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 OF AMERICAN CABLE ASSOCIATION AND NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION FOR STAY PENDING JUDICIAL REVIEW

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SUMMARY

The final Order adopted by the Commission in this proceeding on February 26, 2015 (the "Order") is by any measure a sea change in federal telecommunications law. Since its advent, broadband Internet access service ("broadband") has never been subject to the utility-style regime of Title II of the Communications Act of 1934. The FCC has always classified broadband as an information service not subject to Title II.

The Order abandons that settled approach by reclassifying broadband as a telecommunications service—thereby subjecting broadband to many provisions of Title II, and opening the door to potential application of *all* of Title II. Hundreds of cable operators represented by Petitioners American Cable Association ("ACA") and National Cable & Telecommunications Association ("NCTA") have never before been subject to Title II with respect to their residential broadband services. This seismic regulatory shift has massive repercussions for these broadband providers and their subscribers. As documented in the attached declarations from NCTA and nine cable operators, the many Title II provisions from which the Order does not forbear will have immense and immediate adverse effects on providers, especially smaller providers with limited resources. By contrast, the prospect of harm from a brief delay in implementing the Commission's orders is exceedingly remote if not non-existent. In providing the rationale for this regulatory change, the Commission did not identify ongoing harms, but identified only what it perceived as potential incentives for parties to engage in behavior that could lead to harm. No harm will befall anyone if the Commission retains its former regulatory regime during the pendency of judicial review.

Within the period before the rules take effect on June 12, 2015, providers will need to review all policies related to customer privacy and marketing, provide notice to thousands of utilities as a prelude to likely rate increases for pole attachments, and review all policies that effect access to persons with disabilities. Additional consequences, such as increased taxes and fees and demands for unfavorable revisions to interconnection and traffic exchange arrangements with other networks, will begin immediately upon the effective date of the rules. More broadly, upon the effective date of the rules, broadband providers will be subject to enforcement actions by the Commission and litigation in federal court for any rate or practice alleged to be unreasonable or unreasonably discriminatory under Title II. Further, even conduct that is entirely permissible under these Title II standards may still be subject to challenge under the Order's vague and equally disruptive "general conduct" standard.

Petitioners have sought judicial review of the Order in the U.S. Court of Appeals for the D.C. Circuit. Petitioners appreciate that the Commission intends to defend the Order. But it is in the interest of all parties concerned—petitioners, the public, the Commission, and others—that the Commission stay the effectiveness of its ruling reclassifying broadband as a telecommunications service, and the "Unreasonable Interference/Unreasonable Disadvantage" standard, until petitioners' challenges are adjudicated. The Order's drastic departure from the framework that has been in place since the dawn of broadband by itself justifies proceeding circumspectly and delaying implementation of the Order until the federal courts, which have the final say on the Order's validity, have ruled. All of the actions identified in the attached declarations—notices to utilities and subsequent increases in pole attachment fees, review of internal policies on privacy and marketing and disabilities access, renegotiation of interconnection arrangements, and litigation surrounding rates and practices, among others—will be for naught when the Order is vacat-

ed on judicial review. The factors that the FCC typically considers in deciding whether to stay its orders compel the same conclusion that a stay is warranted.

The Commission does not need to agree that the D.C. Circuit is likely to overturn the order—only that there are significant questions on judicial review. And the questions *are* at the very least significant. Petitioners can compellingly argue that Congress never intended Title II to encumber enhanced services like broadband, where it would cripple investment and innovation. The classification of broadband as an information service comports with the text and structure of the 1996 amendments to the Act, which incorporated the Commission's own regulatory rubric; with Congress's finding that "[t]he Internet … ha[s] flourished, to the benefit of all Americans, with a minimum of government regulation"; and with the national "policy … to preserve the vibrant and competitive free market that presently exists for the Internet … unfettered by Federal or State regulation." 47 U.S.C. § 230(a)(4), (b)(2). Indeed, the FCC's explicit aim in classifying broadband as an information service exempt from Title II was to further the congressional purpose of fostering investment in broadband, a goal that its approach achieved with stunning success.

The Order, moreover, compounds the conflict with the statute by defining the broadband service it reclassifies very differently, and far more expansively, than Congress or the courts ever contemplated. The Commission's reclassification of broadband finds no support in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005): As the Commission itself explained, the only dispute in *Brand X* was whether the FCC originally could have classified a separate, *transmission-only component* of broadband as a telecommunications service. No one, including the *Brand X* dissent, believed that broadband in its *entirety* could be treated as a single, indivisible telecommunications service; yet the Order does just that. The Order's sweeping definition of broadband as an end-to-end service stretching from the end user to all points on the Internet—rather than merely a "last-mile" transmission service—also contradicts the D.C. Circuit's holding in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), that the FCC cannot impose common-carriage regulation on the service broadband providers offer to edge providers (as the Order does) without reclassifying *that service* as common carriage (which the Order does *not* purport to do).

The court also is likely to overturn the reclassification decision because it independently violates bedrock requirements of administrative law codified in the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and reiterated recently by the Supreme Court. The Order departs, without adequate explanation, from the Commission's longstanding position that broadband is an integrated information service. It fails to adequately justify its rejection of the Commission's own prior factual findings that underlay that settled position, and it does not grapple with the reasonable reliance on that prior policy by broadband providers—who invested hundreds of *billions* of dollars in broadband. The Order also abandons the Commission's stated objective in the Notice of Proposed Rulemaking in the wake of a public statement by the President advocating that radical approach. By changing course and objectives, the Commission violated its statutory duty to provide adequate notice of the specific approach it ultimately adopted.

Allowing the reclassification decision to take effect now, only to have it overturned months or years later, will benefit no one, but indeed will cause great and irreparable injuries to many. The Order subjects a wide range of providers' practices to unprecedented common-carrier duties and ill-defined standards of conduct that will invite a torrent of legal challenges, and that will force providers to undertake costly reviews of countless business practices—from "traffic exchange" agreements, by which providers contract to carry data over one another's networks, to handling of customer information and marketing practices, notwithstanding that the Commission has not concluded that any of the industry's current broadband practices are unlawful and require remediation. And it will subject providers to demands for increased pole-attachment charges and state and local taxes and fees, which providers may be unable to recoup. Those injuries will prove irreparable for all providers. But they will prove particularly difficult for smaller providers to endure and will force many to terminate or curtail service.

Staying the reclassification and unreasonable-interference rulings also will cause no harm to the Commission or the public. Petitioners do not seek a stay of the core "bright line" open Internet rules that were the original aim of this proceeding, but ask only to preserve the status quo that the Commission itself has maintained for decades. A brief delay in implementing the Order's abandonment of that approach, while a court adjudicates the validity of the reclassification and the unreasonable-interference standard, will cause no prejudice to the Commission or the public. To the contrary, a stay would provide stability and avoid costly uncertainty and confusion that would result if the Order takes effect but is later overturned. The Commission's actions in this proceeding confirm that there is no urgent need for the Order to take immediate effect. The rulemaking process spanned nearly a year, the Commission took six months after the comment period closed to release the final Order, and it delayed the Order's effective date by two months.

Petitioners and the Commission disagree about the lawfulness of the Order, and a federal court will now decide that dispute. But there is no reason to subject broadband providers, the public, and others to the harms that reclassification will inflict in the interim, especially given the likelihood that the court will invalidate that decision. The Commission should stay the reclassification ruling pending judicial review.

Petitioners respectfully request that the Commission act on this petition by May 8, 2015, so that the court of appeals has adequate time to consider petitioners' application for the same relief, should that become necessary.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

INTRODUCTION

The American Cable Association (ACA)[1] and the National Cable & Telecommunications Association (NCTA)[2] request that the Commission partially stay the Order adopted in the above-referenced proceeding pending judicial review. In particular, Petitioners seek a stay of the Commission's declaratory ruling reclassifying broadband Internet access as a Title II telecommunications service and the related Internet conduct standard that applies solely to broadband providers.[3] As demonstrated in this petition and the ten attached declarations, subjecting these services to Title II is a seismic change in policy that will result in significant and immediate harm to hundreds of ACA and NCTA member companies and disruption to their relationships with customers and other companies in the Internet ecosystem. Because the actions required for

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1 ACA represents small and medium-sized independent providers that serve communities from Main Street America to the smallest towns and rural areas. While members may serve as few as four subscribers, and others nearly a million, the median is just over 1,000 customers. Many ACA members serve small cities and rural areas, where the large distances between homes make infrastructure deployment especially challenging.

2 NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving over 80 percent of the nation's cable television customers, as well as more than 200 cable program networks. NCTA also represents equipment suppliers and others interested in or affiliated with the cable television industry.

3 Petitioners do not seek a stay of the three "bright line" Open Internet rules adopted in the Order. As ACA and NCTA made clear during the rulemaking proceeding, cable operators do not engage in blocking or throttling of traffic, nor do they engage in paid prioritization. NCTA Comments at 14–16; ACA Reply Comments at 3–4.

cable operators to prepare for and comply with the introduction of Title II regulation will be completely wasted when the Order is vacated on appeal, and because no harm will result to other parties from preserving the status quo while a court reviews the case, the Commission should grant the requested stay.

BACKGROUND

1. In a complete reversal of longstanding regulatory policy, the final Order the Commission adopted in this proceeding, *In re Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC 15-24, 80 Fed. Reg. 19,738 (rel. Mar. 12, 2015; pub. Apr. 13, 2015) (the "Order"), subjects retail broadband Internet access service, for the first time, to a regulatory paradigm established 80 years ago in Title II of the Communications Act of 1934, Act of June 19, 1934, ch. 652, 48 Stat. 1066, *codified as amended at* 47 U.S.C. § 151 *et seq*. Title II created a complex web of utility-style regulations applicable to telecommunications providers that operate as "common carrier[s]." 47 U.S.C. § 201(a). Importing a regulatory model developed for railroads in the nineteenth century, Title II imposes a host of duties on such providers.[4] *Only* providers that undertake to operate as common carriers face these far-reaching requirements. *See*, *e.g.*, *id.*

Since the advent of the Internet, the FCC has never subjected retail Internet access service to Title II. Instead, it consistently followed a light-touch approach designed to foster investment and innovation. The FCC's foundational effort in this area, the "*Computer II*" regime established in 1980, provided that only "pure transmission" ("basic" service) was subject to Title

[4] *See*, *e.g.*, 47 U.S.C. § 201 (requiring just and reasonable charges and practices); *id.* § 203 (requiring carriers to file tariffs); *id.* § 205 (authorizing the Commission to prescribe just and reasonable rates), *id.* § 215 (requiring carriers to seek Commission review of proposed transactions).

II, while "enhanced" services that combined pure transmission with "computer processing" were not.[5]

Congress piggybacked on *Computer II* when it modernized the Communications Act in 1996, adopting the substance of the FCC's *Computer II* approach, but with new labels. *See Nat'l Cable & Telecomms. Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967, 977 (2005). Congress renamed "basic," pure-transmission service as "telecommunications service," and it relabeled "enhanced service" as "information service."[6] Like "basic" service providers under *Computer II*, a provider *is* "treated as a common carrier … to the extent that it is engaged in providing telecommunications services," 47 U.S.C. § 153(51), but an information-service provider is *not*.[7]

2. The Commission has consistently applied those statutory definitions to conclude that broadband is an information service *not* subject to Title II. In 2002, the FCC addressed the classification of one type of broadband: cable modem service.[8] The Commission explained that the regulatory classification "turns on the nature of the functions that the end user is offered." *Cable Broadband Order* ¶ 38. Because end users saw cable modem service as a "single, inte-

[5] *In re Amendment of Section 64.702 of the Comm'n's Rules & Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 ¶¶ 96, 99, 114–15 (1980) ("*Computer II*").

[6] 47 U.S.C. § 153(24), (53). "'[T]elecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(50). "'[T]elecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." *Id.* § 153(53). "'[I]nformation service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." *Id.* § 153(24).

[7] As the Commission has recognized, *see In re Fed.-State Joint Bd. on Universal Serv.*, 13 FCC Rcd. 11,501 ¶ 39 (1998) ("*Stevens Report*"), Congress also was guided by the 1982 Modification of Final Judgment that broke up the Bell system, which had defined the "information services" that the Bell operating companies were barred from providing in terms indistinguishable from the definition that Congress adopted in the 1996 amendments. *See United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 227–29 (D.D.C. 1982).

[8] *In re Inquiry Concerning High-Speed Access to Internet over Cable & Other Facilities*, 17 FCC Rcd. 4798 (2002) ("*Cable Broadband Order*"). The *Cable Broadband Order* relied on and confirmed the FCC's earlier analysis in the *Stevens Report*. *See id.* ¶¶ 36–38.

grated service"—including both transmission *and* enhanced, information-processing functions—the FCC concluded that cable modem service could not be divided into component parts. *See id.*; *see also id.* ¶¶ 39–41.[9] The service, the FCC therefore found, was an "information service" that did not include a severable telecommunications service subject to Title II. *Id.* ¶¶ 38–39.

Several groups challenged the Commission's conclusion that broadband is an information service, but the Supreme Court upheld it in *Brand X*, 545 U.S. at 986–1000. As the Commission would later explain, the parties in *Brand X* "agreed that cable modem service either *is* or *includes* an information service"; the only question was whether "providers offer *only* an information service, rather than" an information service *plus* "a separate telecommunications service," consisting of transmission of data over the so-called "last mile" from subscribers to their providers. *In re Framework for Broadband Internet Serv.*, 25 FCC Rcd. 7866 ¶ 18 (2010) ("2010 NOI") (second emphasis added). On *that* question, *Brand X* acknowledged that the statute was ambiguous, 545 U.S. at 990-97, and held that it was reasonable to construe "telecommunications service" and "information service" as "'turn[ing] on the nature of the functions the end user is offered,'" *id.* at 988 (citation and emphasis omitted). The Court upheld the FCC's conclusion that, "from the consumer's point of view," cable modem service is a functionally integrated whole and thus "not a telecommunications offering." *Id.*

After *Brand X*, the Commission reaffirmed its classification of cable modem service, and it extended that approach to other types of broadband—including Digital Subscriber Line ("DSL") service, Broadband over Power Line service, and wireless broadband. *See Verizon v. FCC*, 740 F.3d 623, 631 (D.C. Cir. 2014). The FCC made clear that it adopted and expanded

[9] These enhanced functions included both readily visible capabilities like email and web hosting as well as behind-the-scenes functionalities, such as Domain Name Service ("DNS"), which enables end users armed with a website address to access data stored on servers far away. *Cable Broadband Order* ¶¶ 17, 37–38.

this light-touch, "information service" approach to broadband not only because that approach most faithfully applies the relevant statutory definitions, but also because it furthers congressional policy by inducing "substantial investment" in broadband infrastructure necessary "to build out the networks that will support future broadband capabilities."[10] As intended, that information-service classification spurred massive investments. From 2002 to 2013, providers invested more than $800 *billion* in broadband—more than $2500 for every American.[11] Those investments stem directly from the FCC's classification.[12]

3. In recent years, the Commission has from time to time sought to adopt "net neutrality" rules for the purpose of preserving the "open" character of the Internet. In 2008, it invoked Title I of the Communications Act to impose sanctions on a broadband provider for allegedly slowing delivery of certain peer-to-peer traffic. After the D.C. Circuit rejected that effort, *Comcast Corp. v. FCC*, 600 F.3d 642, 651–61 (D.C. Cir. 2010), the Commission adopted three "open Internet" rules to ensure continued transparency and to prohibit blocking of access to online content and services and other practices it considered anticompetitive.[13] Although the FCC had sought comment on whether to reclassify broadband as a telecommunications service subject to Title II, 2010 NOI ¶¶ 52–99—to provide legal authority for its open-Internet rules—it rejected that approach. Instead, the Commission rested its 2010 order on Section 706, which di-

[10] *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities Universal Serv. Obligations of Broadband Providers*, 17 FCC Rcd. 3019, 3022 ¶ 5 (2002) ("*Wireline Broadband Order*"); *see also*, *e.g.*, *Cable Broadband Order* ¶ 5; *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14853 ¶¶ 1, 89 (2005).

[11] *Historical Broadband Provider Capex*, USTelecom, http://www.ustelecom.org/broadband-industry-stats/investment/historical-broadband-provider-capex.

[12] Comcast Comments 54–55; *see also* AT&T Reply 27; Cisco Comments 2; Verizon Oct. 17 Ex Parte 2. Substantial investment continued through 2014. *See*, *e.g.*, AT&T Reply 27 ("In the past three years alone, AT&T has sunk more than $60 billion into capital expenditures in the United States … much of it on broadband infrastructure.").

[13] 2010 NOI ¶¶ 30–51; *In re Preserving the Open Internet Broadband Indus. Practices*, 25 FCC Rcd. 17905, 17906 ¶ 1 (2010) ("2010 Order").

rects the FCC to "encourage the deployment" of "advanced telecommunications capability." 47 U.S.C. § 1302(a); 2010 Order ¶¶ 117–23.

The D.C. Circuit struck down the 2010 Order in large part. *Verizon*, 740 F.3d at 649–59. Though agreeing that Section 706 provided *affirmative* authority for the rules, *Verizon* held that the 2010 Order unlawfully imposed common-carrier obligations. The Court held that broadband providers offer two distinct services—one to end users, and one to edge providers. *Id.* at 653. Because the FCC had not reclassified the edge service itself as a telecommunications service, broadband providers could not be "obligated to act as common carriers" in providing *that* service. *Id.* And because two of the rules required providers to deliver all edge provider traffic indiscriminately, the Court held that they impermissibly imposed common-carrier obligations. *Id.* The Court did set out a roadmap for adopting similar rules under Section 706. *Id.* at 656–58.

In May 2014, the Commission "respond[ed] directly to [the *Verizon*] remand" by "propos[ing] to adopt" new rules "consistent with the court's opinion." *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, 29 FCC Rcd. 5561 (2014) ("NPRM") ¶ 24. The explicit "goal" was "to find the best approach to protecting and promoting Internet openness." *Id.* ¶ 4. The Commission proposed again to rely on Section 706, "[p]er the blueprint offered by … *Verizon*," to adopt rules substantially similar to those at issue in *Verizon*. *Id.* ¶¶ 4, 10. A few paragraphs of the NPRM sought comment on whether the FCC should reclassify broadband under Title II, but the Commission again inquired about doing so *solely* to provide an additional legal basis for its revised open-Internet rules. *See id.* ¶¶ 4, 142, 149–50. As the NPRM noted, the FCC's 2010 proposal had contemplated that, in the event the Commission reclassified "the Internet connectivity component of broadband," the Commission "would forbear from applying all but a handful of core statutory provisions." *Id.* ¶ 154. In keeping with the NPRM's open-Internet focus, the Commission sought comment on which provisions of Title II should be exempt from forbearance "in order to protect and promote Internet openness." *See id.* ¶¶ 153–55. The Commission made clear that it was *not* proposing to address interconnection—*i.e.*, "the physical linking of two networks for the mutual exchange of traffic"[14]—or related traffic-exchange arrangements *at all*. *See id.* ¶ 59; Order ¶ 194 n.482.[15]

Addressing those proposals, many commenters supported the specific open-Internet rules that the FCC proposed. Petitioners largely supported the specific rules to the extent consistent with *Verizon*. *See*, *e.g.*, NCTA Comments 45–68. In November 2014, two months after the comment period ended, the President publicly "ask[ed] the [FCC] to … implement the strongest possible rules to protect net neutrality," and urged the FCC to "reclassify consumer broadband service under Title II."[16] Many commenters, including petitioners, urged the Commission not to take that radical step, arguing among other things that it was not at all necessary to provide additional authority for the specific open-Internet rules the Commission had previously proposed.

4. On February 26, 2015, by a 3-2 vote, the FCC rejected those pleas, abandoned its prior proposal, and adopted the Order—released to the public in final form March 12—which reclassifies broadband Internet access service as a telecommunications service, subjecting retail broadband services for the first time to Title II's requirements. Order ¶¶ 306–433. The Order reclassifies not just a transmission component of broadband, but the *entire* broadband Internet access service, as a telecommunications service. *Id.* ¶ 25. And that reclassified service includes

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[14] *In re Implementation of the Local Competition Provisions in the Telecomms. Act of 1996; Interconnection between Local Exchange Carriers & Commercial Mobile Radio Serv. Providers*, 11 FCC Rcd. 15499 ¶ 176 (1996).

[15] The NPRM mentioned third-party requests to "expand the scope of the open Internet rules to cover issues related to traffic exchange" but gave no indication whatsoever that traffic exchange might be "subsumed" within retail Internet access service and subjected to Title II regulation. NPRM ¶¶ 194, 202.

[16] Statement of President Obama, Nov. 10, 2014, http://www.whitehouse.gov/net-neutrality.

not just the "last mile" delivery service between end users and their providers, but the entire *end-to-end* path from users to edge providers—allowing the FCC for the first time ever to subject interconnection to Title II without separately reclassifying it as a telecommunications service. *See id.* ¶¶ 28–29, 338–39.

Although the Order purports to "forbear" under 47 U.S.C. § 160 from applying various provisions of Title II to broadband "for now" (Order ¶¶ 470, 488), it leaves in place portions of 15 Title II provisions (more than twice the number the NPRM contemplated). *Id*. ¶¶ 434–542. Moreover, it asserts authority under general provisions of Title II—Sections 201 and 202, from which it did not forbear—to impose substantially similar requirements to those authorized by specific provisions from which it purportedly "forbore." *See id.* ¶¶ 451, 497, 508–09, 512–13; O'Rielly Dissent at 396–97.

Commissioners Pai and O'Rielly dissented. In their view, the FCC failed to provide notice of the approach it eventually adopted (Pai Dissent at 334–50; O'Rielly Dissent at 385–87)—an approach that is, in any event, at odds with the Communications Act. The Order's attempt to square its new classification with the FCC's longstanding interpretation, they objected, was unfounded. Pai Dissent at 351–61; O'Rielly Dissent at 390–94. They maintained that the Order had not substantiated any need for reclassifying broadband as a telecommunications service. O'Rielly Dissent at 387–90; Pai Dissent at 333–34. They also viewed the particular manner in which the Order relies on general provisions of Title II to do the work of more specific provisions from which the Order purportedly forbore as a distortion of the statutory scheme. O'Rielly Dissent at 396–99. Finally, they criticized the Commission for not recognizing that subjecting broadband to Title II not only would undermine the serious reliance interests of broadband providers that had invested billions of dollars in infrastructure, but also would chill the further investment in broadband that the Order is intended to encourage. *Id.* at 389–90; Pai Dissent at 327–28, 361.

The Order was published in the Federal Register on April 13, 2015. 80 Fed. Reg. 19,738. ACA and NCTA each filed petitions for review of the Order in the U.S. Court of Appeals for the D.C. Circuit on April 14, 2015.[17]

ARGUMENT

Pending resolution of the petitions for review of the Order that petitioners each filed in the D.C. Circuit, the Commission should stay the Order insofar as it (1) reclassifies broadband as a "telecommunications service"—thereby subjecting broadband providers to a wide array of Title II's requirements, and (2) adopts a related and vague "Unreasonable Interference or Unreasonable Disadvantage Standard for Internet Conduct." A stay would still leave in place the three "bright line" open Internet rules prohibiting blocking, throttling, and paid prioritization. The Commission has discretion to grant a stay pending judicial review whenever it "finds that justice so requires." 5 U.S.C. § 705.

