

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

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

ORDER DENYING STAY PETITION

Adopted: May 8, 2015

Released: May 8, 2015

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

I. INTRODUCTION

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

II. BACKGROUND

2. The Commission recently adopted new Open Internet rules, responding to the D.C. Circuit’s remand of the Commission’s 2010 no-blocking and antidiscrimination rules.³ The *Order* adopts three “bright-line” rules applicable to both fixed and mobile broadband Internet access service (BIAS) prohibiting blocking, throttling, and paid prioritization. The *Order* defined BIAS as “[a] mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service.”⁴ Under the no-blocking rule, BIAS providers are prohibited from blocking lawful content, applications, services, or non-

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

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

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

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

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

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

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

III. DISCUSSION

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

⁵ *Id.* at para. 112.

⁶ *Id.* at para. 119.

⁷ *Id.* at para. 125.

⁸ *Id.* at para. 136.

⁹ *Id.* at paras. 162-81.

¹⁰ *Id.* at paras. 202-05.

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

¹² *Id.* at paras. 440-536.

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

A. Likelihood of Success on the Merits

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

7. *Statutory Authority.* Petitioner's assertion that the Commission classification of BIAS is "regulat[ing] the Internet"¹⁵ is unpersuasive. The Commission stated in the *Order* that the classification undertaken applied only to broadband Internet access service, leaving untouched IP-based services that do not constitute telecommunications services.¹⁶ Petitioner argues that defining the "public switched network" to include public IP addresses "empower[s] the Commission to exert Title II regulatory command and control over the Internet in the entirety."¹⁷ The Commission's conclusion regarding the public switched network was limited to its implementation of the definitions in section 332 of the Act, which apply solely to the provision of mobile services.¹⁸ In fact, the Commission classified only broadband Internet access service¹⁹ and adopted rules applicable to that service.

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

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

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

¹⁴ Petition at 6-15.

¹⁵ Petition at 9.

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

¹⁷ Petition at 8.

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

¹⁹ *Id.* at paras. 331-425.

²⁰ See *id.* at paras. 310-30.

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

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

²³ *Id.* at para. 335.

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

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

²⁴ Petition at 10-12.

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

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

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

²⁸ See Opposition at 5-6.

²⁹ Petition at 12.

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

³¹ *Id.* at paras. 346-47.

³² *Id.* at para. 360 & n.993.

³³ *Id.* at paras. 310-27; 358-60.

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

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

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

B. Petitioner Will Not Suffer Irreparable Injury

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

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

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

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

³⁵ Petition at 14.

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

³⁷ Petition at 4, 18.

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

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

⁴⁰ Petition at 17.

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

⁴² Petition at 15-16.

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

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

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

C. The Requested Stay Will Result in Harm to Others

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

19. Petitioner's argument that a stay will not result in harm to others does not engage with significant contrary analysis in the *Order*. Petitioner argues that granting a stay would merely preserve the status quo regulatory regime and would not impact the Internet's openness because the rules adopted are merely prophylactic.⁵¹ Petitioner provides no further substantive analysis, and does not engage the Commission's articulation of the need for the rules, including the positive benefits the Commission observed while the *2010 Open Internet Order* was still in effect.⁵² In this respect, it is the Commission's *Order* that maintains the *status quo* of an open Internet, which the Commission has committed to protect and promote since 2005.⁵³ Staying those protections would leave consumers and innovators unprotected against the harm the Commission has been trying to prevent, "particularly where one provider has told the

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

⁴⁴ *Id.* at para. 5.

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

⁴⁶ Petition at 19.

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

⁴⁸ Opposition at 7-8.

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

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

⁵¹ Petition at 19.

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

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

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

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

D. The Public Interest Does Not Support a Grant

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

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

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

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

⁵⁶ Petition at 19.

⁵⁷ Petition at 2.

⁵⁸ *Id.* at 19.

⁵⁹ *Id.*

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

⁶¹ *Id.* at para. 92.

⁶² *Id.* at paras. 435-39.

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

⁶⁴ Petition at 20.

⁶⁵ *Id.*

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

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

IV. ORDERING CLAUSES

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

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

FEDERAL COMMUNICATIONS COMMISSION

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

⁶⁷ See Opposition at 12.