications Commission
Roger.Sherman@fcc.gov

Jonathan Sallet
General Counsel
Federal Communications Commission
Jonathan.Sallet@fcc.gov

/s/ Brett A. Shumate
Brett A. Shumate