A stay is warranted under that standard and the familiar four-factor test applied by both the Commission and the courts.[18] That test asks:

> (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? . . . (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest?[19]

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[17] ACA's petition is docketed as No. 15-1095, and NCTA's as No. 15-1090. Both have been consolidated with other petitions filed by the United States Telecom Association and others, in lead docket No. 15-1063.

[18] *See, e.g.*, *In re Fed.-State Joint Bd. on Universal Serv.,* 20 FCC Rcd 5167, 5168–69 ¶ 4 (FCC Mar. 9, 2005).

[19] *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam); *see also*, *e.g.*, *Brunson Commc'ns, Inc. v. RCN Telecom Servs., Inc.*, 15 FCC Rcd. 12,883 ¶ 2 (2000) (citing *Virginia Petroleum* factors); *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

While "no single factor is necessarily dispositive,"[20] each factor supports a stay here.

Although the Commission may disagree that petitioners are likely to prevail on the merits, it must recognize that petitioners have, at the very least, a substantial case on the merits—and that is all that is required for a stay. "If the last three factors strongly favor the party requesting the stay, the Commission may grant the stay if a petitioner makes a substantial case on the merits, rather than demonstrating likely success." *In re Fed.-State Joint Bd. on Universal Serv.,* 20 FCC Rcd. 5167, 5168–69 ¶ 4 (2005) (citing *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc*., 559 F.2d 841, 843 (D.C. Cir. 1977)). Here, petitioners—many of whom have no experience with regulation under Title II—will suffer severe and irreparable harm if subjected to those provisions during the pendency of the appeal; investment and roll-out of new services will suffer; and some may be forced to exit the market altogether. Conversely, neither the FCC nor the public will suffer any adverse consequences if, during the pendency of the appeal, the Internet continues to be regulated under the Commission's prior light-touch regime. The Internet and Internet access have flourished under that regime, and there is virtually no chance that damaging misconduct will occur during the pendency of judicial review.

I. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS.

Petitioners are likely to prevail in their challenge to the Order's reclassification of broadband because that reclassification contravenes the statutory scheme and fundamental tenets of administrative law. Congress never intended Title II's heavy-handed regulatory regime to apply to enhanced services such as broadband, as the Commission itself understood and emphasized for decades. Contrary to the Order's claim, the Supreme Court's decision in *Brand X* lends no

[20] *In re AT&T Corp. v. Ameritech Corp.*, 13 FCC Rcd. 14,508 ¶ 14 (1998); *see also In re Comcast Cable Commc'ns, LLC*, 20 FCC Rcd. 8217, 8217–18 ¶ 2 (2005) (explaining that the degree to which any one factor must favor a stay "will vary according to the Commission's assessment of the other factors").

support to the Order's abandonment of the FCC's longstanding view; to the contrary, the reclassification contradicts both *Brand X* and the D.C. Circuit's decision in *Verizon*. For those reasons and others addressed at greater length in the stay petitions of the United States Telecom Association et al., the Order's reclassification of broadband cannot be reconciled with the Communications Act.

The Order's decision to reclassify broadband also arbitrarily and capriciously departs from the Commission's own longstanding interpretation of the statute and its prior factual findings, without meaningfully confronting those findings or accounting for the massive, investment-backed reliance that the Commission's prior position deliberately induced. And the Order flouts the APA's notice-and-comment requirements by radically departing from the approach described in the NPRM: The Order adopted a completely different paradigm, and seeks to pursue entirely different objectives, that no one reading the NPRM could have anticipated—taking a sharp turn *after* the comment period ended, in response to presidential influence. In doing so, it precluded the public from participating meaningfully in the rulemaking process to address the specific approach and rationale the Order ultimately adopted.

A. The Order's Reclassification Of Broadband As A Telecommunications Service Contravenes The Communications Act And Controlling Precedent.

As the Commission recognized for many years, the Communications Act's text and structure foreclose any attempt to transform broadband providers into common carriers subject to Title II with respect to retail Internet access service. The Act makes clear that a provider may be "treated as a common carrier" under Title II "*only to the extent* that it is engaged in providing *telecommunications* services." 47 U.S.C. § 153(51) (emphases added). A "telecommunications service" is "the offering of telecommunications for a fee directly to the public," *id.* § 153(53), where "telecommunications" means pure "transmission" of information "without change in [its] form or content," *id.* § 153(50). In contrast, providers of "*information* services"—defined as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," *id.* § 153(24) (emphasis added)—*cannot* be regulated as common carriers. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 975–76 (2005). Thus, a service that goes *beyond* bare transmission and includes such enhanced functions is necessarily an information service, and cannot be regulated as common carriage under Title II. *See Stevens Report* ¶¶ 24–25.

That settled framework resolves this appeal. As the Commission previously found—and the Supreme Court affirmed—broadband cannot be a telecommunications service because end users perceive broadband as a "single, integrated service" that includes far more than pure transmission. *Cable Broadband Order* ¶¶ 38–41; *see also Brand X*, 545 U.S. at 989–1000. *Brand X* affirmed that broadband "provides consumers with a comprehensive capability for manipulating information using the Internet," and "transmits data only in connection with the further processing of information." *Brand X,* 545 U.S. at 987, 998. Thus, it is or at minimum *includes* an information service.[21]

The same is true today: inasmuch as users still cannot *access* the Internet without Internet access service, broadband gives users the "capability" to "generat[e]" a website, "acquir[e]" photos on Instagram, or "stor[e]" e-mails on Gmail. 47 U.S.C. § 153(24). And transmission is still functionally integrated with enhanced functions, such as caching, IP conversion, DNS, and

[21] Indeed, when Congress enacted the statutory definition of "information services," it made clear elsewhere in the statute that the term "includ[es] specifically a service … *that provides access to the Internet*." 47 U.S.C. § 230(f)(2) (emphasis added). That definition makes perfect sense in light of Congress's recognition that "[t]he Internet … ha[s] flourished, to the benefit of all Americans, with a minimum of government regulation," and it is central to national "policy" that Congress prescribed "to preserve the vibrant and competitive free market that presently exists for the Internet … unfettered by Federal or State regulation." *Id.* § 230(a)(4), (b)(2).

parental controls.[22] Broadband thus remains an information service. The Order's attempt to reclassify broadband cannot be squared with the statute.

The Order claims that *Brand X* found the statute ambiguous and left the Commission free to adopt a different view. Order ¶¶ 43, 331–32. But the Order's reading "goes beyond the scope of whatever ambiguity [the statute] contains."[23] As Justice Scalia has noted, any ambiguity in the word "yellow" cannot help an agency that "has interpreted it to mean 'purple.'"[24] Yet that is what the Commission has done here. The only ambiguity *Brand X* identified was whether broadband should be viewed as a single, integrated service—which, by dint of broadband's many enhanced functions, must be an information service—or whether broadband providers can be viewed as *also* "offering" a distinct, last-mile, transmission-only component separate from the information service that providers offer, and which includes various information-processing components such as DNS and email. 545 U.S. at 991. As Justice Scalia put it in his dissent, the dispute was akin to whether a pizzeria that delivers is viewed as "offering" pizza *and* delivery, or pizza alone. *Id.* at 1007 (Scalia, J., dissenting). But the Order treats broadband in its *entirety* as a single, indivisible *telecommunications* service. That is like saying a pizzeria offers only delivery, but not pizza.

The Order departs further from the statute and *Brand X* by redefining the broadband service it reclassifies. *Brand X* contemplated at most classifying a transmission component cover-

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[22] The Order does not deny that these enhanced functions remain integrated with broadband. Instead, it implausibly claims that these functions are irrelevant under a statutory exception for "capabilit[ies] for the management, control, or operation of a telecommunications system." 47 U.S.C. § 153(24); *see also* Order ¶¶ 365–75. But such functions benefit the *user*, not the *system*. The Order itself treats some of these as information services when offered by *others*. *See*, *e.g.*, Order ¶¶ 372–73. It fails to explain why they are irrelevant when offered by broadband providers.

[23] *City of Chicago v. Envtl. Defense Fund*, 511 U.S. 328, 339 (1994).

[24] *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1846 n.1 (2012) (Scalia, J., concurring in part and in the judgment).

ing only the "last mile"—between the end user's home and the broadband provider's facilities—as a telecommunications service. 545 U.S. 989–91. That was crucial to the dissent's reasoning: The dissent found that the last-mile service entailed only transmission because that "delivery service … is down-stream from the computer-processing facilities" and thus "merely serve[d] as a conduit for the information services that have already been 'assembled' by" the provider. *Id.* at 1010 (Scalia, J., dissenting). But the Order reclassifies the *entire* "end-to-end" service from end users' homes to edge providers and back again. Order ¶¶ 338–39. Even the *Brand X* dissent would have rejected that approach.

The Order's expansive definition of the reclassified broadband service, moreover, is a transparent effort to evade the D.C. Circuit's decision rejecting the FCC's 2010 rules in *Verizon*. *Verizon v. FCC* recognized that the last-mile services that broadband providers offer to their subscribers, on the one hand, and to edge providers, on the other, are distinct. *See* 740 F.3d 623, 653, 658 (D.C. Cir. 2014). And the FCC, *Verizon* held, may not in effect impose common-carriage regulation on the services offered to edge providers in the guise of regulating retail, last-mile service. *See id.*; *see also* 47 U.S.C. § 153(51). But the Order does just that: The Order asserts that broadband providers make a "representation to retail customers that they will be able to reach 'all or substantially all Internet endpoints,'" and that that representation "necessarily includes the promise to make the interconnection arrangements necessary to allow that access." Order ¶ 204. On that basis, the Order decrees that the finished service that retail broadband providers offer to end users includes a Title II service that broadband providers offer to edge providers, and thus subjects interconnection and traffic-exchange agreements to Title II—*without* any determination that those services individually constitute common carriage.

The key premise that providers somehow "promise" subscribers that they can reach substantially all endpoints *and* that the provider will make all necessary interconnection arrangements is pure *ipse dixit*. The Order cites no evidence to substantiate that assertion. The Order states only that, "*[a]s a telecommunications service*, broadband Internet access service implicitly includes an assertion that the broadband provider will make just and reasonable efforts to transmit and deliver its customers' traffic to and from 'all or substantially all Internet endpoints' under sections 201 and 202 of the Act." Order ¶ 204 (emphasis added). That reasoning is transparently circular: The Order first derives the implicit promise from broadband's alleged status "as a telecommunications service," and then relies on that same promise as a rationale for reclassifying broadband (including interconnection) "as a telecommunications service." *See*, *e.g.*, *id.* ¶¶ 363–64.[25] But the debate here concerns whether broadband *is* a telecommunications service. The Commission cannot rationally resolve that issue by assuming that it is a telecommunications service, deriving a promise from the assumed answer, and then using that promise to prove its assumption true. And without that assumption, there is no basis for inferring the promise to provide end-to-end access and to make necessary interconnection arrangements to facilitate that access.

B. The Order's Reclassification Is Arbitrary And Capricious.

The Order's reclassification decision is independently unlawful because it is arbitrary and capricious. 5 U.S.C. § 706. The APA requires the Commission, before adopting a policy that

[25] The Commission bypassed its ordinary method for determining whether a service is offered on a "private carriage" or "common carriage" basis (*see, e.g.*, *In re AT&T Submarine Sys., Inc.*, 13 FCC Rcd. 21,585, 21,588-89 ¶ 8 (FCC Oct. 9, 1998)) and concluded that, because of this purported "implied promise," traffic exchange arrangements can be regulated as common carriage even though they are individually negotiated. Order ¶ 364. The Order also fails to acknowledge precedent holding that interconnection is not a telecommunications service. *See, e.g.*, *Global Naps, Inc. v. Bell Atl.-New Jersey, Inc.*, 287 F. Supp. 2d 532, 547 (D.N.J. 2003); *Level 3 Commc'ns., LLC v. Ill. Bell Tel. Co.*, 2014 U.S. Dist. LEXIS 13484, at *15-16 (E.D. Mo. Feb. 4, 2014).

"'rests upon factual findings that contradict those which underlay its prior policy,'" to confront those prior findings and to "provide [a] more substantial justification" for their rejection than would be required absent the conflicting prior policy.[26] And before abandoning its own "prior policy" that "has engendered serious reliance interests," the Commission had to "account" for those interests as well, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), identifying actual offsetting benefits that justify disrupting regulated entities' reasonable reliance. The Commission, however, did not seriously attempt to do either.

1. The Order flatly rejects the central factual premise of its prior classification of broadband: that consumers perceive broadband as a "single, integrated service" in which transmission *and* enhanced, information-processing functions were inextricably intertwined. *See* Order ¶¶ 366–69, 372–75; *cf. Brand X*, 545 U.S. at 987–88. The Order does not dispute that consumers' perspectives are still paramount, but claims instead that those perceptions somehow have been utterly transformed. Order ¶ 350. Yet none of the "evidence" the Order cites remotely supports that claim. The Order asserts that there is widespread availability of third-party services (like e-mail), and that many consumers rely on third-party suppliers instead of their broadband providers for these services. *Id.* ¶¶ 347-48. But that was equally true when the FCC initially classified broadband as an information service more than a decade ago.[27] The Order also asserts that broadband providers "emphasize transmission speed" in their marketing materials. *Id.* ¶ 351. That, too, is nothing new. Indeed, it is such old news that Justice Scalia emphasized it in

[26] *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).
[27] *See Cable Broadband Order* ¶¶ 25, 38 & n.153; *Brand X*, 545 U.S. at 998.

his *Brand X* dissent.[28] And, in any event, advertising about transmission speeds certainly does not show there has been a "change" *in consumer perceptions* about broadband.[29]

2. More fundamentally, the Order does not remotely attempt to provide the "more substantial justification" the APA requires where, as here, the Commission's "'prior policy has engendered serious reliance interests.'"[30] Rather than grappling with the massive reliance interests deliberately engendered by the FCC's prior, longstanding position—including billions of dollars of investment by companies large and small—the Order denies that any reliance interests even *exist*, and claims that classification has at most an "indirect effect" on investment. Order ¶ 360. That is belied by the Commission's own actions and statements over the years: The Commission's explicit aim in classifying broadband as an information service was to further congressional policy in *inducing* investment in broadband in reliance on that classification. *See, e.g.*, *Cable Broadband Order* ¶ 5; *Wireline Broadband Order* ¶¶ 1, 5. That policy achieved its aim, inducing more than $800 *billion* in investment in just over a decade.[31] The APA requires that agencies seeking to change their views confront their own past statements and policies and adequately explain why those statements and policies were mistaken. It does not permit agencies to erase the past with the bureaucratic equivalent of "we've always been at war with Eastasia."

The Order's claim that providers could not have reasonably relied on the FCC's longstanding position because broadband's status was "unsettled" (Order ¶ 360) fails for the same reason. In furtherance of congressional policy, the FCC expressly sought to promote investment by "remov[ing] regulatory uncertainty" in 2002. *Cable Broadband Order* ¶ 5. Any

[28] *Brand X*, 545 U.S. at 1007 n.1 (Scalia, J., dissenting) (noting that "cable broadband" "advertises quick delivery as one of its advantages over competitors").

[29] *See* Pai Dissent at 357–58; O'Rielly Dissent at 391.

[30] *Perez*, 135 S. Ct. at 1209 (quoting *Fox Television Stations*, 556 U.S. at 515).

[31] *Historical Broadband Provider Capex*, USTelecom, http://www.ustelecom.org/broadband-industry-stats/investment/historical-broadband-provider-capex; Comcast Comments 54–55; Pai Dissent 361; O'Rielly Dissent 390.

claim that broadband's status was "unsettled" could not have survived the Supreme Court's 2005 affirmance of that decision.[32]

The Order fails to offer any countervailing benefit to justify the immense disruption to providers' investment-backed reliance. It contends that reclassification provides statutory authority for the open-Internet rules. Order ¶ 42. But, as the D.C. Circuit made plain, the Commission itself recognized, and many commenters argued, the Commission could have imposed such rules *without* reclassifying. NPRM ¶¶ 4, 143. The Order failed adequately to explain why the extreme option of reclassification was necessary to achieve that objective. Nor did it identify any other substantial benefit that reclassification was necessary to provide. Aside from a few stale and dubious anecdotes, the Order cites only *hypothetical* harms that "may" or "could" come to pass. That cannot justify overturning a status quo settled for decades, upsetting hundreds of billions of dollars in investment-backed expectations, and sending the industry into disarray for years to come. *E.g.*, Order ¶ 20, 78–79, 82–83, 127, 200; *see also* Pai Dissent at 334; O'Rielly Dissent at 387.

C. The Commission Failed To Provide Notice Of The Fundamental Approach And Rationale Adopted In The Final Rule.

The Order further violates the APA because it was not a "'logical outgrowth'" of what the FCC proposed in the NPRM. *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1107–08 (D.C. Cir. 2014). The APA required the FCC "make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible."[33] The NPRM must outline the specific approaches under consideration—that is, "describe the range of alternatives

[32] The Order's fallback claim that the forbearance it affords from Title II's specific provisions alleviates any burden on reliance interests (Order ¶ 360) is spurious. The FCC *refused* in the Order to forbear from numerous Title II provisions that impair reliance interests. And it explicitly retained authority to address matters covered by forborne provisions through *ad hoc* adjudication under the hazy standards of Sections 201 and 202. *See*, *e.g.*, *id.* ¶¶ 481, 490, 508, 509, 512, 513.

[33] *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (per curiam).

being considered with reasonable specificity"—rather than merely announce that the agency intends somehow to regulate a particular subject.[34]

The NPRM made clear that the rulemaking's goal was limited "to protecting and promoting Internet openness." NPRM ¶ 4. The NPRM's two-paragraph discussion of reclassification of wired broadband was merely a series of open-ended questions that boiled down to "Should we reclassify? Why or why not?" *See id*. ¶¶ 149–50. The NPRM offered no answers and gave no guidance as to *what* or *how* or *why* the FCC might reclassify, and did not even hint at the rationale and analysis that consumed 128 paragraphs of the Order and threatens to reshape the industry. *See* Order ¶¶ 306–433. That falls far short of what the APA requires.[35] Indeed, only after the President's speech did the FCC refocus its approach to fashion a "Title II tailored for the 21st century" to create "more, better, and open broadband." *Id.* ¶¶ 5, 449.

The NPRM, moreover, nowhere suggested that the FCC was considering reclassifying broadband as a *single*, *end-to-end* service, rather than only a last-mile transmission *component*. And it affirmatively misled commenters with respect to Internet interconnection, assuring them that the Order would *not* address that subject (NPRM ¶ 87), which the Order ultimately *did* (Order ¶¶ 338–39). The APA does not permit agencies to mislead commenters in this manner. *See Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1260 (D.C. Cir. 2005).

Other examples of the NPRM's deficiencies abound.[36] For example, nothing in the NPRM apprised commenters of the Order's new catchall ban on "unreasonable interference or

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[34] *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450–52 (3d Cir. 2011) (internal quotation marks omitted); *Riverkeeper, Inc. v. EPA*, 475 F.3d 83, 112-13 (2d Cir. 2007) (Sotomayor, J.), *rev'd on other grounds sub nom. Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009).

[35] *See*, *e.g.*, *Prometheus Radio*, 652 F.3d at 453 ("general and open-ended" sentences did not "fairly appris[e] the public").

[36] Pai Dissent at 334–50; O'Rielly Dissent at 385–87.

unreasonable disadvantage," guided by a "non-exhaustive" list of factors. Order ¶¶ 133–53. This "wholly new" standard was nowhere mentioned in the NPRM, let alone with the "reasonable specificity" required by the APA.[37] To the contrary, whereas the NPRM aimed to preserve individualized negotiations (NPRM ¶ 116), the new standard imposes precisely the kind of common-carriage regulations struck down in *Verizon*. *See Verizon*, 740 F.3d at 656–57.

II. PETITIONERS' MEMBERS WILL SUFFER IRREPARABLE HARM WITHOUT A STAY.

Absent a stay, the Order "will in fact" cause irreparable harm to petitioners' members. *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 763 (D.C. Cir. 1985) (emphasis omitted). The Order's reclassification of broadband as a telecommunications service, combined with its refusal to forbear from numerous provisions of Title II, will impose immediate, substantial burdens on the business interests of petitioners' members that will be impossible to undo.[38]

A. Potential Litigation And Liability Under General Title II Provisions Concerning Traffic Exchange And Other Practices

If the Order becomes effective, petitioners' members will be subjected to the intrusive, far-reaching and burdensome standards of Sections 201 and 202, plus the associated enforcement mechanisms of Title II. That is particularly problematic for those members who have no prior experience with *any* sort of Title II regulation. Reclassification threatens a wave of lawsuits, including class actions, by consumers, transit providers, and edge providers against petitioners' members. Sections 206 and 207 authorize suits to challenge fees or practices as unreasonable (Section 201), discriminatory (Section 202), or in violation of the Open Internet rules—including the vague yet sweeping "catch-all" general Internet-conduct standard, which prohibits "unrea-

[37] *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994) (per curiam).
[38] *See Sottera, Inc. v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010) (injury to business that could not be remedied was irreparable harm); *Washington Metro. Area Transit Auth. Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n.2 (D.C. Cir. 1977) (economic injuries are irreparable when there is no "adequate compensatory or corrective relief . . . available at a later date") (internal quotation marks omitted).

sonably interfer[ing] with" or causing "unreasonabl[e] disadvantage" to end users or edge providers—nebulous concepts that the Order does not attempt to define (Order ¶ 21). And the Order leaves no doubt that, while the FCC has eschewed *ex ante* rate regulation, it stands ready to address any and all "issues *ex post* under sections 201 and 202." *Id.* ¶ 451. Petitioners' members must undertake a thorough (and expensive) evaluation of their existing rates and practices to determine whether the FCC might find them unreasonable or discriminatory. *See* Declaration of Steven F. Morris ("Morris Decl.") ¶¶ 6–9; Declaration of W. Thomas Simmons, Midcontinent Communications ("Simmons Decl.") ¶¶ 3–4. The costs of such litigation and review cannot be recovered.[39] And these costs will be particularly devastating to petitioners' smaller members—several of which serve fewer than 500 customers—because they will be compelled to hire additional employees to manage compliance with Title II's requirements.[40]

One area where the Order's claim of regulatory authority under Sections 201 and 202 will be particularly problematic is the FCC's assertion of jurisdiction over Internet traffic exchange, which threatens to undo countless interconnection agreements that petitioners' members have formed, and exposes petitioners' members to costly and unpredictable litigation. Historically, Internet traffic-exchange arrangements have been commercially negotiated and free from FCC oversight. Order ¶ 203; O'Rielly Dissent at 392–93; Morris Decl. ¶ 10. The Commission identi-

[39] The number and type of lawsuits that will inevitably arise under these vague standards is limited only by the creativity of the plaintiffs' bar. Even if these suits are meritless, as most of them surely will be, broadband providers (many of them small companies with limited resources) must expend considerable sums of money fighting them. And when the court of appeals ultimately vacates the Order as unlawful, these suits will turn out to have been unauthorized all along. But the retroactive mooting of any pending cases will not make petitioners' members whole because litigation costs are unrecoverable.

[40] *See* Declaration of Michael Jensen, General Manager of Bagley Public Utilities ("Jensen Decl.") ¶ 6; Declaration of William D. Bauer, CEO of Windbreak Cable ("Bauer Decl.") ¶ 6; Declaration of Herbert Longware, President of Cable Communications of Willsboro ("Longware Decl.") ¶ 6; Declaration of Steven Neu, Owner of Mountain Zone Broadband ("Neu Decl.") ¶ 6; Declaration of Robert Watson, Owner of Watson Cable ("Watson Decl.) ¶ 6.

fied no evidence, anywhere in the record, that negotiations of this sort have *ever* led to improper or exclusionary conduct that damages Internet openness, much less in a manner not already amply addressed by current Commission rules. Nevertheless, the Order declares that interconnection agreements are now "within the scope of Title II" (Order ¶ 29), and thus subjects broadband providers—but not their interconnecting counter-parties—to the "just and reasonable" and nondiscrimination requirements of Sections 201 and 202. *Id.* ¶¶ 195, 203.

Some of petitioners' members have already received proposals from transit providers contemplating *free* exchange of all Internet traffic, in contravention of the well-established industry standard that parties sending significantly unbalanced traffic volumes bear some responsibility for the increased costs. Declaration of Ronald Da Silva ("Da Silva Decl.") ¶¶ 2–4; Morris Decl. ¶ 11. As these proposals make clear, these entities—which the Order did *not* address—recognize that the playing field has shifted in their favor. Morris Decl. ¶¶ 10–11; *see also* Da Silva Decl. ¶ 3; Declaration of Jennifer W. Hightower ("Hightower Decl.") ¶ 5. Indeed, the Order may even preclude broadband providers "from declining to interconnect with any similarly situated network provider that seeks a direct connection," despite the obvious "inefficien[cies]" of "establish[ing] direct connections with *every* network provider[.]" Da Silva Decl. ¶¶ 4–5. Edge providers are likewise taking advantage of this regulatory asymmetry in negotiations with petitioners' members.[41]

Petitioners' members refuse these proposals at their peril because the FCC's decision not to forbear from Title II's enforcement provisions paints a litigation target on their backs. Morris

[41] *See* Declaration of Thomas J. Larsen, Group Vice President of Legal & Public Affairs of Mediacom Cable ("Larsen Decl.") ¶¶ 3–4 (describing edge providers' "undue leverage in negotiations over allocating costs of delivering their content").

Decl. ¶ 11; *see also* 47 U.S.C. §§ 206–208.[42] Yet despite inviting litigation, the Order provides *zero guidance* as to how Sections 201 and 202 apply to interconnection.[43] Indeed, it acknowledges that the FCC "lack[s] th[e] necessary background in practices addressing Internet traffic exchange" to draft clear rules. Order ¶ 202. But that admitted ignorance will not stop the FCC from adjudicating disputes on "a case-by-case approach." *Id.*; *see also id.* ¶¶ 203-04.

In the face of such standard-less agency second-guessing, broadband providers face two untenable options: (1) acquiesce to their counterparties' demands for free traffic exchange; or (2) continue to negotiate interconnection agreements based on commercial realities and thus risk costly and time-consuming litigation in front of an agency that seems to place broadband providers and interconnection parties on decidedly uneven ground. *See* Da Silva Decl. ¶¶ 5–7; Hightower Decl. ¶¶ 4–5; Morris Decl. ¶¶ 10–11. Either way, the harms will be irreparable.[44]

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[42] One transit provider has already publicly threatened to file interconnection complaints the moment the Order takes effect. Brendan Sasso, *The First Net Neutrality Complaints are Coming*, National Journal, *available at* http://www.nationaljournal.com/tech/the-first-net-neutrality-complaints-are-coming-20150409 ("Cogent Communications, which controls part of the Internet backbone, is preparing to file complaints to the FCC, charging service providers Comcast, Time Warner Cable, AT&T, Verizon, and CenturyLink with inappropriately degrading Internet traffic."); *see also id.* ("Mike Mooney, the general counsel for Level 3 Communications, another Internet backbone provider, said his company is also 'currently evaluating our options.'"); Kery Murakami, *Cogent To Petition FCC Over Interconnection*, Washington Internet Daily, Apr. 7, 2015, at 5–6 ("Cogent Vice President Robert Beury told us Monday that unless ISPs reduce congestion at interconnection points, the company plans to ask the commission to take action as soon as the order takes effect 60 days after publication in the Federal Register."); Da Silva Decl. ¶ 7 ("Cogent has made clear in conversations with TWC that it will file complaints against TWC and other parties that refuse to give into its demands.").

[43] Recent public statements suggest that the FCC will take a dim view of interconnection agreements that involve the payment of fees to the ISP. *See* Remarks of FCC Chairman Wheeler as Prepared for Delivery at The Ohio State University School of Law Symposium on "The Future of Internet Regulation," ("Wheeler Comments") Mar. 27, 2015 (warning that, without regulation, ISPs have the power to require "interconnection fees").

[44] *See Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996) (agency action that interferes with commercial negotiations constitutes irreparable harm because even "[i]f the FCC's rules are later struck down, it w[ould] be extremely difficult for the parties to abandon the influence of their previous agreements . . . and to recreate the atmosphere of free negotiations that would have existed in the absence of the FCC's dictated presumptive prices").

B. Customer-Information Handling Practices

The Order also would subject broadband providers to the requirements of Section 222, (Order ¶ 462), imposing additional irreparable harms. Section 222 provides (inter alia) that, absent customer approval, a carrier can use "customer proprietary network information" ("CPNI") only in providing the customer's telecommunications service. 47 U.S.C. § 222(c)(1).[45] Petitioners' members, not subject until now to Title II, may need to change their existing practices to comply with Section 222(c)(1). One such practice is to use the CPNI of broadband customers to market other services to them, such as cable television and voice services. Bauer Decl. ¶¶ 19-20; Hightower Decl. ¶ 9; Simmons Decl. ¶ 10; Watson Decl. ¶ 20. Because this marketing uses CPNI for purposes other than providing broadband itself, Section 222(c)(1) may require customer approval—which petitioners' members currently do not have. Hightower Decl. ¶ 9; Simmons Decl. ¶ 10.[46]

Petitioners' members would face extensive burdens to comply with Section 222(c)(1), including the creation of processes to ensure that CPNI is not used in marketing without customer approval. Bauer Decl. ¶¶ 22–25; Hightower Decl. ¶¶ 9–10.[47] These burdens cannot be reme-

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[45] CPNI includes information such as the "type" of service that a customer uses, her "location" when she uses it, and the "amount" of her use. *Id.* § 222(h)(1)(A).

[46] *See In re Implementation of the Telecomms. Act of 1996*, 13 FCC Rcd. 8061, ¶ 35 (1998) (interpreting Section 222 to require approval for this type of marketing).

[47] Indeed, the FCC's implementing rules in the voice context spell out these processes in great (and costly) detail. See 47 C.F.R. §§ 64.2007–2009. Although the Order technically forbears from these regulations, it still threatens to enforce the statute (Order ¶ 462 n.1381), and thus leaves providers with little choice but to adopt an approach in line with the FCC's existing interpretations of the statute. Morris Decl. ¶¶ 14–15. Even then, however, the FCC might not find the existing regulations sufficient to satisfy the statutory requirements in the broadband context. Thus, petitioners' members will still face potential liability (including class-action lawsuits) even for their costly, good-faith compliance efforts (Hightower Decl. ¶ 10; Morris Decl. ¶ 13; Simmons Decl. ¶ 11), which could be crippling for petitioners' smaller members, who could be required to implement yet another set of new policies at great cost when the FCC does issue regulations directed at broadband (Bauer Decl. ¶ 24; Watson Decl. ¶ 22). And while petitioners' members could wait to seek customer approval until the FCC provides further guidance, that it-

died after the Order is overturned on the merits because petitioners' members cannot recoup the administrative costs associated with obtaining customer approval. These irreparable burdens will be particularly harmful for petitioners' smaller members, who cannot spread the costs of compliance over a large customer base and therefore must either attempt to bear these costs themselves (which would preclude them from using these funds for critical service upgrades and capital projects) or pass along significant cost increases to their customers (which would cause them to lose some of those customers forever to larger competitors). Bauer Decl. ¶ 23; Watson Decl. ¶¶ 23, 27–28.

Section 222 will irreparably harm petitioners' members in additional ways, notwithstanding that the Commission has made no finding that broadband providers' existing privacy and security measures are wanting. For example, Section 222(a) imposes a general duty to protect customers' "proprietary information." 47 U.S.C. § 222(a). The FCC has interpreted this provision to require common carriers to apply detailed authentication requirements and provide customers with information about their accounts only if specific password procedures are followed.[48] Implementing those "minimum" procedures in the broadband context will be costly and difficult. Hightower Decl. ¶ 7; Larsen Decl. ¶ 5; Simmons Decl. ¶¶ 6. It will also damage the goodwill of petitioners' members because customers will be frustrated when they are subjected, by dint of the Order, to a cumbersome, unnecessary process in accessing their own accounts. Simmons

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self would impose irreparable harm by requiring petitioners' members to suspend their marketing practices in the meantime. Bauer Decl. ¶¶ 19-21; Hightower Decl. ¶ 10; Simmons Decl. ¶ 11; Watson Decl. ¶¶ 20-21.

[48] *See* 47 C.F.R. § 64.2010; *In re Implementation of the Telecomms. Act of 1996: Telecomms. Carriers Use of Proprietary Network Info. & Other Customer Info.*, 22 FCC Rcd. 6927, ¶ 64 (2007) (identifying this rule as a "minimum requirement[]" to comply with the statutory obligations of Section 222(a)).

Decl. ¶ 8.[49] None of these costs can be recouped, and the impact could be particularly severe for petitioners' smaller members, some of which might be forced to cease providing service entirely. Morris Decl. ¶ 15.

The new requirements are particularly problematic, and particularly unnecessary, for many smaller providers. Those providers know their customers personally and rely on that for customer loyalty and service quality. Indeed, many of their customers choose broadband Internet access and cable television service based not just on price, but also on their personal relationships with providers. The sudden imposition of complex authentication procedures will damage the personal nature of the relationship, impose significant frustration, and lead to cancellations of service.[50]

C. Pole-Attachment Agreements

Absent a stay, petitioners' members will also suffer irreparable harm in connection with Section 224, which governs the agreements that allow petitioners' members to attach their network equipment to utility poles. First, reclassification will trigger obligations for cable operators to notify utilities that they are offering telecommunications services. Morris Decl. ¶ 21. Satisfying those obligations will be a massive undertaking because they could potentially implicate thousands of pole agreements that petitioners' members have. *Id.* ¶ 22. And because many of

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[49] "[T]he loss of customers and goodwill is an irreparable injury." *Ferrero v. Associated Materials Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991) (internal quotation marks omitted); *see also, e.g.*, *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 217 F.3d 8, 13 (1st Cir. 2000) (courts "often find" injuries to "goodwill and reputation" to be irreparable). Moreover, at the same time that Section 222(a) limits the disclosure of account information, Section 222(c)(2) affirmatively obligates the disclosure of CPNI upon a customer's written request. 47 U.S.C. § 222(c)(2). Petitioners' members also must implement new systems to satisfy this requirement. Simmons Decl. ¶ 12.

[50] Longware Decl. ¶ 9 ("[C]ustomers—especially those who drop by our office in person—may feel insulted if asked to prove their identities after years of doing business with the company."); Neu Decl. ¶ 8 ("We personally know almost every one of our customers."); *see also generally* Bauer Decl. ¶ 8–11; Jensen Decl. ¶ 9; Watson Decl. ¶¶ 9–10.

the notice provisions in these agreements contain specialized, agreement-specific requirements, petitioners' members will be required to devote extraordinary amounts of time and resources to reviewing these thousands of agreements and providing an endless variety of notices pursuant to their particular terms. Hightower Decl. ¶ 15; Larsen Decl. ¶ 9; Morris Decl. ¶ 22. Rural providers, many of whom are quite small and have far fewer customers served per pole attachment, will be particularly hard hit. *See* Larsen Decl. ¶ 11. These needless costs cannot be recovered after the Order is overturned.

Second, as the Order recognizes, public utilities have a strong financial incentive to use reclassification to justify increasing the rates that they charge cable operators for pole attachments. *See* Order ¶¶ 482–83; Hightower Decl. ¶ 16; Morris Decl. ¶¶ 20, 23; Neu Decl. ¶ 23. Although the Order "caution[s]" utilities not to increase these fees (Order ¶ 482), it does not *prohibit* them from doing so. When utilities do attempt to increase these fees, cable operators will face serious financial and administrative burdens in opposing those efforts, both in negotiations and in litigation—which will irreparably harm petitioners' members either by disrupting broadband deployment if capital is diverted or by injuring their goodwill if they attempt to pass these costs on to consumers. Hightower Decl. ¶ 17; Morris Decl. ¶ 23; Simmons Decl. ¶ 15. Petitioners' smaller members will similarly suffer irreparable harm to their ability to maintain their networks or their customer goodwill because they cannot afford to litigate against utility owners, and therefore will have no choice but to succumb to demands for increased fees. Bauer Decl. ¶¶ 31–32; Longware Decl. ¶¶ 25–26; Watson Decl. ¶¶ 30–31. And if the Order is vacated, efforts to recover increased fees paid in the meantime will be costly, time-consuming, and potentially unsuccessful, as utilities will undoubtedly take the position that these payments were proper while the Order was in effect. Morris Decl. ¶ 23.

D. State And Local Taxes And Fees

The Order's reclassification of broadband as a telecommunications service will also expose petitioners' members to a vast assortment of state and local taxes and fees. State and local jurisdictions impose numerous taxes and fees on telecommunications service that they do not impose on broadband service (or assess on broadband at a lower rate). The FCC's prior classification of broadband as an information service was understood as a reason that broadband providers were not subject to these taxes and fees.[51] States and localities may therefore use reclassification as a justification for seeking to impose many new taxes and fees on broadband providers. For example, the Order may subject petitioners' members to demands for new franchise fees.[52] It may also result in increased property taxes for petitioners' members.[53]

These harms to petitioners' members will be irreparable. In many cases, petitioners' members will have strong arguments that these taxes and fees are preempted and thus unenforceable, but disputing efforts to impose them will itself require time and resources that cannot be remedied. Morris Decl. ¶¶ 26, 28, 30. Moreover, any payment of these taxes and fees will slow

[51] *See, e.g.*, *Cmty. Telecable of Seattle, Inc. v. City of Seattle, Dep't of Exec. Admin.*, 186 P.3d 1032, 1034, 1037 (Wash. 2008) (city could not tax cable-modem service as a "telecommunications service," in part because "[c]able Internet service should mean the same thing inside the Seattle city limits as elsewhere").

[52] Many franchising authorities impose separate franchise fees on cable systems and telecommunications services. Morris Decl. ¶ 27; *see also, e.g.*, D.C. Code Ann. § 34-1256.01 (imposing franchise fee on cable operators); *id.* § 34-2004 (separately authorizing franchise fee for providers of "telecommunications service"). These authorities may use the Order's reclassification of broadband to impose separate fees on the broadband services of cable operators. Hightower Decl. ¶ 20; Morris Decl. ¶ 27. Although the Order states that the FCC "do[es] not believe" that these fees are justified (Order ¶ 433 n.1285), it does nothing to preempt them. Nor does it even suggest that the FCC has authority to do so.

[53] In several States, property taxes for telecommunications services are centrally assessed using a much less favorable methodology that taxes both tangible and intangible assets, whereas cable operators are generally locally assessed and pay property taxes only on their tangible assets. Hightower Decl. ¶ 19; Larsen Decl. ¶ 13; Morris Decl. ¶ 24. These States may use reclassification to subject petitioners' members to centralized assessment and significantly increase their tax burdens. Hightower Decl. ¶ 19; Larsen Decl. ¶ 13; Morris Decl. ¶ 24.

the deployment of broadband facilities by reducing available capital (particularly for smaller providers), or will be passed on to consumers through higher retail rates, thus damaging customer goodwill in a manner that cannot be remedied after the fact. *Id.* Finally, efforts by petitioners' members to recoup taxes and fees that they are forced to pay will be costly, time-consuming, and potentially unsuccessful. *Id.*[54]

III. A Partial Stay Will Not Injure Others And Is In The Public Interest.

The final stay factors—harm to the opposing party and the public interest— "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). A partial stay here will not injure the FCC or the public. That stay would not affect the core "bright line" open-Internet rules that were the aim of the original NPR M. As to reclassification, the stay petitioners seek would merely maintain the longstanding status quo established by the Commission years ago, which has since succeeded in "fostering investment and innovation in [broadband] networks by limiting regulatory uncertainty and unnecessary or unduly burdensome regulatory costs." *Wireline Broadband Order* ¶ 5. The public interest is served when a stay "preserve[s] the continuity and stability of [a] regulatory system" like this that has "proved to be successful." *Iowa Utils. Bd.*, 109 F.3d at 427.

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[54] The Order dismisses the importance of all state and local taxes and fees by observing that the Internet Tax Freedom Act ("ITFA") "prohibits states and localities from imposing '[t]axes on Internet access.'" Order ¶ 430 (quoting 47 U.S.C. § 151 note, ITFA § 1101(a)(1)) (alteration in original). But the ITFA expressly *allows* state and local governments to impose all of the taxes and fees discussed above. *See* 47 U.S.C. § 151 note, ITFA § 1105(8)(B) (franchise fees); *id.*, ITFA § 1105(10)(B) (property taxes); *id.*, ITFA § 1107(a) (universal service contributions). Moreover, the ITFA does not prohibit "grandfathered" taxes on Internet access in several States. *Id.*, ITFA § 1104; *see also id.*, ITFA § 1105(10)(C). Petitioners' members operating in these States may be required to pay, for the first time, taxes that apply to "telecommunications service" providers. Morris Decl. ¶ 25; Simmons Decl. ¶¶ 16–17. These taxes will not be readily recoverable (or easily refundable to customers to the extent applicable) when the Order is vacated. Simmons Decl. ¶¶ 16–17.

Nor is there any need to give the reclassification decision or related conduct standard immediate effect. Given that the FCC's prior approach has prevailed for decades, there is no basis to conclude that upsetting that settled status quo is direly urgent or that leaving that status quo in place while a court adjudicates the lawfulness of reclassification would pose any grave threat. Indeed, the Commission took six months after the comment period closed to complete the rulemaking, and it stayed the effectiveness of the Order until 60 days after publication in the Federal Register. Order ¶ 585. Neither edge providers nor the public face any imminent threat from broadband providers—and any conceivable injury they might face is far outweighed by the irreparable harm to broadband providers (and their customers), and the inability to undo that harm if the Order is later struck down. *See Iowa Utils. Bd.*, 109 F.3d at 427.

CONCLUSION

The Commission should stay the effectiveness of the Order pending judicial review insofar as it (1) reclassifies broadband as a "telecommunications service" and (2) adopts an "Unreasonable Interference or Unreasonable Disadvantage Standard for Internet Conduct." Petitioners respectfully request that the Commission act on this petition by May 8, 2015, so that the court of appeals has adequate time to consider petitioners' application for the same relief, should that become necessary.

Dated: May 1, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jonathan C. Bond, do hereby certify that on this 1st day of May, 2015, I caused the foregoing Petition for Stay Pending Judicial Review to be served on the following individuals via electronic mail:

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

DECLARATION OF WILLIAM D. BAUER

DECLARATION OF WILLIAM D. BAUER, CEO OF WINDBREAK CABLE

I, William D. Bauer, hereby state as follows:

1. I am President and CEO of WinDBreak Cable ("WinDBreak").

2. WinDBreak is a small broadband Internet access service and cable television provider based in Gering, Nebraska. Founded in 1987, WinDBreak serves largely rural areas in the Nebraska panhandle and eastern Wyoming. It has cable systems in Harrison, Lyman, and Oshkosh, Nebraska, as well as in Pine Bluffs and Guernsey, Wyoming.

3. WinDBreak's five cable systems offer broadband Internet access and cable television to about 440 total customers. WinDBreak, through its affiliate InterTECH, provides services to other small cable operators around the country. WinDBreak provides support to cable operators for configuring and activating new lines when cable Internet service is first installed in a home. WinDBreak does not offer telephone service.

4. WinDBreak has three employees who are primarily involved with its broadband Internet access and cable television service, and ten total employees. None of WinDBreak's employees works solely on regulatory compliance matters.

5. In the past decade, the company has invested over $2 million in these networks, in reliance on the light-touch regulatory framework the FCC has to date applied to broadband Internet access and cable television service. WinDBreak

would not have invested so much money if the industry had been more heavily regulated, and will likely have to reduce its investment now that the FCC has applied heavier regulations to broadband Internet access service.

6. WinDBreak understands that the FCC's Open Internet Order ("Order") reclassified broadband Internet access providers like WinDBreak as common carriers under Title II of the Telecommunications Act of 1934. WinDBreak has never been regulated under Title II and has no experience complying with Title II requirements. WinDBreak's reclassification as a Title II carrier will thus impose significant new burdens on the company. WinDBreak may have to hire additional employees to manage compliance, which will be particularly burdensome given the company's small number of employees and the absence of any employees who work solely on regulatory compliance efforts.

Irreparable Harm from CPNI Requirements

7. WinDBreak understands that the FCC has used its authority to forbear, for now, from applying some regulations implementing Title II to broadband Internet access providers. But the FCC did not forbear from applying 47 U.S.C. § 222, which requires telecommunications providers to protect Customer Proprietary Network Information ("CPNI"). To the extent that forbearance does not entirely exempt WinDBreak from CPNI requirements, requiring compliance with those procedures will harm WinDBreak irreparably.

8. The Order states that §222 imposes a duty on carriers to protect the confidentiality of their customers' CPNI. Order ¶53. To the extent this duty mandates that telecommunications carriers require customers to provide passwords during support calls or photo identification during in-store visits before disclosing CPNI, *see* 47 C.F.R. §64.2010(b), (d), it would impose serious and irreparable harm on small carriers, like WinDBreak, that have strong personal relationships with their customers. Because of WinDBreak's live customer service—rather than an automated call center—and small customer base, WinDBreak's customers develop personal, informal relationships with the company and its staff. We know many, if not most, of our customers by name. Those close customer relationships create loyalty (sometimes called "stickiness") that the company cultivates to ensure a loyal customer base that stays with the company.

9. Mandating that customers provide "authentication"—*e.g.*, passwords or other forms of identification—will irreparably harm these customer relationships. Many customers will view the new procedures as an affront to the close relationship the company has developed with them over the years. Complicated authentication procedures, moreover, will cause many customers to perceive WinDBreak as another faceless company that does not make a significant effort to know and have relationships with its customers. That is especially true for older

customers, who may be skeptical of authentication procedures that require disclosure of personal information.

10. Impairment of close customer relationships may cause WinDBreak to lose customers and market share. WinDBreak's customers and its partners' customers choose their broadband Internet access and cable television service based not just on price, but also on their personal relationships with the companies. Personal customer relationships are WinDBreak's comparative advantage. Personalized customer service helps WinDBreak attract and retain customers who would otherwise go to larger competitors.

11. Losses of goodwill and customers are irreparable: Relationships that are damaged are hard to repair; goodwill that is lost is hard to retrieve; and winning back customers who switch or discontinue service is a rarity in this industry. There would be no way for WinDBreak to make up for those losses once they are incurred.

12. The Order states that §222 imposes restrictions on carriers' ability to use, disclose, or permit access to customers' CPNI without their consent. Order ¶462. We understand that the FCC has previously interpreted §222 to prohibit disclosing CPNI to partners or contractors when the information may be used for marketing purposes, and has suggested that any sharing of CPNI with partners or contractors may put that information at a heightened risk of disclosure.

Restrictions on such sharing of information with partners or contractors will irreparably harm WinDBreak, which derives significant revenue from partnering with other cable operators to provide services and support.

13. As noted above, WinDBreak offers support services to other cable operators. For example, when an operator first installs cable service in a customer's home, WinDBreak configures the operator's cable equipment to connect to the cable modem in the customer's house. When WinDBreak works with another operator, it configures its database so that technicians at both companies can access customer information, including CPNI. Technicians must log in to access the database. Once logged in, however, they can access individual customer information without further authentication. This sharing of information helps WinDBreak offer seamless support to its partners' customers.

14. To the extent that § 222 restricts how WinDBreak and its partners may share customer CPNI, WinDBreak will have to restructure its partnerships and may lose business. WinDBreak will likely need to renegotiate its contracts with its partners to ensure that all parties comply with new CPNI requirements. For example, to the extent that WinDBreak or its partners may use CPNI for marketing purposes, they will need to obtain customer consent, which may be difficult to secure. If the restrictions on CPNI sharing are too burdensome, WinDBreak's

partners may also start handling customer support on their own instead of working with WinDBreak.

15. WinDBreak will be irreparably harmed by lost opportunities to partner with other operators. Operators that decide to start handling their own support are unlikely to return to a partnership with WinDBreak. And if operators decide not to partner with WinDBreak because of concerns about CPNI rules, the company may never be able to recover those lost opportunities.

16. The FCC emphasized in the Order that § 222 requires carriers to take reasonable precautions to protect CPNI. Order ¶ 53. It also offered, as a warning, the example of a telecommunications carrier that was found in violation of § 222 for failing to put in place security measures for its computer databases containing CPNI. *Id.* Even though WinDBreak has never had any problem keeping customer information safe, § 222 may require WinDBreak to upgrade the security of its computer databases, which will irreparably harm the company.

17. WinDBreak develops its own computer databases to store customer information, and takes a serious approach to protecting that information from hackers and other threats. But the Order leaves WinDBreak uncertain about what specific measures it will have to put in place to comply with § 222. WinDBreak currently has a single, consolidated database that includes each customer's identifying information, such as name, phone number, and service address, as well

as information the FCC might in the future construe as CPNI, such as geographic location, service plan, service level, and bandwidth usage. The company's computer systems present all this information in one place to make it easy to offer customer support and diagnose service problems. If WinDBreak had to isolate CPNI from other data and limit access, WinDBreak would have to undertake significant modifications to its software. New, untested software may result in computer crashes or other bugs. WinDBreak will also have to re-train its users in the new software. That does not merely impose financial harm; it also threatens goodwill. Transitions and revisions to computer systems are always imperfect at first. That may result in reduced service and support quality, not to mention the possibility of new security vulnerabilities. These issues would all erode customer goodwill.

18. Any harm to WinDBreak from upgrading its computer systems would be irreparable. WinDBreak would never be able to recoup the cost of software development. More importantly, if customer service suffers while the computer system is being upgraded, WinDBreak will never be able to recover the lost goodwill.

19. Moving to Title II regulation will also impose irreparable harm to the extent § 222 is construed to prohibit carriers from using CPNI except to provide telecommunications service or related services, or prohibits the use of CPNI for

marketing purposes, except within the same "categories of service" to which a customer is already subscribed. Because the Order leaves so much unclear about what §222 requires of broadband providers, WinDBreak will have to decide between potentially violating the rules and being overcautious about how it markets its services. Imposing these restrictions on WinDBreak will prevent it from efficiently marketing new services that it is planning to deploy.

20. The inability to target marketing to broadband subscribers will be particularly problematic for the communities that WinDBreak services. These small communities often lack local newspapers or radio stations, and inserting ads into cable channels is costly and ineffective (particularly for a smaller company with fewer than 500 customers). Direct mail advertisements to existing customers would be the most efficient way to reach relevant customers.

21. Those forgone marketing opportunities will irreparably harm WinDBreak. The company can never recoup revenues or market share it loses from lost opportunities to sign up customers for new services. It cannot recover the lost revenues that result when customers are reached more slowly, and sign up more slowly, because of such restrictions. And it would be impossible to quantify the impact on its competitive position.

22. WinDBreak currently has no formal policies and procedures for handling CPNI. It will have to develop such policies from scratch and train its

employees to follow them. That may require hiring additional personnel as well as the involvement of legal counsel. Worse still, because the FCC has yet to issue specific rules for how broadband Internet access providers should handle CPNI, the whole endeavor may be a wasted effort. WinDBreak must implement policies now—it cannot risk non-compliance—but may have to put in place entirely new policies when the FCC issues specific requirements. WinDBreak would never be able to recoup the cost of these unnecessary efforts.

23. WinDBreak cannot spread the expenses of those compliance efforts over a large customer base so as to reduce the impact on individual bills. If WinDBreak had to hire just one new employee to manage compliance efforts—to say nothing of new hardware and software—that would require significant increases in the bills of the company's 440 customers. To the extent WinDBreak cannot pass those costs along, the financial harm will be unrecoverable and irreparable. To the extent WinDBreak attempts to pass those expenses through, it will lose some customers. And it may lose many customers to larger competitors who can spread compliance costs among a large base of customers, minimizing any impact on individual bills. Even if WinDBreak were eventually able to lower prices to prior levels, customers who have left once are unlikely to come back.

24. The uncertainty regarding the extent and scope of these prohibitions exacerbates the irreparable harm. Although the FCC has decided to forbear from

certain specific CPNI regulatory requirements, it has also indicated that § 222 itself imposes certain duties in connection with CPNI. Order ¶¶ 462, 467. The FCC does not specify what requirements are necessary for statutory compliance. WinDBreak would face enormous uncertainty about which rules it must obey and which rules are merely regulatory additions that have been forborne.

25. Any misjudgment by WinDBreak about the statute's requirements could have catastrophic consequences. WinDBreak understands that the FCC can impose large penalties—sometimes millions of dollars—for violations of CPNI rules. WinDBreak also understands that the FCC did not forbear from provisions of Title II that create a private right of action against carriers who violate other provisions of the statute. WinDBreak would face grave risks as a result. Even hiring counsel—which can be prohibitive for a small company—cannot wholly insulate WinDBreak from those risks because there is so much uncertainty about what § 222 requires of broadband Internet access providers.

26. WinDBreak understands that the FCC has decided to forbear from applying other requirements under Title II. But the FCC has created enormous regulatory uncertainty in the process. For example, the Order forbears, "for now," from requiring broadband Internet access providers to contribute to the Universal Service Fund, but does not forbear from applying Title II provisions that presuppose a provider's contributions into the fund. Order ¶¶ 57-58, 488; *see* 48

U.S.C. §254(h)(1)(A). The FCC also instructs providers to protect customer privacy without giving concrete guidance on how to do so. Order ¶¶462, 467, 468, 470. The resulting patchwork leaves WinDBreak uncertain about its new obligations under Title II, and leaves the door open for the FCC to impose additional obligations and fees in the near future.

27. Uncertainty surrounding the FCC's forbearance from applying certain Title II provisions will further jeopardize WinDBreak's upgrade plans. Upgrades will require substantial upfront capital expenditures. WinDBreak will have to take on debt for the capital expenditures, and commit to servicing it with revenues remaining after paying for operating expenses and overhead, like compliance costs. To the extent that the new Title II rules create uncertainty about future compliance burdens, WinDBreak will have to err on the side of caution before committing to major long-term capital projects.

28. Harm from forgone upgrades and capital projects will be irreparable—for WinDBreak and its customers. For example, if WinDBreak delays rolling out any upgrades, WinDBreak will give up opportunities to win new customers, or entice existing customers to purchase better services. It will never be able to calculate the cost of those forgone opportunities. And many customers—mostly in smaller, rural communities—will be deprived of those services, aggravating the digital divide between them and their urban counterparts.

<u>Irreparable Harm from Increased Pole Attachment Rates</u>

29. WinDBreak understands that neither Nebraska nor Wyoming regulates pole attachment rates at the state level, and that utilities calculate the pole attachment rates WinDBreak pays based on federal formulas. WinDBreak also understands that it currently pays rates based on formulas applicable to "cable services" and that reclassification may cause utilities to apply formulas applicable to "telecommunications services," which may result in higher rates.

30. WinDBreak will be harmed by any increases in pole attachment rates. WinDBreak has pole attachment agreements with Nebraska Public Power Division and Wyoming Rural Electric. As a rural operator, pole attachment fees are a significant expense for WinDBreak. Population densities in rural areas are low, and correspondingly the number of customers served per pole is low. Utilities routinely charge WinDBreak a yearly fee for each pole attachment, and consequently the company pays a higher fee per customer than cable operators who serve more urban areas.

31. Harm to WinDBreak from increased pole attachment fees will be irreparable. WinDBreak must pay any increases—it cannot afford litigation with utilities by withholding fees. If WinDBreak does not pass along increased fees to its customers, WinDBreak will have a difficult time spending even more capital to

properly maintain and repair its network. If WinDBreak does pass along increased fees to its customers, customer goodwill will be eroded.

I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct.

May 1, 2015

William D Bauer

William D. Bauer
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

DECLARATION OF RONALD DA SILVA

DECLARATION OF RONALD DA SILVA

I, Ronald da Silva, hereby state as follows:

1. I am Vice President for Network Engineering, Architecture, and Technology at Time Warner Cable Inc. ("TWC"). TWC is a leading provider of broadband Internet access, video, and voice services to residential and business customers in 29 states. In my position at TWC, I am one of the employees with primary responsibility for managing the operation of company's broadband network, ensuring that Internet traffic is transmitted and processed over the network as efficiently and cost-effectively as possible, and negotiating interconnection arrangements with interconnect partners with which TWC exchanges Internet traffic.

2. In that capacity, I have already seen a change in the demands of our negotiating counterparts as the result of the Federal Communications Commission ("FCC")'s recently adopted Order. *See Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24 (rel. Mar. 12, 2015) ("Order on Review" or "Order"). My interconnect partner counterparts have been emboldened by the Order and are already making onerous demands and engaging in threats that will result in immediate and irreparable harms to TWC.

3. Shortly after the FCC released the text of the Order, Cogent Communications ("Cogent") contacted TWC seeking to renegotiate the parties' interconnection arrangement and proposed terms that Cogent claimed are required under the Order's new "just and reasonable" rubric for ISPs' interconnection practices. These terms include demands that TWC supply additional interconnection ports and make them available to Cogent, and that TWC alone bear the costs associated with adding ports and implementing other network changes required to expand capacity for Cogent. Under such an arrangement, Cogent's traffic-exchange practices would no longer be disciplined by the network costs that its exchange of Internet traffic with TWC creates; as a result, Cogent would have no incentive to establish a collaborative relationship with TWC to exchange traffic and undertake port expansions and capacity upgrades in an efficient manner. Cogent took the position that if TWC refuses to accede to these demands, Cogent will file a complaint with the FCC pursuant to the Order.

4. Prior to the FCC's Order, TWC would have been free to continue negotiating towards a fairer and commercially reasonable outcome, particularly given that the terms Cogent proposed contravene the decades-long industry practice of splitting such costs between the ISP and the interconnecting network provider. TWC also would have been able to walk away from any interconnection relationship if negotiations failed to yield a mutually agreeable arrangement; the

interconnected nature of the Internet obviates the need to have direct connections with every network operator, and indeed it would be inefficient to establish direct connections with *every* network provider that carries Internet traffic.

5. But the Order's extension of Sections 201 and 202 to ISPs' Internet traffic-exchange practices now significantly undercuts TWC's ability to resist these demands, and could even preclude TWC from declining to interconnect with any similarly situated network provider that seeks a direct connection. To begin with, the application of Section 201 creates a compulsion to serve that has never existed before, thus giving current and would-be interconnect partners a greater ability to force TWC to accept inefficient interconnection arrangements. And by subjecting TWC to the threat of complaints alleging that it is engaging in "unjust and unreasonable" interconnection practices, the Order presents TWC with a choice between two alternatives in responding to unfair demands by interconnect partners with which TWC is interested in doing deals, each of which would result in immediate and irreparable harms for TWC and its customers.

6. The first option for TWC would be simply to accede to Cogent's (and similarly situated parties') demands in order to prevent any disruption to the exchange of Internet traffic between the networks and to avoid lengthy and costly litigation over TWC's interconnection practices. But that approach would eliminate incentives for Cogent to exchange Internet traffic with TWC in an

efficient manner and would raise interconnection costs for TWC and its customers. Because these negotiations are ongoing or imminently forthcoming, the harm to TWC's business will be immediate. And because the Order precludes *ISPs* from filing complaints challenging the reasonableness of such terms, *see* Order ¶ 205, these harms would not be remediable if the Order were not stayed.

7. The other alternative would be for TWC to resist Cogent's (and other similarly situated parties') demands, at which point, based on my experience at negotiating with such parties, the interconnect partner would likely seek to increase its leverage by overloading TWC's most utilized and costly ports and degrade the perceived performance of TWC's broadband Internet access service. In particular, in my experience, Cogent and other interconnect partners have consistently resorted to those tactics when TWC has been unwilling to abandon industry-standard practices and provide substantially increased network capacity for out-of-balance traffic flows without any compensation. I believe such conduct is even more likely here, since Cogent has made clear in conversations with TWC that it will file complaints against TWC and other parties that refuse to give into its demands, and I believe it would then try in those proceedings to portray the problems it created as a reason that it should be awarded relief. Indeed, Cogent has publicly announced that it will file complaints or otherwise petition the FCC to require ISPs to "reduce congestion at interconnection points," and will "ask the

[FCC] to take action *as soon as the [O]rder takes effect.*" *See* Kery Murakami, *Cogent To Petition FCC Over Interconnection*, Communications Daily, Apr. 7, 2015, at 2-5 (emphasis added). Therefore, any effort by TWC to resist Cogent's demands almost certainly will be met with immediate and harmful traffic manipulation by Cogent, lost goodwill from customers whose access to the Internet will be impaired, and costly litigation over the "reasonableness" of TWC's interconnection practices. Such harms cannot be remedied through some later monetary award, and the FCC's one-sided complaint regime for interconnection precludes TWC from seeking such a remedy in any event.

8. The harms to TWC's business from these tactics, including the unquantifiable loss of goodwill from TWC's customers whose access to the Internet will be impaired, will be immediate and irreparable. TWC also will be required to devote substantial resources to defending itself against interconnection complaints that arise from these disputes—costs that likewise cannot be recovered if the Order is later struck down.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED: May 1, 2015

Ronald da Silva

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

DECLARATION OF JENNIFER W. HIGHTOWER

DECLARATION OF JENNIFER W. HIGHTOWER

I, Jennifer W. Hightower hereby state as follows:

1. I am Senior Vice President of Law and Policy and General Counsel at Cox Communications, Inc. ("Cox"). Cox is a broadband communications and entertainment company, providing advanced digital video, Internet, telephone, and home security and automation services over its robust broadband network. In my position as Senior Vice President of Law and Policy and General Counsel, I oversee Cox's compliance, legal operations, litigation, regulatory and privacy affairs, and corporate government affairs. I also advise on policy and strategic initiatives related to Cox's lines of business. Based on my review and analysis of the FCC's Order, as well as my position at Cox, which requires me to have knowledge of Cox's operations and compliance measures, I have gained an understanding of how the measures that the FCC adopted in the Order—including the reclassification of broadband Internet access service as a "telecommunications service" and the regulatory obligations imposed in conjunction with that reclassification—will result in a variety of immediate, irreparable harms to Cox as described below.

2. The FCC's Open Internet Order subjects broadband Internet access service ("BIAS") to an expansive and highly uncertain new regulatory regime. Since Cox began offering BIAS to its customers in 1996, it has done so under a

"light touch" regulatory regime that permitted Cox to build its broadband network and operate its business absent intrusive governmental mandates and restrictions. Cox has invested more than $15 billion in its network over the past 10 years and most recently has begun to deploy 1-Gigabit-per-second residential Internet speeds in certain markets and to double the speeds of the company's most popular broadband tiers for the majority of its customers. Cox's network investment and commitment to broadband has been based in part on the promise of FCC regulators of both major political parties that this "light touch" regime would continue. And it has offered its services on terms responsive to the interests of its customers and the demands of the competitive broadband marketplace, rather than by regulatory fiat.

3. If the FCC's Order is permitted to go into effect, the impact on Cox's business will be significant. The Order's reclassification of BIAS—from an "information service," lightly regulated under Title I of the Communications Act of 1934, as amended (the "Act"), and Section 706 of the Telecommunications Act of 1996, to a newly defined "telecommunications service," regulated under an ill-conceived hodgepodge of Title II provisions—will cause immediate, significant, and irreparable harm to Cox in a several respects.

4. ***Burdens of Compliance with Sections 201 and 202 and Related Regulatory Requirements.*** The uncertainty surrounding the FCC's new regulatory

regime for BIAS will create significant difficulties for Cox's business. For example, the FCC's assertion that it will now monitor Cox's traffic-exchange agreements with transit providers and content delivery networks ("CDNs") under Sections 201 and 202 of the Act is particularly troubling. Order ¶¶ 194-206. As the Order acknowledges, these arrangements are essential to providing broadband Internet access to Cox's customers. They are also complex and highly technical agreements that the FCC itself notes it lacks the experience to fully understand. *Id.* ¶ 202. And yet the Order creates an immediate requirement that Cox refrain from "engaging in unjust and unreasonable practices," while providing no indication of what that might mean in this context. *See id.* ¶ 203. To make matters worse, the Order applies that standard to broadband providers only and not to the other party to these agreements between sophisticated, commercial entities.

5. The one-sided and vague nature of these obligations will immediately impede Cox's ability to move forward with its interconnection objectives. Cox, as a smaller Internet service provider ("ISP"), already has very limited negotiating leverage with large edge providers or intermediaries for Internet traffic exchange. The uncertainty created by the new rules will widen this gap by permitting such entities, which are not subject to the Section 201 and 202 standards of reasonableness, to threaten lengthy, costly, and uncertain complaint proceedings unless Cox accepts all of their terms—no matter how egregious. While Cox

believes its interconnection policies are reasonable and nondiscriminatory, the Order contains so much subjectivity that Cox can have no assurance that the FCC or others will view its policies and objectives the same way. At the very least, rather than focusing solely on entering into agreements that benefit our customers, Cox will be forced to weigh the risk of this uncertainty with each negotiation.

6. ***Burdens of Compliance with Section 222.*** Cox will be required to devote significant time and resources to establish new policies and procedures and to train personnel to comply with its new obligations under Section 222 of the Act. Section 222 imposes a general duty on all telecommunication carriers "to protect the confidentiality of [all] proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers"; imposes certain specific restrictions on the use—including for marketing purposes—of "customer proprietary network information" ("CPNI") without customer approval; and requires telecommunications carriers to disclose CPNI to "any person designated by the customer" upon the customer's request. 47 U.S.C. § 222. The Order forbears from applying the FCC's implementing regulations for Section 222 but "decline[s] to forbear from applying [S]ection 222" itself. Order ¶ 462.

7. There is considerable uncertainty as to what processes will be required under the statute. The FCC has interpreted these statutory provisions broadly in the telephone context, and may well apply the statute in a similarly expansive

manner to broadband service even absent the forborn-from rules. At a minimum, Cox will be required to evaluate its current processes for authenticating individuals who contact Cox via phone, online, or in retail locations to obtain BIAS-related customer data to determine whether it is protecting customer information using processes that specifically comply with the requirements of Section 222. *See* 47 C.F.R. § 64.2010; *see also Implementation of the Telecommunications Act of 1996: Telecommunications Carriers Use of Proprietary Network Information and Other Customer Information*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 ¶ 64 (2007) (indicating that compliance with this rule also is one of the "minimum requirements" to comply with *statutory* obligations under Section 222). Cox also will be forced to evaluate all of its contracts with vendors that come into contact with BIAS-related customer data to ensure that the contracts provide sufficient protection to comply with the requirements of Section 222. In some cases, renegotiation of the contracts likely will be required.

8. Moreover, if the Order is not stayed, Cox may have to quickly adjust its business practices. Section 222 defines CPNI as "information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the

customer solely by virtue of the carrier-customer relationship." 47 U.S.C. § 222(h)(1)(A). "Except as required by law or with the approval of the customer," a telecommunications carrier may "use, disclose, or permit access" to "individually identifiable" CPNI only in its provision of (1) "the telecommunications service from which such information is derived," or (2) "services necessary to, or used in, the provision of such telecommunications services." *Id.* § 222(c)(1).

9. In the voice context, the FCC has concluded that "the best interpretation" of Section 222(c)(1) affords carriers the right to use CPNI for marketing related offerings within their customers' existing service, but does not permit the use of CPNI to market "categories of service" to which its customers do not already subscribe. *See Implementation of the Telecommunications Act of 1996*, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 ¶ 35 (1998). Without further guidance from the FCC, Cox must decide whether to apply this "best interpretation" of Section 222(c)(1) to the BIAS context. Doing so, however, would require Cox to impose new restrictions on the use of CPNI, and to create processes to ensure that the data will not be used in marketing without appropriate customer consent—for example, targeting its BIAS-only subscribers for offers of telephone or cable television service, since the "type" of telecommunications service a customer subscribes to (here, BIAS-only service) is included in the statutory definition of CPNI. Cox's existing customer notices

and processes may need to be quickly changed to cover BIAS services, at great cost and effort to Cox.

10. This situation is exacerbated by the absence of any safe harbor, which means that even conduct that is consistent with the voice rules may be deemed insufficient with respect to broadband. Cox therefore can either wait to seek customer approval for what may be newly prohibited marketing practices until the FCC specifies an approval method for doing so (and thus forgo these practices until then) or it can implement new notice and approval procedures at substantial costs only to risk the FCC's finding those procedures to be inadequate in the future.

11. ***Burdens of Compliance with Sections 225, 255, and 251(a)(2).*** Cox similarly will incur significant burdens adapting its policies and procedures to comply with new obligations under Section 225, 255, and 251(a)(2) of the Act. Section 225 addresses "telecommunications relay services" ("TRS") which provide the ability for individuals who are deaf, hard of hearing, deaf-blind, or who have a speech disability to engage in communications "in a manner that is functionally equivalent to the ability of hearing individuals without a speech disability to communicate using voice communications. 47 U.S.C. § 225(a)(3). It requires the FCC to "ensure that interstate and intrastate telecommunications relay services are available . . . to hearing-impaired and speech-impaired individuals in the United

States." 47 U.S.C. § 225(b)(1). Video Relay Service ("VRS") for hearing impaired/deaf customers could potentially consume large amounts of bandwidth. Nevertheless, the Order declined to forbear from applying Section 225 to broadband providers for fear that the providers' otherwise neutral network management practices "could have an adverse effect" on TRS services that rely on broadband Internet access service, Order ¶ 468, but provided no guidance to broadband providers on how to avoid such a result. Cox thus has been forced to evaluate its current *neutral* network management practices in an effort to determine whether they might "adverse[ly] effect" TRS, Internet TRS, and VRS over its network. And Cox's efforts to optimize its network will be significantly impeded by these ambiguous requirements going forward.

12. Sections 255 and 251(a)(2) of the Act and the accompanying regulations require telecommunications service providers to make their services accessible to individuals with disabilities, whenever "readily achievable," 47 U.S.C. § 255(c), and prohibit providers from installing any new "network features, functions, or capabilities that do not comply with the guidelines and standards established under [S]ection 255," 47 U.S.C. § 251(a)(2). As the Order acknowledges, the requirements imposed by the FCC under these provisions exceed the existing regulation of broadband providers under the Twenty-First Century Communications and Video Accessibility Act of 2010 to ensure that

individual with disabilities may utilize advanced communication services. *See* Order ¶ 473-74. To meet its regulatory requirements, Cox will need to hire additional accessibility subject matter experts in addition to deploying new accessibility technologies, the costs of which cannot easily be recouped if the Order is vacated.

13. ***Fees, Taxes, and Related Burdens Resulting from the FCC's Order.*** The Order's reclassification of BIAS as a "telecommunications service" also will cause Cox irreparable harms related to demands for and payment of a variety of new or increased fees and taxes, including higher pole attachment fees, state and local taxes, franchise fees, and state regulatory fees.

14. *Pole Attachment Agreements.* Cox has entered into approximately 244 pole attachment agreements with public utilities. Pursuant to these agreements, Cox is permitted to add attachments to utility poles in order to deliver cable service and related non-telecommunications services to its customers. The FCC and, in some instances, the States have long possessed regulatory authority over these agreements. *See* 47 U.S.C. § 224(f)(1) (requiring utilities to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it"); 47 U.S.C. § 224(b)(1) (granting the FCC the authority to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and

conditions are just and reasonable" where a State does not do so). The Order's reclassification of BIAS will harm Cox with respect to these agreements in two ways.

15. First, FCC rules require Cox to "notify pole owners upon offering telecommunications services." 47 C.F.R. § 1.1403(e). At a minimum, if the Order is not stayed, Cox's legal staff will be required to review each of its 244 pole agreements and prepare potentially hundreds of such notices to utilities. Moreover, many pole attachment agreements contain specialized telecommunications notice requirements, which will be triggered automatically by reclassification. Cox will be required to devote many hours of in-house staff time, hire outside counsel, and incur the substantial expense of reviewing each agreement and taking the required follow up actions. These costs will not be recoverable if Order is ultimately overturned on judicial review.

16. Second, reclassification is likely to subject Cox to higher rates for its pole attachments. Section 224 of the Act provides different formulas for calculating "just and reasonable" rates for pole attachments for "cable service" than for "telecommunications services"; rates for "telecommunications services" are permitted to be higher. *Compare* 47 U.S.C.§ 224(d) (cable service rate formula), *with* 47 U.S.C. § 224(e) (telecommunications services rate formula). Reclassification could permit many of the utilities with whom Cox has agreements

to seek to renegotiate our rates on terms favorable to the utilities. Based on past experience, Cox expects utilities to attempt to do so at the earliest opportunity.

17. Once the utility pole owners begin requesting these higher rates, Cox has two options, both equally detrimental to Cox's business strategy. First, Cox could pay the increased pole rates and then sue for refunds if the Order is ultimately vacated. We would expect the utility companies to contest Cox's entitlement to a refund under this scenario, and, at a minimum, Cox could be required to pursue costly utility-by-utility litigation to challenge the increased pole fees and with no guarantee of ultimate success against hundreds of utilities across its service footprint. Second, and in the alternative, Cox could engage in self-help by withholding payment until judicial review of the Order is complete. Utility pole owners typically respond to this kind of practice, however, by refusing to process new attachment permits until all amounts are paid in full. This outcome would significantly impede Cox's deployment of broadband facilities.

18. Finally, Cox operates in six states that regulate pole attachments pursuant to its own state laws and regulations. In addition to the efforts described above, reclassification will require Cox to analyze the applicable state laws and regulations in these jurisdictions to determine the impact of the reclassification on pole attachments in those states as well.

19. *State and Local Taxes.* Cox also will be at risk of facing new state and local taxes as a direct result of the FCC's reclassification decision in the Order. Currently, Cox is generally assessed locally for property taxes as a provider of cable service. Over the last several years, authorities in states served by Cox have signaled a willingness to change the methodology for assessing property taxes by treating cable companies more like traditional telephone companies, which are subject to centralized assessments that result in higher property taxes. The FCC's decision to reclassify BIAS as a telecommunications service now paves the way for centralized assessment of property taxes for cable broadband service in many states. Although the Order asserts that the Internet Tax Freedom Act ("ITFA") prohibits states and localities from imposing "[t]axes on Internet access," Order ¶ 430, it ignores the fact that the ITFA does not apply to taxes "upon or measured by net income, capital stock, net worth, or property value." 47 U.S.C. § 151 note, ITFA, § 1105(10)(B). Accordingly, IFTA will not preclude the application of new state property taxes stemming from the FCC's reclassification decision—taxes that will be impracticable to recover should the Order be overturned on appeal.

20. *Franchise Agreements.* The Order's reclassification of broadband Internet access may require Cox to acquire or modify franchise agreements with State and localities all across the country. Cox holds franchises to operate "cable system[s]" throughout its footprint, but is concerned that reclassification may

prompt the relevant States and localities to require new or modified franchise agreements in order to permit Cox to offer a telecommunications service, even though the functional service being provided to the customer remains unchanged. *See, e.g.*, Scottsdale, Ariz., Mun. Code § 47-163(a) (providing that entities shall not "construct, install, maintain or operate telecommunications facilities in any public highway" without a telecommunications franchise); Norfolk, Va., Mun. Code § 42-55 (precluding the installation of "telecommunications" facilities "without having first obtained a franchise from the city council permitting the same"). At best, reclassification will force Cox to undertake an analysis of each of these agreements and all relevant State and local laws. With franchises in 500 communities and 18 States, this analysis will impose a significant burden on Cox's resources that will not be recoverable if the Order is vacated. The Order states that the FCC "do[es] not believe that [its Order] would serve as justification for a state or local franchising authority to require a party . . . to obtain an additional or modified franchise," but it stops short of preempting such a requirement. Order ¶ 433 n.1285.

21. *State Regulatory Fees.* The Order's reclassification decision also will lead to efforts by state authorities to require that Cox pay new state regulatory fees, and these fees will not be readily recoverable in the event the Order is vacated. Although the Order purports to preempt the imposition of state universal service

fees, several state authorities have asserted that they view this preemption as invalid. As a result, Cox expects to be subject to demands to pay new state universal service fees in connection with Cox's provision of BIAS in various states. In addition to contributions to state universal service funds, Cox operates in a number of states that require telecommunications service providers to pay regulatory fees for a variety of other purposes, and will incur additional irreparable losses if these fees are applied to BIAS.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED: May 1, 2015

Jennifer W. Hightower

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

DECLARATION OF MICHAEL JENSEN

DECLARATION OF MICHAEL JENSEN,
GENERAL MANAGER OF BAGLEY PUBLIC UTILITIES

I, Michael Jensen, hereby state as follows:

1. I am General Manager at Bagley, MN Public Utilities ("Bagley Utilities").

2. Bagley Utilities is the not-for-profit public utility provider in the City of Bagley, Minnesota. Among other services, it offers residents broadband Internet access and cable television service. The primary mission of the utility is to offer broadband Internet access and cable television service at low rates.

3. Bagley Utilities' cable system offers broadband Internet access and cable television to about 450 total customers. Bagley Utilities does not offer telephone service.

4. Bagley Utilities has one employee who is primarily involved with its broadband Internet access and cable television service, seven full-time employees, and one part-time employee. None of the utility's employees works solely on regulatory compliance matters.

5. In the past three years, the company has invested approximately $400,000 in these networks, in reliance on the light-touch regulatory framework the FCC has to date applied to broadband Internet access and cable television service. Bagley Utilities would not have invested so much money if the industry

had been more heavily regulated, and will likely have to reduce its investment now that the FCC has applied heavier regulation to broadband Internet access service.

6. Bagley Utilities understands that the FCC's Open Internet Order ("Order") reclassified broadband Internet access providers like Bagley Utilities as common carriers under Title II of the Telecommunications Act of 1934. Bagley Utilities has never been regulated under Title II and has no experience complying with Title II requirements. Bagley Utilities' reclassification as a Title II carrier will thus impose significant new burdens on the utility. Bagley Utilities may have to hire additional employees to manage compliance, which will be particularly burdensome given the utility's small number of employees and the absence of any employees who work solely on regulatory compliance efforts.

Irreparable Harm from CPNI Requirements

7. Bagley Utilities understands that the FCC has used its authority to forbear, for now, from applying some regulations implementing Title II to broadband Internet access providers. But the FCC did not forbear from applying 47 U.S.C. § 222, which requires telecommunications providers to protect Customer Proprietary Network Information ("CPNI"). To the extent that forbearance does not entirely exempt Bagley Utilities from CPNI requirements, requiring compliance with those procedures will harm Bagley Utilities irreparably.

8. The Order states that § 222 imposes a duty on carriers to protect the confidentiality of their customers' CPNI. Order ¶53. To the extent this duty mandates that telecommunications carriers require customers to provide passwords during support calls or photo identification during in-store visits before disclosing CPNI, *see* 47 C.F.R. § 64.2010(b), (d), it would impose serious and irreparable harm on small carriers, like Bagley Utilities, that have strong personal relationships with their customers. Because of the utility's small customer base, and the fact that it is a local public utility dedicated to serving the City of Bagley, the utility's customers develop personal, informal relationships with the utility and its staff. Those close customer relationships create loyalty among the utility's customer base and ensure that city residents feel like they are getting the best possible value from their public utility.

9. Mandating that customers provide "authentication"—*e.g.*, passwords or other forms of identification—will irreparably harm these customer relationships. Many customers will view the new procedures as an affront to the close relationship the utility has developed with them over the years. Burdensome authentication procedures, moreover, will cause many customers to stop perceiving Bagley Utilities as a small-town utility provider that knows and is dedicated to the residents of the city. That is especially true for older customers, who may be

skeptical of authentication procedures that require disclosure of personal information.

10. Impairment of close customer relationships may cause Bagley Utilities to lose customers and market share. Bagley Utilities' customers choose their broadband Internet access and cable television service based not just on price, but also on their personal relationships with the utility. Personalized customer service helps Bagley Utilities attract and retain customers who might otherwise choose to subscribe to the services of a larger satellite television company.

11. Losses of goodwill and customers are irreparable: Relationships that are damaged are hard to repair; goodwill that is lost is hard to retrieve; and winning back customers who switch or discontinue service is a rarity in this industry. There would be no way for Bagley Utilities to make up for those losses once they are incurred.

12. The Order states that §222 imposes restrictions on carriers' ability to use, disclose, or permit access to customers' CPNI without their consent. Order ¶462. We understand that the FCC has previously interpreted §222 to prohibit disclosing CPNI to partners or contractors when the information may be used for marketing purposes, and has suggested that any sharing of CPNI with partners or contractors may put that information at a heightened risk of disclosure. Restrictions on such sharing of information with partners or contractors will

irreparably harm Bagley Utilities, which relies on a contractor to perform certain operational services.

13. For example, Bagley Utilities contracts with Momentum Telecom to configure and activate new service in customers' homes and monitor its network for outages. Momentum Telecom also serves as a second level of technical support.

14. To the extent that § 222 restricts how Bagley Utilities may share CPNI with contractors, Bagley Utilities will have to restructure its relationship with Momentum Telecom. For example, it may have to renegotiate its contracts with the company to ensure that CPNI is never used for marketing or sales purposes, and to ensure that Momentum Telecom takes necessary precautions to ensure the confidentiality of CPNI. And to the extent that Bagley Utilities concludes that sharing CPNI with Momentum Telecom creates a heightened risk of disclosure of CPNI, Bagley Utilities may be forced to handle certain operational activities itself.

15. Having to renegotiate, or forgo entirely, its arrangements with Momentum Telecom will irreparably harm Bagley Utilities. In particular, if Bagley Utilities must find other providers to work with, it may not be able to secure the same favorable terms it currently enjoys with Momentum Telecom. And if it must start handling operational tasks currently performed by Momentum Telecom itself, its ability to offer seamless customer service may be disrupted, for

example, by delays in installing new service or responding to outages. Bagley Utilities would never be able to recoup those expenses or the lost goodwill.

16. The FCC emphasized in the Order that §222 requires carriers to take reasonable precautions to protect CPNI. Order ¶53. It also offered, as a warning, the example of a telecommunications carrier that was found in violation of §222 for failing to put in place security measures for its computer databases containing CPNI. *Id.* Even though Bagley Utilities has never had any problem keeping customer information safe, §222 may require the utility to upgrade the security of its computer databases, which will irreparably harm the utility.

17. Bagley Utilities currently has a single, consolidated database that includes each customer's identifying information, such as name, phone number, and service address, as well as information the FCC might in the future construe as CPNI, such as geographic location, service plan, service level, and bandwidth usage. To isolate CPNI from other data and limit access, Bagley Utilities would have to upgrade its software systems and potentially move to a new, costly system. New, untested software may result in computer crashes or other bugs. Bagley Utilities will also have to re-train its employees in the new software. That does not merely impose financial harm; it also threatens goodwill. Transitions and revisions to computer systems are always imperfect at first. That may result in reduced service and support quality, which would erode customer goodwill.

18. Any harm to Bagley Utilities from upgrading its computer systems would be irreparable. Bagley Utilities would never be able to recoup the cost of new software. More importantly, if customer service suffers while the computer system is being upgraded, Bagley Utilities will never be able to recover the lost goodwill.

19. Bagley Utilities currently has no formal policies and procedures for handling CPNI. It will have to develop such policies from scratch and train its employees to follow them. That may require hiring additional personnel as well as the involvement of legal counsel. Worse still, because the FCC has yet to issue specific rules for how broadband Internet access providers should handle CPNI, the whole endeavor may be a wasted effort. Bagley Utilities must implement policies now—it cannot risk non-compliance—but may have to put in place entirely new policies when the FCC issues specific requirements. The utility would never be able to recoup the cost of these unnecessary efforts.

20. Bagley Utilities cannot spread the expenses of those compliance efforts over a large customer base so as to reduce the impact on individual bills. If Bagley Utilities had to hire just one new employee to manage compliance efforts—to say nothing of new hardware and software—that would require significant increases in the bills of the utility's 450 customers. To the extent Bagley Utilities cannot pass those costs along, the financial harm will be unrecoverable and

irreparable. To the extent Bagley Utilities attempts to pass those expenses through, it will lose some customers. And it may lose many customers to larger competitors who can spread compliance costs among a large base of customers, minimizing any impact on individual bills. Even if Bagley Utilities were eventually able to lower prices to prior levels, customers who have left once are unlikely to come back.

21. Bagley Utilities' status as a public utility, answerable to the City of Bagley Public Utilities Commission, increases the threat of irreparable harm from additional burdens under Title II. The Commission is extremely cost-sensitive. Higher compliance burdens from Title II regulation and higher prices could cause the Commission to decide that the utility can no longer fulfill its mission to provide low-cost service to residents, and require the utility to discontinue those services. In that event, even if the Commission could be convinced to reinstate service, the utility could not win back customers who switched to other providers.

22. The uncertainty regarding the extent and scope of Title II requirements on Bagley Utilities exacerbates the irreparable harm. Although the FCC has decided to forbear from certain specific CPNI regulatory requirements, it has also indicated that § 222 itself imposes certain duties in connection with CPNI. Order ¶¶ 462, 467. The FCC does not specify what requirements are necessary for statutory compliance. Bagley Utilities would face enormous uncertainty about

which rules it must obey and which rules are merely regulatory additions that have been forborne.

23. Any misjudgment by Bagley Utilities about the statute's requirements could have catastrophic consequences. Bagley Utilities understands that the FCC can impose large penalties—sometimes millions of dollars—for violations of CPNI rules. Bagley Utilities also understands that the FCC did not forbear from provisions of Title II that create a private right of action against carriers who violate other provisions of the statute. Bagley Utilities would face grave risks as a result. Even hiring counsel—which can be prohibitive for a small utility—cannot wholly insulate Bagley Utilities from those risks because there is so much uncertainty about what § 222 requires of broadband Internet access providers.

24. Bagley Utilities understands that the FCC has decided to forbear from applying other requirements under Title II. But the FCC has created enormous regulatory uncertainty in the process. For example, the Order forbears, "for now," from requiring broadband Internet access providers to contribute to the Universal Service Fund, but does not forbear from applying Title II provisions that presuppose a provider's contributions into the fund. Order ¶¶57-58, 488; *see* 48 U.S.C. § 254(h)(1)(A). The FCC also instructs providers to protect customer privacy without giving concrete guidance on how to do so. Order ¶¶462, 467, 468, 470. The resulting patchwork leaves Bagley Utilities uncertain about its new

obligations under Title II, and leaves the door open for the FCC to impose additional obligations and fees in the near future.

25. Uncertainty surrounding the FCC's forbearance from applying certain Title II provisions will jeopardize Bagley Utilities' upgrade plans. The utility is currently in the process of upgrading to Data Over Cable Service Interface Specification ("DOCSIS") 3.0, a new cable modem technology that will allow it to offer higher-speed service to its customers. Deploying such upgrades will require substantial upfront capital expenditures. Bagley Utilities will have to take on debt for the capital expenditures, and commit to servicing it with revenues remaining after paying for operating expenses and overhead, like compliance costs. To the extent that the new Title II rules create uncertainty about future compliance burdens, Bagley Utilities will have to err on the side of caution before committing to major long-term capital projects.

26. Harm from forgone upgrades and capital projects will be irreparable—for Bagley Utilities and its customers. For example, if Bagley Utilities delays rolling out higher-speed Internet access service, Bagley Utilities will give up opportunities to win new customers, or entice existing customers to purchase better services. It will never be able to calculate the cost of those forgone opportunities. And many customers will be deprived of those services.

I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct.

April 30, 2015

Michael Jensen

Michael Jensen
18 Main Ave. S
Bagley, MN 56621

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

DECLARATION OF THOMAS J. LARSEN

DECLARATION OF THOMAS J. LARSEN

I, Thomas J. Larsen, hereby state as follows:

1. I am Group Vice President of Legal & Public Affairs at Mediacom Communications Corporation ("Mediacom"). In this role, I oversee all government relations and media relations functions for Mediacom, and interact extensively with Mediacom's accounting, customer service, engineering and technology, finance, legal, operations, and tax departments. My position requires me to have knowledge of the FCC's rules governing broadband Internet access service ("BIAS") and Mediacom's compliance with such regulations, and accordingly I have reviewed the Federal Communication Commission's ("FCC") recently adopted Order. *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24 (rel. Mar. 12, 2015) ("Order"). The Order's reclassification of BIAS will cause immediate, significant, and irreparable harm to Mediacom in a several respects.

2. Reclassification will, as described below, harm Mediacom in several specific ways. But the overarching harm to Mediacom stems from the tremendous uncertainty created by the Order. The Order imposes a complicated and vast new regulatory scheme under Title II of the Communications Act covering nearly every aspect of Mediacom's BIAS offering, and yet leaves many of the specifics of that regime unclear—for example, the meaning of the "just and reasonable" standard

under Sections 201 and 202 in the broadband context; the precise activities that will be prohibited under the Order's new "general conduct" standard; the extent of the FCC's forbearance from non-"ratemaking" rules adopted under Sections 201 and 202; and various other matters. This uncertainty will frustrate Mediacom's efforts to ensure compliance with this new regulatory regime now and in the future, and cast a shadow on its interactions with its customers, vendors, and business partners.

3. ***Burdens of Compliance with Sections 201 and 202 and Related Regulatory Requirements.*** The Order immediately will hamper Mediacom's ongoing commercial negotiations with transit providers and content delivery networks ("CDNs"), including those operated by website/online service providers and other so-called "edge" companies. For example, as a result of the increased capacity demand created by rising use of certain web applications, , Mediacom recently has been required to make significant network upgrades in order to provide a satisfactory experience to its customers. Mediacom is making investments in fiber connectivity in order to eliminate dependence on intermediate carriers that might lack adequate network capacity. Edge providers and other entities with which Mediacom exchanges traffic will be the primary beneficiaries of these improvements. Prior to the FCC's Order, these entities would have appropriately borne some of these costs under established industry practice, and

Mediacom would have been able to negotiate with these providers to facilitate the sharing of such costs to the ultimate benefit of consumers.

4. Absent a stay, the Order will embolden these providers to take a position in these negotiations that they should bear no cost burdens in expanding the capacity that their applications require. By establishing an amorphous reasonableness standard that applies only to Mediacom's side of any interconnection arrangements, *see* Order ¶¶ 194-206, while also threatening enforcement against any action by Mediacom that might construed as "impair[ing] or degrad[ing] lawful Internet traffic on the basis of content, application, or service," *id.* ¶ 119, the Order gives these providers undue leverage in negotiations over allocating the costs of delivering their content to Mediacom's customers. As a result, Mediacom will be required to accept less favorable commercial terms from these providers than it would obtain if the Order were not in effect. These unfavorable deals in turn will only create a precedent for later deals, and cause substantial, unrecoverable harm to Mediacom's business if the Order is not stayed.

5. ***Burdens of Compliance with Section 222.*** Mediacom also will face immediate, irreparable harm in undertaking to comply with new requirements imposed by Section 222 of the Communications Act of 1934, as amended (the "Act"). Under that section, Mediacom will be required "to protect the confidentiality of proprietary information of, and relating to, other

telecommunication carriers, equipment manufacturers, and customers" and to refrain certain uses of "customer proprietary network information" ("CPNI") without customer approval. 47 U.S.C. § 222.

6. The Order creates significant ambiguity as to the precise measures that Mediacom must take in order to comply with Section 222. On the one hand, the Order states that it is forbearing from applying the FCC's rules implementing Section 222 to BIAS providers. *See* Order ¶ 462. But at the same time, the FCC already has interpreted Section 222 in the context of voice telephony to require certain procedures as the "minimum" needed to comply with *statutory* obligations. *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers Use of Proprietary Network Information and Other Customer Information*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 ¶ 64 (2007). These procedures include specific authentication protocols that must be followed before releasing CPNI through phone calls, the company's website, or in retail stores; "immediate" customer notification when changes are made to a customer's account; and mandatory law-enforcement and customer notification if there is a breach of CPNI. *See* 47 C.F.R. §§ 64.2010, 64.2011.

7. Given these ambiguities, Mediacom will have no choice but to implement new procedures to comply with Section 222, including updating

operating manuals, implementing necessary technical or software updates, and training its customer support staff. The substantial costs involved in taking these potentially unneeded steps cannot be recouped if the Order's reclassification is vacated.

8. ***Fees, Taxes, and Related Burdens Resulting from the FCC's Order.*** The Order will also result in immediate and irreparable harm for Mediacom related to its pole attachment agreements with various utility pole owners. To provide cable service and broadband Internet access service to its customers, Mediacom has entered into numerous pole attachment agreements with public utilities—*e.g.*, telephone, electric, gas, and water companies—that own utility poles throughout the company's footprint. These agreements allow Mediacom, for a fee, to attach equipment to utility poles in order to provide cable and broadband services to its customers. These arrangements have long been subject to regulation and such regulation will continue after the Order takes effect. *See* 47 U.S.C. § 224(f)(1) (requiring utilities to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it"); 47 U.S.C. § 224(b)(1) (granting the FCC the authority to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable" where a State does not do

so). But the Order's reclassification will cause Mediacom immediate, irreparable harms related to these agreements in two ways.

9. First, pursuant to FCC rules, Mediacom has an obligation to "notify pole owners upon offering telecommunications services." 47 C.F.R. § 1.1403(e). At a minimum, if the Order is not stayed, Mediacom's legal staff will be required to review each of its pole agreements and prepare hundreds of such notices to utilities. Moreover, many pole attachment agreements contain more demanding or specialized notice requirements that will be triggered by reclassification. This review process will be an enormous undertaking. Mediacom will be required to devote many hours of in-house staff time, hire outside counsel, and incur the substantial expense of reviewing each agreement and taking the required follow up actions. This burden on Mediacom's personnel and the outside legal expenses will be wasted if the Order is ultimately overturned on judicial review.

10. Second, reclassification will subject Mediacom to higher rates for its attachments. Some pole agreements specify the types of services Mediacom may offer over facilities attached to poles, and many do not include telecommunications service. Reclassification of BIAS as a telecommunications service thus will mean that Mediacom will be in breach of such agreements absent new terms authorizing telecommunications attachments and, in all likelihood, imposing related fee increases.

11. Other pole attachment agreements specify different rates for cable services and for telecommunications services. Section 224 of the Act provides different formulas for calculating "just and reasonable" rates for pole attachments for "cable service" and for "telecommunications services"; rates for "telecommunications services" are typically higher. *Compare* 47 U.S.C.§ 224(d) (cable service rate formula), *with id.* § 224(e) (telecommunications services rate formula); *see also* Order ¶ 481 (noting that the "cable rate" is the "lower rate" under the statutory formulas). Reclassification may automatically increase Mediacom's rates under any agreements that may follow these formulas. In addition, a significant number of Mediacom's systems are in rural areas where the difference between the cable and telecom rates is more significant than in urban areas.

12. Mediacom has two unworkable options for responding to these increases. Mediacom can pay the increased pole rates and then sue for refunds if the Order is ultimately reversed. Pole owners will undoubtedly contest such lawsuits and, at a minimum, Mediacom will be required to pursue costly utility-by-utility litigation to recoup the increased pole fees against hundreds of utilities across the country. Mediacom has been involved in this type of litigation in the past; it imposes substantial burdens on the company with no guarantee of ultimate success. Or Mediacom could delay payment of the increased rates until judicial

review of the Order is complete. But, in Mediacom's experience, when faced with this sort of "self-help," utilities often simply refuse to process new attachment permits, which would significantly impede Mediacom's deployment of broadband facilities.

13. As a result of the Order, Mediacom also may face new state and local taxes. For example, because the property tax assessment approach in many states differs between telecommunications and non-telecommunications services, the reclassification may cause states to change their assessment methodology with respect to Internet access services. While the Order states that the Internet Tax Freedom Act ("ITFA") bars states and municipalities from imposing "[t]axes on Internet access," Order ¶ 430, the ITFA does not apply to taxes "upon or measured by net income, capital stock, net worth, or property value." 47 U.S.C. § 151 note, ITFA, § 1105(10)(B). If, as a result of the Commission's reclassification of BIAS, Mediacom is required to pay higher state and local taxes, efforts to recover such taxes if the Order were to be overturned would be costly and potentially unsuccessful.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED: May 1, 2015

Thomas J. Larsen

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

DECLARATION OF HERBERT LONGWARE

DECLARATION OF HERBERT LONGWARE,
PRESIDENT OF CABLE COMMUNICATIONS OF WILLSBORO

I, Herbert Longware, hereby state as follows:

1. I am owner and President of Cable Communications of Willsboro ("CCW").

2. CCW is a small broadband Internet access service and cable television provider based in Willsboro, New York. Founded in 1988, CCW serves the towns of Willsboro and Essex, in New York. These towns are in upstate New York, overlooking Lake Champlain, and have a significant resort population.

3. CCW's cable system offers broadband Internet access and cable television service to about 700 customers. CCW does not offer telephone service.

4. CCW has two employees primarily involved with its broadband Internet access and cable television service business. None of CCW's employees works solely on regulatory compliance matters.

5. In the past decade, the company has invested over $150,000 in these networks, in reliance on the light-touch regulatory framework the FCC has to date applied to broadband Internet access and cable television service. CCW would not have invested so much money if the industry had been more heavily regulated, and will likely have to reduce its investment now that the FCC has applied heavier regulation to broadband Internet access service.

6. CCW understands that the FCC's Open Internet Order ("Order") reclassified broadband Internet access providers like CCW as common carriers under Title II of the Telecommunications Act of 1934. CCW has never been regulated under Title II and has no experience complying with Title II requirements. CCW's reclassification as a Title II carrier will thus impose significant new burdens on the company. CCW may have to hire additional employees to manage compliance, which will be particularly burdensome given the company's small number of employees and the absence of any employees who work solely on regulatory compliance efforts.

Irreparable Harm from CPNI Requirements

7. CCW understands that the FCC has used its authority to forbear, for now, from applying some regulations implementing Title II to broadband Internet access providers. But the FCC did not forbear from applying 47 U.S.C. §222, which requires telecommunications providers to protect Customer Proprietary Network Information ("CPNI"). To the extent that forbearance does not entirely exempt CCW from CPNI requirements, requiring compliance with those procedures will harm CCW irreparably.

8. The Order states that §222 imposes a duty on carriers to protect the confidentiality of their customers' CPNI. Order ¶53. To the extent this duty mandates that telecommunications carriers require customers to provide passwords

during support calls or photo identification during in-store visits before disclosing CPNI, *see* 47 C.F.R. §64.2010(b), (d), it would impose serious and irreparable harm on small carriers, like CCW, that have strong personal relationships with their customers. The company prides itself on being extremely accessible, and has offices downtown right next to the Post Office so that customers can come in and talk to staff in person. As a result, CCW's customers develop personal, informal relationships with the company. In fact, our staff can recognize many of our customers just by their voices. Those close customer relationships create loyalty that the company cultivates to ensure a loyal customer base that stays with the company.

9. Mandating that customers provide "authentication"—*e.g.*, passwords or other forms of identification—will irreparably harm these customer relationships. CCW serves a close-knit rural community, and customers—especially those who drop by our office in person—may feel insulted if asked to prove their identities after years of doing business with the company. Complicated authentication procedures, moreover, will cause many customers to perceive CCW as another faceless company that does not make a significant effort to know and have relationships with its customers. That is especially true for older customers, who may be skeptical of authentication procedures that require disclosure of personal information.

10. Impairment of close customer relationships may cause CCW to lose customers and market share. CCW's customers choose their broadband Internet access and cable television service based not just on price, but also on their personal relationships with the company. Those relationships are benefits of CCW's service—ones not offered by the large satellite and telephone companies CCW competes with for business.

11. Losses of goodwill and customers are irreparable: Relationships that are damaged are hard to repair; goodwill that is lost is hard to retrieve; and winning back customers who switch or discontinue service is a rarity in this industry. There would be no way for CCW to make up for those losses once they are incurred.

12. The FCC emphasized in the Order that §222 requires carriers to take reasonable precautions to protect CPNI. Order ¶53. It also offered, as a warning, the example of a telecommunications carrier that was found in violation of §222 for failing to put in place security measures for its computer databases containing CPNI. *Id.* Even though CCW has never had any problem keeping customer information safe, §222 may require CCW to upgrade the security of its computer databases, which will irreparably harm the company.

13. CCW does not currently have a secure customer information database. It keeps customer information, such as name, phone number, and service address, as well as information the FCC might in the future construe as CPNI, such as

geographic location, service plan, service level, and bandwidth usage, on the company's billing computer. To isolate CPNI from other data and limit access, CCW could have to abandon its existing software, which was not designed for such security, and move to an entirely new system. New, untested software may result in computer crashes or other bugs. CCW will also have to re-train its users in the new software. That does not merely impose financial harm; it also threatens goodwill. Transitions and revisions to computer systems are always imperfect at first. That may result in reduced service and support quality, which would erode customer goodwill.

14. Any harm to CCW from upgrading its computer systems would be irreparable. CCW would never be able to recoup the cost of new software. More importantly, if customer service suffers while the computer system is being upgraded, CCW will never be able to recover the lost goodwill.

15. Complying with §222's requirement to take precautions to protect CPNI may also force CCW to abandon its existing billing system. Currently, customers annually receive a "coupon book" that contains each customer's monthly invoices. The book and accompanying documentation includes CPNI, including the type of service to which the customer is subscribed. To the extent that its billing system may be inadequate under CPNI rules, the company will have to put into place a new billing system. Transitioning to a new billing system would

create a significant risk of disruption to customer service and billing, which could cost CCW goodwill.

16. Any loss of goodwill from customer service disruptions caused by migrating to a new billing system would cause CCW irreparable harm. Customer goodwill can quickly evaporate in the face of billing errors, and once lost it is difficult if not impossible to recover.

17. CCW currently has no formal policies and procedures for handling CPNI. It will have to develop such policies from scratch and train its employees to follow them. That may require hiring additional personnel as well as the involvement of legal counsel. Because the FCC has yet to devise specific rules for how broadband Internet access providers should handle CPNI, moreover, the whole endeavor may be a wasted effort. CCW must implement policies now—it cannot risk non-compliance—but may have to put in place entirely new policies when the FCC determines specific requirements. CCW would never be able to recoup the cost of these unnecessary efforts.

18. CCW cannot spread the expenses of those compliance efforts over a large customer base so as to reduce the impact on individual bills. If CCW had to hire just one new employee to manage compliance efforts—to say nothing of new hardware and software—that would require significant increases in the bills of the company's 700 customers. To the extent CCW cannot pass those costs along, the

financial harm will be unrecoverable and irreparable. To the extent CCW attempts to pass those expenses through, it will lose some customers. And it may lose many customers to larger competitors who can spread compliance costs among a large base of customers, minimizing any impact on individual bills. Even if CCW were eventually able to lower prices to prior levels, customers who have left once are unlikely to come back.

19. The uncertainty regarding the extent and scope of these prohibitions exacerbates the irreparable harm. Although the FCC has decided to forbear from certain specific CPNI regulatory requirements, it has also indicated that § 222 itself imposes certain duties in connection with CPNI. Order ¶¶ 462, 467. The FCC does not specify what requirements are necessary for statutory compliance. CCW would face enormous uncertainty about which rules it must obey and which rules are merely regulatory additions that have been forborne.

20. Any misjudgment by CCW about the statute's requirements could have catastrophic consequences. CCW understands that the FCC can impose large penalties—sometimes millions of dollars—for violations of CPNI rules. CCW also understands that the FCC did not forbear from provisions of Title II that create a private right of action against carriers who violate other provisions of the statute. CCW would face grave risks as a result. Even hiring counsel—which can be prohibitive for a small company—cannot wholly insulate CCW from those risks

because there is so much uncertainty about what §222 requires of broadband Internet access providers.

21. CCW understands that the FCC has decided to forbear from applying other requirements under Title II. But the FCC has created enormous regulatory uncertainty in the process. For example, the Order forbears, "for now," from requiring broadband Internet access providers to contribute to the Universal Service Fund, but does not forbear from applying Title II provisions that presuppose a provider's contributions into the fund. Order ¶¶57-58, 488; *see* 48 U.S.C. §254(h)(1)(A). The FCC also instructs providers to protect customer privacy without giving concrete guidance on how to do so. Order ¶¶462, 467, 468, 470. The resulting patchwork leaves CCW uncertain about its new obligations under Title II, and leaves the door open for the FCC to impose additional obligations and fees in the near future.

22. Uncertainty surrounding the FCC's forbearance from applying certain Title II provisions will jeopardize CCW's upgrade plans. CCW is currently in the process of deploying Data Over Cable Service Interface Specification ("DOCSIS") 3.0, a new technology for cable modems that will allow CCW to offer higher-speed broadband Internet access service to customers. Deployment of DOCSIS 3.0 will be expensive and require substantial upfront capital expenditures. CCW will have to take on debt for the capital expenditures, and commit to servicing it with

revenues remaining after paying for operating expenses and overhead, like compliance costs. To the extent that the new Title II rules create uncertainty about future compliance burdens, CCW will have to err on the side of caution before committing to major long-term capital projects.

23. Harm from foregone upgrades and capital projects will be irreparable—for CCW and its customers. For example, if CCW delays rolling out DOCSIS 3.0 and the higher broadband speeds it makes possible, CCW will give up opportunities to win new customers, or entice existing customers to purchase higher tiers of service. It will never be able to calculate the cost of those forgone opportunities. And many customers—mostly in smaller, rural communities—will be deprived of those services, aggravating the digital divide between them and their urban counterparts.

Irreparable Harm from Increased Pole Attachment Rates

24. CCW understands that New York regulates pole attachment rates at the state level, rather than relying on federal formulas. CCW also understands that under the applicable formulas, it may pay higher rates if classified as a "telecommunications service" than if it is classified as a "cable service."

25. CCW will be harmed by any increases in pole attachment rates. CCW has pole attachment agreements with New York State Electric & Gas, Verizon Communications, and Frontier Communications. As a rural operator, pole

attachment fees are a significant expense for CCW. Population densities in rural areas are low, and correspondingly the number of customers served per pole is low. Utilities charge CCW a yearly fee for each pole attachment, and consequently the company pays a higher fee per customer than cable operators who serve more urban areas.

26. Harm to CCW from increased pole attachment fees will be irreparable. CCW will have to pay any increases—it cannot afford to risk litigation with large utilities by withholding fees. If CCW does not pass along increased fees to its customers, CCW will have a difficult time spending even more capital to properly maintain and repair its network. If CCW does pass along increased fees to its customers, customer goodwill will be eroded.

I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct.

May 1, 2015

Herbert Longware
3669 Essex Rd., Suite 1
Willsboro, NY 12966

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

DECLARATION OF STEVEN F. MORRIS

DECLARATION OF STEVEN F. MORRIS

I, Steven F. Morris, hereby state as follows:

1. I am Vice President and Associate General Counsel at the National Cable & Telecommunications Association ("NCTA"), the principal trade association for the U.S. cable industry. NCTA's members include broadband Internet access service providers of all sizes and operating in all 50 states. In my position at NCTA, I routinely confer with and provide guidance to NCTA's members regarding compliance with applicable statutory and regulatory requirements, including the rules adopted and other actions taken by the Federal Communications Commission ("FCC") in the Order on Review. *See Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24 (rel. Mar. 12, 2015) ("Order on Review" or "Order"). My role at NCTA requires me to develop a general understanding of the operations of and regulatory compliance measures taken by NCTA's member companies as providers of broadband Internet access service.

2. Based on my review and analysis of the FCC's Order, as well as my knowledge of the operations of and compliance measures in effect at or contemplated by NCTA's member companies, and reports from member companies regarding actions they will take or refrain from taking as a result of the Order, I have gained an understanding of how the measures that the FCC adopted

in the Order—including the reclassification of broadband Internet access service as a "telecommunications service" and the regulatory obligations imposed in conjunction with that reclassification—will result in a variety of immediate, irreparable harms to NCTA's members. I describe several examples of such harms below.

3. As a general matter, the Order's reclassification of broadband Internet access service as a "telecommunications service" will subject NCTA's members, for the very first time with respect to that service, to a comprehensive and sweeping regulatory regime initially designed for telephone service under Title II of the Communications Act of 1934, as amended (the "Act"). NCTA's members suddenly will face a host of new regulatory obligations, each of which will force them to undertake compliance measures that in many instances will require a significant commitment of resources that could not be recovered if the FCC's reclassification decision were later vacated. Because the Order takes effect only 60 days after its publication in the Federal Register, NCTA's members will be forced to implement these substantial compliance measures and incur the associated costs over a very short period of time. Making matters worse, the Order also leaves substantial ambiguity as to the precise nature of the legal obligations that flow from the FCC's reclassification decision. Such ambiguity will compound the burdens faced by providers of broadband Internet access service in developing and

implementing systems, policies, and other measures to comply with these obligations, by (a) expanding the range of potential actions that must be considered to meet expansive and vague regulatory standards, and (b) chilling the pursuit of business initiatives that could be deemed inconsistent with such standards. The sudden imposition of these new, numerous, and ambiguous regulatory obligations thus will cause immediate and irreparable harms for NCTA's members, most notably with respect to the specific matters addressed herein.

4. ***Burdens of Compliance with Sections 201 and 202 and Related Regulatory Requirements.*** Most fundamentally, the Order's reclassification of broadband Internet access service as a "telecommunications service" will result in immediate and irreparable harms for NCTA's members stemming from the application of sweeping and vague common carrier obligations under Sections 201 and 202 of the Act.

5. Section 201 requires, among other things, that "[a]ll charges, practices, classifications, and regulations for and in connection with" a telecommunications service "shall be just and reasonable." 47 U.S.C. § 201(b). Section 202 prohibits providers of telecommunications services from "mak[ing] unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device," and from "giv[ing] any

undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage." *Id.* § 202(a). The Order provides virtually no guidance as to how these statutory requirements will be applied to broadband Internet access service—and in particular does not categorically identify any "charges" or "practices" that would be deemed unjust, unreasonable, or unreasonably discriminatory under Sections 201 and 202, nor does it specifically identify any charges or practices that are permissible. However, the Order *does* make clear that broadband providers alleged to have violated these provisions are subject to complaints before the FCC under Section 208, and to private suits for damages in court (including class actions) under Sections 206 and 207. *See* Order ¶ 453 (declining to forbear from Sections 206, 207, and 208).

6. As a result of the unprecedented application of these common carrier requirements to cable broadband services, at the moment the Order becomes effective, every "charge" and "practice" instituted or maintained by a broadband provider suddenly will become subject to challenge before the FCC and in federal court. Broadband providers thus will be obligated to devote substantial time and resources to evaluating all current "charges" and "practices" in order to determine whether any might be challenged as unjust, unreasonable, or unreasonably

discriminatory under these statutes, and must do so without any useful clarification from the FCC as to the meaning of those terms in the context of broadband Internet access service. The broad and uncertain reach of Sections 201 and 202—and the threat of legal challenges (even ones that are baseless under this legal framework) to broadband providers' charges and practices—also will force broadband providers to undertake costly compliance measures that ultimately may prove to be unnecessary, chill their efforts to offer new and innovative services or pricing plans, and sap resources that could be devoted to investment in broadband networks and other business initiatives. These harms will be particularly severe for NCTA's smaller members, which have very limited resources available to devote to expanded regulatory compliance.

7. Application of Sections 201 and 202 could create significant uncertainty surrounding the introduction of new services. For example, cable operators and other ISPs often introduce new services or faster tiers of service in limited geographic areas, rather than immediately offering such services to their entire customer base. ISPs may be hesitant to take such steps after the Order takes effect due to the risk that such services will trigger complaints or litigation from customers to whom such new services are not available for failure to provide service "upon reasonable request" under Section 201 or because the limited

availability of such services constitutes unreasonable discrimination pursuant to Section 202.

8. The Order imposes other broad and unclear requirements on cable broadband providers pursuant to Sections 201 and 202, subjecting NCTA's members to additional regulatory uncertainty that likewise will result in immediate, irreparable harm. Most notably, the Order imposes an amorphous prohibition on any and all ISP practices that, in the FCC's view, "unreasonably interfere with or unreasonably disadvantage" end users' access to content and content providers' access to end users, Order ¶¶ 133-53—thus immediately chilling ISPs' efforts to develop innovative and pro-consumer service offerings that might implicate this rule. The FCC identifies a variety of factors that would be considered in applying this standard, but these factors are sufficiently vague as to provide no meaningful guidance to ISPs. Similarly, the Order creates a threat of *ex post* regulation of broadband rates under the same ambiguous "just and reasonable" standard, *id.* ¶ 451, and accordingly frustrates ISPs' efforts to roll out innovative pricing plans that consumers desire. *See, e.g.,* Declaration of W. Thomas Simmons, Midcontinent Communications ("Simmons Decl.") ¶¶ 3-4.

9. In addition, the Order could be read as leaving in place an undefined set of regulations adopted under Sections 201 and 202 that do not relate to "ratemaking." Order ¶ 456; *but see id.* ¶ 443 n. 1317 (suggesting such rules do not

apply). Because the Commission has not provided a specific list of which rules apply or which rules have been forborne from, it is entirely unclear which of these rules will apply to ISPs going forward, NCTA's members will be forced to devote substantial resources to establish compliance mechanisms that may ultimately prove unnecessary.

10. The FCC's Order also will subject NCTA's members to immediate, irreparable harms in negotiating agreements with third parties under the restrictions imposed by Sections 201 and 202. For decades prior to the adoption of the Order, NCTA's members negotiated Internet interconnection arrangements in an unregulated, free-market setting, and market forces have long encouraged parties to reach fair and efficient arrangements to allocate the costs associated with exchanging Internet traffic. But the Order turns this longstanding free-market system upside down, by imposing a new requirement on ISPs—and only ISPs—not to engage in "unjust or unreasonable practices" in negotiating interconnection arrangements, without providing any indication as to what sorts of practices might be deemed unjust or unreasonable. *Id.* ¶ 203. The Order accordingly forces NCTA's members to negotiate interconnection arrangements subject to ambiguous and one-sided limitations—requiring ISPs to ensure that any terms they offer are "just and reasonable" while leaving ISPs with no recourse when counterparties propose terms that are unjust and unreasonable. In doing so, the Order invites

transit providers and content delivery networks ("CDNs")—ISPs' counter-parties in interconnection negotiations—to leverage the asymmetric regulatory regime to obtain preferential economic and non-economic terms. The risk and uncertainty faced by ISPs thus will significantly reduce their incentive and ability to resist unreasonable pricing and other demands from transit providers and CDNs in interconnection negotiations—thus forcing ISPs to accept less favorable commercial agreements than if the Order were stayed pending judicial review. And by inhibiting the ability of ISPs to recover the costs of interconnection from transit providers and CDNs, and encouraging transit providers and ISPs to place more onerous demands on ISPs, such a regime will cause collateral damage to consumers, who will be forced to shoulder a larger portion of ISPs' network costs. *See, e.g.,* Declaration of Jennifer W. Hightower, Cox Communications, Inc. ("Hightower Decl.") ¶¶ 4-5; Declaration of Thomas J. Larsen, Mediacom Communications Corp. ("Larsen Decl.") ¶¶ 3-4; Declaration of Ronald da Silva, Time Warner Cable Inc. ("da Silva Decl.") ¶¶ 3-8.

11. In addition, this new interconnection regime will require ISPs to devote significant resources not only to reviewing existing interconnection arrangements to determine whether they could be viewed as implicating this vague and one-sided standard, but also to defending against complaints from transit providers, CDNs, and others challenging existing terms and conditions under

Sections 201 and 202. Notably, even before the effective date of the Order, NCTA's members received demands from transit providers to renegotiate the terms of their current interconnection arrangements under the vague, one-sided standard imposed on ISPs in the Order. *See, e.g.*, da Silva Decl. ¶ 3. And Cogent has announced that it will petition the FCC to require ISPs to "reduce congestion at interconnection points," and will "ask the [FCC] to take action as soon as the [O]rder takes effect." *See* Kery Murakami, *Cogent To Petition FCC Over Interconnection*, Communications Daily, Apr. 7, 2015, at 2-5. Thus, absent a stay, ISPs will face a barrage of threatened and actual legal challenges from transit providers, CDNs, and others as to the "reasonableness" of *existing* interconnection arrangements under Section 201 and 202—again imposing substantial costs on ISPs that cannot be recovered.

12. ***Burdens of Compliance with Section 222.*** The FCC's Order also will result in immediate, irreparable harms for NCTA's members related to compliance with new and ambiguous obligations under Section 222 of the Act. Section 222(c) subjects telecommunications carriers to various restrictions relating to the confidentiality of "customer proprietary network information" ("CPNI")—defined as "information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made

available to the carrier by the customer solely by virtue of the carrier-customer relationship." 47 U.S.C. §§ 222(c), (h)(1)(A). The FCC has adopted several orders interpreting these statutory CPNI obligations in the voice context, and while the Order specifically forbore from applying the FCC's "rules" implementing Section 222(c), *see* Order ¶ 462, it left open the possibility that the FCC's prior interpretations of the statute would remain authoritative in the broadband context. NCTA's members are subject to similar burdens and regulatory uncertainty with regard to Section 222(a), which requires providers to "protect the confidentiality of proprietary information of, and relating to, other telecommunications carriers, equipment manufacturers, and customers," and Section 222(b), which limits the ability of providers to use "proprietary information from another carrier" for purposes other than "providing any telecommunications service." 47 U.S.C. §§ 222(a), (b).

13. The application of Section 222 will impose a variety of immediate and irreparable harms on NCTA's members if the Order is not stayed. Broadband providers' efforts to safeguard CPNI will become subject to FCC enforcement action under the statute, which the FCC has applied aggressively without relying on its implementing rules. *See TerraCom, Inc. and YourTel America, Inc.*, Notice of Apparent Liability and Forfeiture, 29 FCC Rcd 13325 (2014) ("*TerraCom NAL*"). Moreover, plaintiffs' class action lawyers can immediately bring

complaints for purported violations of Section 222 pursuant to Sections 206 and 207 of the Act. Because Section 222's provisions have never previously applied to broadband Internet access and the FCC has identified no safe harbors, ISPs face a very real risk of liability for alleged failures to comply.

14. Relatedly, these new and ambiguous requirements under Section 222 will require NCTA members to dedicate significant resources to evaluating their current business practices, determining what changes are necessary under the statute, implementing such changes, and training personnel to abide by these requirements. Facing an immediate risk of enforcement, NCTA's members will have no choice but to treat the FCC's prior interpretations of Section 222 and even existing but forborn-from CPNI rules for telephone services as guideposts—thus forcing members to take measures that could be entirely misguided and unnecessary.

15. For example, NCTA's members will be compelled to reexamine and in some cases change their marketing practices to comport with rules in the telephone context governing the use of account information to market additional services to customers, given FCC precedent indicating that such restrictions are grounded directly in Section 222 itself (and not just in implementing rules). *See, e.g.,* Hightower Decl. ¶¶ 8-10; Simmons Decl. ¶¶ 9-11. Relatedly, NCTA's members will be forced to reevaluate current practices for authenticating

individuals who request CPNI by telephone, online, or in retail locations, so that members can ensure that they are protecting customer information from inappropriate disclosure in compliance with Section 222—and will face significant new costs and other burdens related to the development and implementation of new identity-verification systems and the training of staff in the proper use of these systems. *See, e.g.*, Hightower Decl. ¶ 7; Simmons Decl. ¶¶ 6-8; Larsen Decl. ¶ 6. NCTA's members also will be required to devote substantial time and resources in attempting to discern what other obligations might flow from the sudden imposition of CPNI requirements designed for the telephone industry under Section 222, and in undertaking other business measures to comply with those obligations, including the overhauling of current systems and processes for seeking and obtaining customer consent, and the implementation of new monitoring and audit procedures. *See, e.g.*, Simmons Decl. ¶¶ 12-13; Larsen Decl. ¶¶ 6-7. NCTA's members will not be able to recover these substantial compliance costs in the event the Order is vacated, and the impact will be especially severe on NCTA's smaller members.

16. ***Burdens of Compliance with Sections 225, 255, and 251(a)(2).*** The FCC's Order also will result in immediate, irreparable harms for NCTA's members related to compliance with new and ambiguous disabilities access obligations under Section 225, 255, and 251(a)(2) of the Act. Section 225 addresses

"telecommunications relay services" (TRS), which enable hearing-disabled persons to engage in communications "in a manner that is functionally equivalent to the ability of hearing individuals without a speech disability to communicate using voice communications." 47 U.S.C. § 225(a)(3). The Order declined to forbear from applying Section 225 to broadband providers based on the notion that ISPs' otherwise neutral network management practices "could have an adverse effect" on TRS services that rely on broadband Internet access service, Order ¶ 468, but provided no guidance to broadband providers on how to avoid such a result. Accordingly, NCTA's members not only will be required to undertake thorough reevaluations of their network management practices to determine whether they might adversely affect TRS services, but also will be chilled in efforts to optimize network performance for fear of violating Section 225. *See, e.g.,* Hightower Decl. ¶ 11.

17. The Order's application of Section 225 to broadband Internet access service also will inhibit ISPs' ability to offer innovative, low-cost services and pricing models to consumers. As the Order acknowledges, service plans that include "usage allowances" or usage-based billing "may benefit consumers by offering them more choices over a greater range of service options" and price points. *Id.* ¶ 153. But in describing how the FCC will apply Section 225 to broadband, the Order indicates that service plans "limiting [users'] bandwidth

capacity" could violate ISPs' obligations under the statute, based on a theory that usage limits "could compromise [users'] ability to obtain access" to TRS services, including Video Relay Service. *Id.* ¶ 468. Thus, the application of Section 225 will require ISPs to reevaluate and potentially eliminate existing offerings that involve usage allowances or usage-based billing, and will chill efforts to make such options available to consumers in the future. In both cases, ISPs will suffer irreparable harm from the loss of goodwill among consumers who prefer such lower-priced plans but now must move to more expensive plans with larger (or unlimited) usage allowances.

18. Sections 255 and 251(a)(2) of the Act require telecommunications service providers to make their services accessible to individual with disabilities, whenever "readily achievable," 47 U.S.C. § 255(c), and prohibit providers from installing any new "network features, functions, or capabilities that do not comply with the guidelines and standards established under [S]ection 255," 47 U.S.C. § 251(a)(2). As the Order acknowledges, the requirements imposed by the FCC under these provisions exceed the existing regulation of broadband providers under the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA") to ensure that individual with disabilities may utilize advanced communication services. *See* Order ¶¶ 473-74. For example, the Order indicates that the rules adopted under Sections 255 and 251(a)(2) impose technical

requirements on the "equipment" used to provide telecommunications services that go beyond the CVAA's requirements, including the mandatory pass-through of all "cross-manufacturer, non-proprietary, industry-standard codes, translation protocols, formats or other information necessary to provide telecommunications in an accessible format, if readily achievable." 47 C.F.R. § 6.9 (cited at Order ¶ 474 & n.1436). NCTA's members will need to devote significant resources to determining whether existing systems and practices comport with these and other new requirements, and to upgrading those systems and updating those practices where necessary. NCTA's members will not be able to recover these substantial compliance costs in the event the Order is vacated. *See, e.g.,* Hightower Decl. ¶ 12.

19. ***Fees, Taxes, and Related Burdens Resulting from the FCC's Order.*** The Order's reclassification of broadband Internet access service as a "telecommunications service" also will result in immediate, irreparable harms for NCTA's members related to demands for and payment of a variety of new or increased fees and taxes, including higher pole attachment fees, state and local taxes, franchise fees, and state regulatory fees.

20. *Pole Attachment Fees and Related Harms.* When attaching broadband equipment to utility poles, cable broadband providers have long been permitted by law to pay pole owners pursuant to the rate formula applicable to

cable operators in Section 224(d) of the Act, *see NCTA v. Gulf Power Co.*, 534 U.S. 327 (2002)—rather than the rate formula applicable to telecommunications service providers in Section 224(e), which results in higher rates than the cable rate formula in almost all cases. *See* Order ¶ 481 (acknowledging that the "cable rate" is the "lower rate" under the statutory formulas); *see also* Petition for Reconsideration or Clarification of the National Cable & Telecommunications Association, COMPTEL, and tw telecom, Inc., WC Docket No. 07-245, at 5-6, Attach. A (filed Jun. 8, 2011) (showing that applying the current rate formulas "would result in a telecom rate that is *70 percent higher* than the cable rate for most poles").

21. The FCC's reclassification decision, once effective, may trigger obligations for NCTA's members to notify pole owners upon offering telecommunications services—obligations that could implicate many thousands of pole agreements that NCTA's members have throughout their service areas. Such notifications in turn will lead to demands by pole owners to pay the higher rate for telecommunications service providers, as the FCC's Order recognizes in its repeated assertions that it hopes pole owners will simply forgo such increases. *See, e.g.*, Order ¶ 482 (expressing concern that pole owners will use the Order "as an excuse to increase pole attachment rates of cable operators providing broadband Internet access service"). Notably, the Order on Review does *not* preclude pole

owners from seeking higher pole attachment rates as a result of the FCC's reclassification decision. *See id.* (declining to grant forbearance to address increases in pole attachment rates). And the notion that pole owners will *voluntarily* hold back on this opportunity to seek increased revenues is unfounded—and potentially in violation of pole owners' fiduciary obligations to their own shareholders to maximize revenues. *See* Kery Murakami, *Net Neutrality Order Leads to Uncertainty Over Cable Pole Attachment Rates*, Communications Daily, Apr. 17, 2015, at 6-9 (citing an attorney "who represents a number of utilities" stating that the "order has created uncertainty" that pole owners will seize upon in seeking higher rates).

22. The actual and potential application of higher pole attachment rates as a result of the FCC's Order will cause immediate, irreparable harms for NCTA's members. Absent a stay, NCTA's members immediately will need to analyze many thousands of pole attachment agreements for terms and obligations that may be triggered by or relevant to the FCC's reclassification decision, including additional notice obligations, prohibitions on the use of pole attachments to provide telecommunications services without authorization, and automatic fee modifications. The process of reevaluating and complying with these arrangements will entail substantial time and resources; NCTA's largest member has over 700 pole attachment agreements on its own, and nearly all of its members

have multiple utility partners. NCTA's members also will need to devote substantial time and resources to analyzing all relevant state laws regulating pole attachment rates in order to determine the impact of the FCC's reclassification decision on pole attachments at the state level. The resources needed to undertake these review and compliance measures necessarily will be diverted from other business efforts—a particular burden on NCTA's smaller members. *See, e.g.*, Larsen Decl. ¶ 9.

23. Moreover, the Order inevitably will result in efforts by pole owners to collect higher pole attachment rates. These disputes not only will strain relationships between pole owners and attachers, but also will impose substantial financial and administrative burdens on NCTA's members, which will significantly interfere with the deployment of broadband facilities and other business initiatives. The inevitable payment of higher pole attachment rates likewise will sap resources that could be devoted to the deployment of broadband facilities and other business initiatives by reducing the capital available for such efforts, or will be passed on to consumers in the form of higher retail rates, thus resulting in a loss of customer goodwill. These delays in deployment and losses of goodwill cannot meaningfully be offset by some later monetary award. And if the FCC's reclassification decision is ultimately vacated, efforts by NCTA's members to recoup the excessive pole fees paid in the interim period will be costly, time-

consuming, and potentially unsuccessful, as pole owners will argue that any such payments under the rate for telecommunications services were proper while the Order was in effect. *See, e.g.,* Hightower Decl. ¶¶ 16-17; Larsen Decl. ¶¶ 12.

24. *State and Local Taxes.* The Order's reclassification decision also will result in immediate, irreparable harms for NCTA's members related to demands by state authorities for and payment of state and local taxes that have never previously applied to cable broadband service. Although the Order asserts that the Internet Tax Freedom Act ("ITFA") precludes the imposition of new state and local taxes on Internet access, *see* Order ¶ 430, the ITFA expressly does *not* apply to taxes "upon or measured by net income, capital stock, net worth, or property value." 47 U.S.C. § 151 note, ITFA, § 1105(10)(B). Thus, once the Order becomes effective, NCTA members operating in jurisdictions that assess income or property taxes on "telecommunications service" providers (or an equivalent category) may immediately become subject to new payment obligations in connection with such taxes. For example, in several states where NCTA's members operate, property taxes for telecommunications services are assessed centrally using a much less favorable methodology that taxes both tangible and intangible assets, whereas cable operators are generally locally assessed and pay property taxes only on their tangible assets. *See, e.g.,* Hightower Decl. ¶ 19; Larsen Decl. ¶ 13. The move to a centralized assessment of property taxes for NCTA's members as a result of the

FCC's reclassification decision thus will directly and immediately lead to significantly higher tax burdens in many jurisdictions. *See, e.g.,* Hightower Decl. ¶ 19; Larsen Decl. ¶ 13.

25. Also, several of NCTA's members operate in jurisdictions in which the ITFA's prohibition on "taxes on Internet access" does not apply *at all*, including states that have "grandfathered" taxes on Internet access, such as Hawaii, New Mexico, North Dakota, Ohio, South Dakota, Texas, and Wisconsin. 47 U.S.C. § 151 note, ITFA, § 1105(10)(C). Accordingly, NCTA members operating in these jurisdictions will not be exempt from—and thus will be required to pay, for the first time—*any* taxes that apply to "telecommunications service" providers (or an equivalent category) in offering Internet access. *See, e.g.,* Simmons Decl. ¶¶ 16-17.

26. The actual and potential application of these taxes as a result of the FCC's Order will cause immediate, irreparable harms for NCTA's members. NCTA's members will be forced to devote significant time and resources to complying with or disputing the application of new state and local taxes, and these burdens will significantly interfere with the deployment of broadband facilities and other business initiatives. Moreover, any payment of these taxes will slow the deployment of broadband facilities and other business initiatives by reducing the capital available for such efforts (particularly for smaller providers), or will be

passed on to consumers in the form of higher retail rates, thus resulting in a loss of customer goodwill. These delays in deployment and losses of goodwill cannot meaningfully be offset by some later monetary award. And if the FCC's reclassification decision is ultimately vacated, efforts by NCTA's members to recoup additional taxes paid in the interim period will be costly, time-consuming, and potentially unsuccessful.

27. *Franchise Fees and Related Harms.* Cable franchise agreements with local or state governments frequently are written to authorize the use of a "cable system" as defined by federal law, and the definition of "cable system" under the Communications Act of 1934, as amended (the "Act"), excludes "a facility of a common carrier, which is subject, in whole or in part, to" Title II, except in certain instances. 47 U.S.C. § 522(7). A significant percentage of state and local franchising authorities impose separate franchising requirements on cable systems and telecommunications services. *See, e.g.,* D.C. Code Ann. § 34-2004 (providing authority to impose separate franchising obligations on providers of "telecommunications service"). The Order on Review does not expressly prohibit franchising authorities from seeking additional franchise fees from or imposing additional franchise requirements on cable broadband providers, asserting only that the FCC "do[es] not believe" such fees would be justified. Order ¶ 433 n.1285. State and local governments are not bound by the FCC's "beliefs," however, and

the FCC's recognition of the need to address this concern illustrates its acknowledgement that the problem is real. Accordingly, the FCC's reclassification decision inevitably will lead to disputes over whether cable operators must obtain separate franchises and pay new franchise fees for the portions of their networks used to provide broadband Internet access service. *See, e.g.*, Hightower Decl. ¶ 20.

28. The actual and potential application of these franchise fees and other requirements as a result of the FCC's Order will cause immediate, irreparable harms for NCTA's members. NCTA's members will face legal challenges to their facilities already deployed in the public rights-of-way, and also will be forced to devote significant time and resources to complying with or disputing the application of new franchise fees and requirements. These burdens will significantly interfere with the deployment of broadband facilities and other business initiatives. Moreover, any payment of these franchise fees will slow the deployment of broadband facilities and other business initiatives by reducing the capital available for such efforts (particularly for smaller providers), or will be passed on to consumers in the form of higher retail rates, thus resulting in a loss of customer goodwill. These delays in deployment and losses of goodwill cannot meaningfully be offset by some later monetary award. And if the FCC's reclassification decision is ultimately vacated, efforts by NCTA's members to

recoup additional franchise fees paid in the interim period will be costly, time-consuming, and potentially unsuccessful.

29. *State Regulatory Fees and Related Harms.* The Order's reclassification decision also will result in immediate, irreparable harms for NCTA's members related to demands by state authorities for and payment of state regulatory fees related to the provision of telecommunications services that have never previously applied to cable broadband service. Some states, such as South Carolina and Vermont, assess both intrastate and interstate telecommunications service revenues for purposes of collecting contributions to their respective state universal service funds. *See Office of Regulatory Staff v. S.C. Pub. Serv. Comm'n*, 374 S.C. 46 (S.C. 2007) (upholding state universal service contribution requirements assessed on interstate revenues); Vermont Public Service Board, *Interpretation of Act No. 197 of 1994 Relating to the Vermont Universal Service Fund*, §§ 201, 301, *available at* http://psb.vermont.gov/sites/psb/files/projects/vusf/FirstRuling.pdf (interpreting Vermont law as authorizing assessment of state universal service contributions on various "interstate and international" services). State authorities have demonstrated that they have an interest in assessing such fees and have suggested that the FCC's preemption authority may be limited. *See* Steve Zind, *Under New FCC Standard, 30 Percent of Vermonters Now Lack Broadband*, Vermont Public Radio, Feb. 3, 2015, *available at*

http://digital.vpr.net/post/under-new-fcc-standard-30-percent-vermonters-now-lack-broadband (quoting the Executive Director of the Vermont Telecommunications Authority as stating that reclassification of broadband will give Vermont "the ability to assess a universal service fee on broadband services"); *see also* Letter of the National Association of Regulatory Utility Commissioners to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 7 n.13 (filed Nov. 6, 2014) (asserting that "Congress reserved State authority to impose universal service" obligations on telecommunications service providers notwithstanding federal preemption authority). Accordingly, NCTA members providing broadband Internet access service in those states suddenly will be subject to demands to pay substantial new regulatory fees to support state universal service funds. *See, e.g.*, Hightower Decl. ¶ 21.

30. The actual and potential application of these state regulatory fees as a result of the FCC's Order will cause immediate, irreparable harms for NCTA's members. NCTA's members will be forced to devote significant time and resources to complying with or disputing state efforts to impose regulatory fees that are subject to preemption under the Order, and these burdens will significantly interfere with the deployment of broadband facilities and other business initiatives. Moreover, any payment of these fees will slow the deployment of broadband facilities and other business initiatives by reducing the capital available for such

efforts (particularly for smaller providers), or will be passed on to consumers in the form of higher retail rates, thus resulting in a loss of customer goodwill. These delays in deployment and losses of goodwill cannot meaningfully be offset by some later monetary award. And if the FCC's reclassification decision is ultimately vacated, efforts by NCTA's members to recoup additional regulatory fees paid in the interim period will be costly, time-consuming, and potentially unsuccessful.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED: May 1, 2015

Steven F. Morris

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

DECLARATION OF STEVEN NEU

DECLARATION OF STEVEN NEU,
OWNER OF MOUNTAIN ZONE BROADBAND

I, Steven Neu, hereby state as follows:

1. I am owner and manager of Mountain Zone Broadband ("Mountain Zone").

2. Mountain Zone is a small broadband Internet access service and cable television provider based in Alpine, Texas. Founded in 1957, Mountain Zone serves rural counties in west Texas. The company has systems in Brewster, Presidio, Jeff Davis, Reeves, Culberson, and Terrell Counties. The population density in the counties Mountain Zone serves is just 1.7 people per square mile.

3. Mountain Zone's seven cable and two wireless networks offer broadband Internet access and cable television service to about 2,139 customers. Mountain Zone does not offer telephone service.

4. Mountain Zone has two employees who are primarily involved with its broadband Internet access and cable television service, and six total employees. None of Mountain Zone's employees works solely on regulatory compliance matters.

5. In the past decade, the company has invested in excess of $400,000 in these networks, in reliance on the light-touch regulatory framework the FCC has to date applied to broadband Internet access and cable television service. Mountain Zone would not have invested so much money if the industry had been more

heavily regulated, and will likely have to reduce its investment now that the FCC has applied heavier regulations to broadband Internet access service.

6. Mountain Zone understands that the FCC's Open Internet Order ("Order") reclassified broadband Internet access providers like Mountain Zone as common carriers under Title II of the Telecommunications Act of 1934. Mountain Zone has never been regulated under Title II and has no experience complying with Title II requirements. Mountain Zone's reclassification as a Title II carrier will thus impose significant new burdens on the company. Mountain Zone may have to hire additional employees to manage compliance, which will be particularly burdensome given the company's small number of employees and the absence of any employees who work solely on regulatory compliance efforts.

Irreparable Harm from CPNI Requirements

7. Mountain Zone understands that the FCC has used its authority to forbear, for now, from applying some regulations implementing Title II to broadband Internet access providers. But the FCC did not forbear from applying 47 U.S.C. §222, which requires telecommunications providers to protect Customer Proprietary Network Information ("CPNI"). To the extent that forbearance does not entirely exempt Mountain Zone from CPNI requirements, requiring compliance with those procedures will harm Mountain Zone irreparably.

8. The Order states that §222 imposes a duty on carriers to protect the confidentiality of their customers' CPNI. Order ¶53. To the extent this duty mandates that telecommunications carriers require customers to provide passwords during support calls or photo identification during in-store visits before disclosing CPNI, *see* 47 C.F.R. §64.2010(b), (d), it would impose serious and irreparable harm on small carriers, like Mountain Zone, that have strong personal relationships with their customers. Because Mountain Zone has a small customer base, and offers responsive service—including letting customers call service technicians directly—Mountain Zone's customers develop personal, informal relationships with the company and its staff. We personally know almost every one of our customers. Those close customer relationships create loyalty that the company cultivates to ensure a loyal customer base that stays with the company.

9. Mandating that customers provide "authentication"—*e.g.*, passwords or other forms of identification—will irreparably harm these customer relationships. Many customers will view the new procedures as an imposition, inconsistent with the close relationships the company has built with them over the years. Complicated authentication procedures, moreover, will cause many customers to perceive Mountain Zone as another faceless company that does not make a significant effort to know and have relationships with its customers. That

is especially true for older customers, who may be skeptical of authentication procedures that require disclosure of personal information.

10. Impairment of close customer relationships may cause Mountain Zone to lose customers and market share. Mountain Zone's customers choose their broadband Internet access and cable television service based not just on price, but also on their personal relationships with the company. For example, Mountain Zone competes with a Title II carrier in its service area that subjects customers to a rigorous procedure to sign up for service. That process frustrates many people, who instead choose to become customers of our company.

11. Losses of goodwill and customers are irreparable: Relationships that are damaged are hard to repair; goodwill that is lost is hard to retrieve; and winning back customers who switch or discontinue service is a rarity in this industry. There would be no way for Mountain Zone to make up for those losses once they are incurred.

12. The FCC emphasized in the Order that § 222 requires carriers to take reasonable precautions to protect CPNI. Order ¶53. It also offered, as a warning, the example of a telecommunications carrier that was found in violation of § 222 for failing to put in place security measures for its computer databases containing CPNI. *Id.* Even though Mountain Zone has never had any problem keeping

customer information safe, §222 may require Mountain Zone to upgrade the security of its computer databases, which will irreparably harm the company.

13. Mountain Zone currently has a single, consolidated database that includes each customer's identifying information, such as name, phone number, and service address, as well as information the FCC might in the future construe as CPNI, such as geographic location, service plan, service level, and bandwidth usage. To isolate CPNI from other data and limit access, Mountain Zone would have to upgrade its software systems and potentially move to a new, costly system. New, untested software may result in computer crashes or other bugs. Mountain Zone will also have to re-train its users in the new software. That does not merely impose financial harm; it also threatens goodwill. Transitions and revisions to computer systems are always imperfect at first. That may result in reduced service and support quality, which would erode customer goodwill.

14. Any harm to Mountain Zone from upgrading its computer systems would be irreparable. Mountain Zone would never be able to recoup the cost of new software. More importantly, if customer service suffers while the computer system is being upgraded, Mountain Zone will never be able to recover the lost goodwill.

15. Mountain Zone currently has no formal policies and procedures for handling CPNI. It will have to develop such policies from scratch and train its

employees to follow them. That may require hiring additional personnel as well as the involvement of legal counsel. Worse still, because the FCC has yet to devise specific rules for how broadband Internet access providers should handle CPNI, the whole endeavor may be a wasted effort. Mountain Zone must implement policies now—it cannot risk non-compliance—but may have to put in place entirely new policies when the FCC determines specific requirements. Mountain Zone would never be able to recoup the cost of these unnecessary efforts.

16. Mountain Zone cannot spread the expenses of those compliance efforts over a large customer base so as to reduce the impact on individual bills. If Mountain Zone had to hire just one new employee to manage compliance efforts—to say nothing of new hardware and software—that would require significant increases in the bills of the company's 2,139 customers. To the extent Mountain Zone cannot pass those costs along, the financial harm will be unrecoverable and irreparable. To the extent Mountain Zone attempts to pass those expenses through, it will lose some customers. And it may lose many customers to larger competitors who can spread compliance costs among a large base of customers, minimizing any impact on individual bills. Even if Mountain Zone were eventually able to lower prices to prior levels, customers who have left once are unlikely to come back.

17. The uncertainty regarding the extent and scope of these prohibitions exacerbates the irreparable harm. Although the FCC has decided to forbear from certain specific CPNI regulatory requirements, it has also indicated that §222 itself imposes certain duties in connection with CPNI. Order ¶¶462, 467. The FCC does not specify what requirements are necessary for statutory compliance. Mountain Zone would face enormous uncertainty about which rules it must obey and which rules are merely regulatory additions that have been forborne.

18. Any misjudgment by Mountain Zone about the statute's requirements could have catastrophic consequences. Mountain Zone understands that the FCC can impose large penalties—sometimes millions of dollars—for violations of CPNI rules. Mountain Zone also understands that the FCC did not forbear from provisions of Title II that create a private right of action against carriers who violate other provisions of the statute. Mountain Zone would face grave risks as a result. Even hiring counsel—which can be prohibitive for a small company—cannot wholly insulate Mountain Zone from those risks because there is so much uncertainty about what §222 requires of broadband Internet access providers.

19. Mountain Zone understands that the FCC has decided to forbear from applying other requirements under Title II. But the FCC has created enormous regulatory uncertainty in the process. For example, the Order forbears, "for now," from requiring broadband Internet access providers to contribute to the Universal

Service Fund, but does not forbear from applying Title II provisions that presuppose a provider's contributions into the fund. *Id.* ¶¶57-58, 488; *see* 48 U.S.C. §254(h)(1)(A). The FCC also instructs providers to protect customer privacy without giving concrete guidance on how to do so. Order ¶¶462, 467, 468, 470. The resulting patchwork leaves Mountain Zone uncertain about its new obligations under Title II, and leaves the door open for the FCC to impose additional obligations and fees in the near future.

20. Uncertainty surrounding the FCC's forbearance from applying certain Title II provisions will jeopardize Mountain Zone's upgrade plans. Mountain Zone is constantly upgrading the circuits that connect its network to the broader Internet. That is an extremely expensive proposition in rural areas, like the counties Mountain Zone serves. To the extent that the new Title II rules create uncertainty about future compliance burdens, Mountain Zone will have to err on the side of caution before committing to major long-term capital projects.

21. Harm from forgone upgrades and capital projects will be irreparable—for Mountain Zone and its customers. For example, if Mountain Zone delays upgrading the circuits that connect its network to the broader Internet, Mountain Zone will give up opportunities to win new customers and frustrate its existing customers that demand more bandwidth for their online activities. It will never be able to calculate the cost of those forgone opportunities. And many

customers—mostly in smaller, rural communities—will be deprived of those services, aggravating the digital divide between them and their urban counterparts.

Irreparable Harm from Increased Pole Attachment Rates

22. Mountain Zone understands that Texas does not regulate pole attachment rates at the state level, and that utilities calculate the pole attachment rates Mountain Zone pays based on federal formulas. Mountain Zone also understands that it currently pays rates based on formulas applicable to "cable services" and that reclassification may cause utilities to apply formulas applicable to "telecommunications services," which may result in higher rates.

23. Mountain Zone will be harmed by any increases in pole attachment rates. Mountain Zone has pole attachment agreements with American Electric Power and El Paso Electric. If those utilities raised Mountain Zone's rates to the level they apply to telecommunication services, the company would incur significant additional expenses. Mountain Zone anticipates a high probability of such rate increases, because utilities in Texas requested such increases recently.

24. Increased pole attachment rates will have a particularly harmful effect on operators in rural areas, like Mountain Zone. Population densities in rural areas are low, and correspondingly the number of customers served per pole is low. Utilities charge Mountain Zone a yearly fee for each pole attachment, and

consequently the company pays a higher fee per customer than cable operators who serve more urban areas.

25. Harm to Mountain Zone from increased pole attachment fees will be irreparable. If Mountain Zone does not pass along increased fees to its customers, Mountain Zone will have a difficult time spending even more capital to properly maintain and repair its network. If Mountain Zone does pass along increased fees to its customers, customer goodwill will be eroded.

I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct.

April 30, 2015

Steven Neu
307 E Ave. E
Alpine, TX 79830

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

DECLARATION OF W. THOMAS SIMMONS

DECLARATION OF W. THOMAS SIMMONS

I, W. Thomas Simmons, hereby state as follows:

1. I am Senior Vice President of Public Policy at Midcontinent Communications ("Midcontinent"). I have served in various capacities at Midcontinent over the past 27 years ranging from Vice President and General Manager of the radio group to Vice President and General Manager of telephone services. Midcontinent is a mid-sized communications company that for over 40 years has provided a variety of video, voice, and high-speed broadband Internet services in cities and rural areas throughout North Dakota and South Dakota, and parts of Minnesota and Wisconsin. Midcontinent's service area includes over 335 communities serving approximately 300,000 customers. The communities we represent vary in size from densities of 5 to 116 homes per mile of cable plant, and their population ranges from less than 125 in Dodge, North Dakota, to our largest community, Sioux Falls, South Dakota, which has a population of more than 160,000.

2. If the FCC's Open Internet Order is permitted to go into effect—along with the Order's reclassification of broadband Internet access service ("BIAS") as a "telecommunications service" under Title II of the Communications Act of 1934, as amended (the "Act")—Midcontinent will suffer immediate, significant, and irreparable harm in a several respects.

3. ***Burdens of Compliance with Sections 201 and 202 and Related Regulatory Requirements.*** First and foremost, the sheer uncertainty surrounding this new regulatory regime will have a profound effect on Midcontinent's business. The Order imposes intrusive new federal oversight of nearly every aspect of our business with only the most minimal guidance on how that oversight will be applied. For example, in addition to its three "bright line" open Internet rules, the Order adopts a "no-unreasonable interference/disadvantage standard" pursuant to Sections 201 and 202 of the Act. Under this standard, the FCC will prohibit on a case-by-case basis all broadband provider practices that "unreasonably interfere with or unreasonably disadvantage the ability of consumers to reach the Internet content, services, and applications of their choosing or of edge providers to access consumers using the Internet." Order ¶ 135. Although recognizing that "vague or unclear regulatory requirements could stymie rather than encourage innovation," the Order provides only a vague, "non-exhaustive list of factors" that the FCC will consider in deciding whether a broadband provider's practices might run afoul of this rule. *Id.* ¶¶ 138-45. This amorphous standard casts a cloud on all of Midcontinent's mid- and long-term business planning, creating a need for new layers of internal and external scrutiny that Midcontinent has never previously required and, as a medium-size business operating a massively complicated broadband network, can scarcely afford.

4. Further, this vague "no unreasonable interference/disadvantage standard" will create the enormous practical problem of developing a recordkeeping system to assure and document compliance with the new standard. Determining the types of business records that must be created and maintained to demonstrate Midcontinent has not unreasonably interfered with or disadvantaged consumers or edge providers will be difficult and time consuming. How does a BIAS provider document a negative (that we have not unreasonably interfered or disadvantaged)? This will require substantial investments of time, equipment and resources to design and create systems to accumulate, organize and maintain potentially crippling amounts of data. On its face, this may seem like an expected and necessary cost associated with any regulation, but in this case – assembling and storing data to demonstrate compliance through proof of a negative – has far-reaching practical effects and costs.

5. ***Burdens of Compliance with Section 222.*** Midcontinent will also suffer substantial unrecoverable costs implementing procedures and training its staff to comply with certain other requirements imposed by Title II. Section 222 of the Communications Act, for instance, imposes a general duty on all telecommunication carriers "to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers"; imposes certain specific restrictions on the use—

including for marketing purposes—of "customer proprietary network information" ("CPNI") without customer approval; and requires telecommunications carriers to disclose CPNI to "any person designated by the customer" upon the customer's request. 47 U.S.C. § 222. The Order forbears from applying the FCC's regulations under Section 222, but it does not "forbear from applying [S]ection 222" itself. Order ¶ 462. Section 222 will therefore impose requirements on Midcontinent immediately when the Order takes effect. We understand how these requirements apply to our existing telecommunications services, but it is not at all clear how the requirements apply to newly reclassified Internet access services.

6. The FCC has adopted detailed authentication and notification regulations that prevent telecommunications carriers from releasing certain customer data based on customer-initiated requests unless specific password procedures are followed and that require "immediate" customer notification when account changes are made. *See* 47 C.F.R. § 64.2010. These regulations also impose mandatory law-enforcement and customer notification requirements in the event of a breach of the carrier's CPNI. *See id.* § 64.2011. Although the Order does not apply these regulations directly to Midcontinent's broadband service, the FCC has indicated that these procedures are the "minimum requirements" to comply with the duty in Section 222(a) "to protect the confidentiality of [their customers'] proprietary information," which will apply immediately to

Midcontinent's service, if the Order is not stayed. *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers Use of Proprietary Network Information and Other Customer Information*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 ¶ 64 (2007). Indeed, the FCC expects telecommunications carriers to "take additional steps" to protect CPNI where "feasible." *Id.*

7. Midcontinent already has practices and procedures in place to protect its customers' account information and other data, but after reclassification it will have no choice but to implement the specific procedures that the FCC has indicated represent the minimum required to satisfy Midcontinent's new Section 222 duties with respect to BIAS customers and evaluate whether any "additional steps" to protecting its customers' private data are feasible, or risk facing an FCC enforcement action in the future.

8. Implementing these new procedures and training our staff will come at a substantial cost to Midcontinent. That includes the time and money that will have been wasted (and completely unrecoverable) if the Order is vacated. But, just as importantly, those costs include the loss of goodwill caused by authentication protocols that, in our experience, customers tend to favor in the abstract but view as inconvenient obstacles and bureaucratic foolishness when actually subjected to them. That will be particularly true when applied to Midcontinent's BIAS

customers for whom certain backup verification procedures may not be available. For example, in the voice context, when a customer has lost her password and is unwilling to provide the last 4 digits of her social security number, the procedures allow for a phone call to the phone number of record. 47 C.F.R. § 64.2010(b). That procedure works well when the telecommunication provider is, in fact, providing telephone service, and therefore the customer is guaranteed to have a current phone number of record. It will prove extremely frustrating and difficult in the BIAS context where the customer has not provided a phone number, or the phone number provided has since changed.

9. Moreover, if the Order is not stayed, certain Midcontinent business practices will be immediately prohibited. Section 222 defines CPNI as "information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship." 47 U.S.C. § 222(h)(1)(A). "Except as required by law or with the approval of the customer," a telecommunications carrier may "use, disclose, or permit access" to "individually identifiable" CPNI only in its provision of (1) "the telecommunications service from which such information is derived," or (2) "services necessary to, or used in,

the provision of such telecommunications services." *Id.* § 222(c)(1). Again, these requirements will apply to Midcontinent's practices immediately.

10. In the voice context, the FCC has concluded that "the best interpretation" of Section 222(c)(1) affords carriers the right to use CPNI for marketing related offerings within their customers' existing service, but does not permit the use of CPNI to market "categories of service" to which its customers do not already subscribe. *Implementation of the Telecommunications Act of 1996*, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, ¶ 35 (1998). Without further guidance from the FCC, Midcontinent has no choice but to apply this "best interpretation" of Section 222(c)(1) to the BIAS context. Doing so, however, would require Midcontinent immediately to stop using CPNI to market non-BIAS services to its BIAS-only subscribers unless and until it has received customer approval for such practices—for example, targeting its BIAS-only subscribers for offers of telephone or cable television service, since the "type" of telecommunications service a customer subscribes to (here, BIAS-only service) is included in the statutory definition of CPNI.

11. This situation is exacerbated by the absence of any safe harbor, which means that even conduct that is consistent with the voice rules may be deemed insufficient with respect to broadband. Midcontinent therefore can either wait to seek customer approval for newly prohibited marketing practices until the FCC

specifies an approval method for doing so (and thus forgo these practices until then) or it can implement new approval procedures at substantial costs only to risk the FCC finding those procedures inadequate in the future.

12. Finally, Section 222(c)(2) requires a telecommunications carrier to "disclose [CPNI], upon affirmative written request by the customer, to any person designated by the customer." 47 U.S.C. § 222(c)(2). Under the plain language of that provision, Midcontinent will need to institute procedures for responding to disclosure requests made by its BIAS customers, even in advance of the adoption of any BIAS-specific rules guiding that process. That likely will include, at a minimum, implementing procedures to track and respond to requests for disclosure; training employees to respond to such requests; and maintaining records of such requests and responses in order to demonstrate compliance.

13. Moreover, due to the distributed nature of the Internet and frequently used tracking techniques by other Internet companies (*e.g.*, cookies, web browser finger-printing), comprehensive records our customers' Internet activities may be captured and stored by companies and services that have no relation to Midcontinent (*e.g.*, Facebook, Google, or Amazon). While Midcontinent already has practices and procedures in place to protect its customers' data, the Order subjects Midcontinent's broadband service for the first time to new and ambiguous requirements under Section 222, under which parties might attempt to attribute the

disclosure of such sensitive information to Midcontinent in these circumstances. To protect against such false data breach attributions, Midcontinent will be forced to purchase new equipment, implement significant new monitoring and audit procedures, and hire and train additional staff, to ensure that all network transmission equipment that even temporarily collect and/or store information about those transmissions are secured against all forms of unauthorized access and are actively monitored to detect such access.

14. ***Fees, Taxes, and Related Burdens Resulting from the FCC's Order.*** Reclassification of BIAS will also result in immediate, irreparable harms for Midcontinent related to its pole attachment agreements and potential demands for new State taxes, among other potential fees.

15. *Pole Attachment Agreements.* Midcontinent has entered into pole attachment agreements with approximately 50 public utilities and communities that grant Midcontinent the right to attach equipment to approximately 120,000 utility poles across three states to deliver cable service and related non-telecommunications services to its customers. As is customary, some of these agreements specify different attachment rates for cable services and for telecommunications services. Section 224 of the Act provides different formulas for calculating "just and reasonable" pole attachment rates for "cable service" and for "telecommunications services"; rates for "telecommunications services" are

permitted to be higher. *Compare* 47 U.S.C.§ 224(d) (cable service rate formula), *with id.* § 224(e) (telecommunications services rate formula); *see also* Order ¶ 481 (stating that the "cable rate" is the "lower rate" under the statutory formulas). Reclassification will therefore permit utility providers to increase the rates they charge Midcontinent on a significant proportion of its pole attachment agreements. As utility pole owners begin charging these higher rates, Midcontinent will be forced either to pursue costly utility-by-utility litigation to challenge these increases, or to withhold payment until judicial review of the Order is complete. Utility pole owners typically respond to these kinds of measures, however, by refusing to process new attachment permits until all amounts are paid in full, which would significantly impede Midcontinent deployment of broadband facilities. These disputes also would require Midcontinent to retain outside counsel to review agreements and challenge the utilities' demands for higher rates at significant cost to the company.

16. *State and Local Taxes – South Dakota.* Midcontinent has significant operations in South Dakota, which imposes unique taxes on "telecommunications services." *See* South Dakota Codified Law 10-33A and 49-1A. These taxes have never previously been applied to BIAS, but if the Order takes effect, Midcontinent may face imposition of these new taxes on BIAS services and facilities. Notably, while the Order claims that the Internet Tax Freedom Act ("ITFA") prohibits states

and localities from imposing "[t]axes on Internet access," Order ¶ 430, South Dakota's taxes were "grandfathered" under the ITFA. 47 U.S.C. § 151 note, ITFA, § 1105(10)(C). These additional taxes—and the substantial costs associated with challenging them—will not be readily recoverable in the event the Order is vacated.

17. *State and Local Taxes – North Dakota.* A similar situation exists for a more limited period of time in North Dakota where Midcontinent also has significant operations. North Dakota also imposes unique taxes on "telecommunications services," *see* North Dakota Century Code 49-21, and its taxes on Internet access likewise were "grandfathered" under the ITFA, 47 U.S.C. § 151 note, ITFA, § 1105(10)(C). However, North Dakota has recently passed legislation to repeal its Internet access taxes effective in 2017. Accordingly, if the Order takes effect, Midcontinent may face imposition of new taxes on BIAS services in North Dakota until the effective date of such repeal. Any additional North Dakota taxes will not be readily recoverable in the event the Order is vacated.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED: May 1, 2015

W. Thomas Simmons,
Senior Vice President of Public Policy

DECLARATION OF W. THOMAS SIMMONS

I, W. Thomas Simmons, hereby state as follows:

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permitted to be higher. *Compare* 47 U.S.C.§ 224(d) (cable service rate formula), *with id.* § 224(e) (telecommunications services rate formula); *see also* Order ¶ 481 (stating that the "cable rate" is the "lower rate" under the statutory formulas). Reclassification will therefore permit utility providers to increase the rates they charge Midcontinent on a significant proportion of its pole attachment agreements. As utility pole owners begin charging these higher rates, Midcontinent will be forced either to pursue costly utility-by-utility litigation to challenge these increases, or to withhold payment until judicial review of the Order is complete. Utility pole owners typically respond to these kinds of measures, however, by refusing to process new attachment permits until all amounts are paid in full, which would significantly impede Midcontinent deployment of broadband facilities. These disputes also would require Midcontinent to retain outside counsel to review agreements and challenge the utilities' demands for higher rates at significant cost to the company.

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Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED: May 1, 2015

W. Thomas Simmons,
Senior Vice President of Public Policy

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

DECLARATION OF ROBERT WATSON

DECLARATION OF ROBERT WATSON,
OWNER OF WATSON CABLE

I, Robert Watson, hereby state as follows:

1. I am owner of Watson Cable Company ("Watson").

2. Watson is a small broadband Internet access service and cable television provider based in Warner Robins, Georgia. Founded in 1970, Watson serves urban and suburban areas in middle Georgia. It has cable systems in Macon and Warner Robins, Georgia. The company also serves Robins Air Force Base.

3. Watson has about 300 residential video customers and 200 broadband Internet customers in Warner Robins. It has about 200 video customers and 36 broadband Internet customers in Macon. Watson does not offer telephone service.

4. Watson has three employees working in operations and two employees providing customer support. None of Watson's employees works solely on regulatory compliance matters.

5. In the past decade, the company has invested approximately $800,000 in these networks, in reliance on the light-touch regulatory framework the FCC has to date applied to broadband Internet access and cable television service. Watson would not have invested so much money if the industry had been more heavily regulated, and will likely have to reduce its investment now that the FCC has applied heavier regulations to broadband Internet access service.

6. Watson understands that the FCC's Open Internet Order ("Order") reclassified broadband Internet access providers like Watson as common carriers under Title II of the Telecommunications Act of 1934. Watson has never been regulated under Title II and has no experience complying with Title II requirements. Watson's reclassification as a Title II carrier will thus impose significant new burdens on the company. Watson may have to hire additional employees to manage compliance, which will be particularly burdensome given the company's small number of employees and the absence of any employees who work solely on regulatory compliance efforts.

Irreparable Harm from CPNI Requirements

7. Watson understands that the FCC has used its authority to forbear, for now, from applying some regulations implementing Title II to broadband Internet access providers. But the FCC did not forbear from applying 47 U.S.C. § 222, which requires telecommunications providers to protect Customer Proprietary Network Information ("CPNI"). To the extent that forbearance does not entirely exempt Watson from CPNI requirements, requiring compliance with those procedures will harm Watson irreparably.

8. The Order states that § 222 imposes a duty on carriers to protect the confidentiality of their customers' CPNI. Order ¶53. To the extent this duty mandates that telecommunications carriers require customers to provide passwords

during support calls or photo identification during in-store visits before disclosing CPNI, *see* 47 C.F.R. §64.2010(b), (d), it would impose serious and irreparable harm on small carriers, like Watson, that have strong personal relationships with their customers. Because of Watson's small customer base and its dedicated customer service staff that offers live support, Watson's customers develop personal, informal relationships with the company. Those close customer relationships create loyalty that the company cultivates to ensure a loyal customer base that stays with the company.

9. Mandating that customers provide "authentication"—*e.g.*, passwords or other forms of identification—will irreparably harm these customer relationships. Many customers will view the new procedures as an affront to the close relationship the company has developed with them over the years. And most do not want to be bothered to jump through additional hoops when they need help with their service. Complicated authentication procedures, moreover, will cause many customers to perceive Watson as another faceless company that does not make a significant effort to know and have relationships with its customers. Many of Watson's customers will also have trouble remembering passwords, and will be skeptical of authentication procedures that require disclosure of personal information.

10. Impairment of close customer relationships may cause Watson to lose customers and market share. Watson's customers choose their broadband Internet access and cable television service based not just on price, but also on their personal relationships with the company. Personal customer relationships are Watson's comparative advantage. Watson competes with larger providers in 75% of its service area, and personalized customer service helps Watson attract and retain customers who would otherwise go to those competitors.

11. Losses of goodwill and customers are irreparable: Relationships that are damaged are hard to repair; goodwill that is lost is hard to retrieve; and winning back customers who switch or discontinue service is a rarity in this industry. There would be no way for Watson to make up for those losses once they are incurred.

12. The Order states that §222 imposes restrictions on carriers' ability to use, disclose, or permit access to customers' CPNI without their consent. Order ¶462. We understand that the FCC has previously interpreted §222 to prohibit disclosing CPNI to partners or contractors when the information may be used for marketing purposes, and has suggested that any sharing of CPNI with partners or contractors may put that information at a heightened risk of disclosure. Restrictions on such sharing of information with partners or contractors will irreparably harm Watson, which contracts with another company, Momentum Telecom, to provide certain operational services.

13. Momentum Telecom works with Watson to configure and activate new service in customers' homes. Momentum Telecom also provides Watson with a second level of technical support for its network infrastructure.

14. To the extent that § 222 restricts how Watson may share CPNI with its contractors, Watson will have to restructure its relationship with Momentum Telecom. For example, it may have to renegotiate its contracts with Momentum Telecom to ensure that CPNI is never used for marketing or sales purposes, and to ensure that Momentum Telecom takes additional measures to ensure the confidentiality of CPNI. And to the extent that Watson concludes that sharing CPNI with Momentum Telecom creates a heightened risk of disclosure of CPNI, Watson may be forced to handle certain operational and technical tasks itself.

15. Having to renegotiate, or forgo entirely, its arrangement with Momentum Telecom will irreparably harm Watson. In particular, if Watson must find another provider to work with, it may not be able to secure the same favorable terms it currently enjoys with Momentum Telecom. And if it must start handling those operational activities itself, its ability to offer seamless customer service may be disrupted, for example by delays in installing new service. Watson would never be able to recoup those expenses or the lost goodwill.

16. The FCC emphasized in the Order that § 222 requires carriers to take reasonable precautions to protect CPNI. Order ¶ 53. It also offered, as a warning,

the example of a telecommunications carrier that was found in violation of § 222 for failing to put in place security measures for its computer databases containing CPNI. *Id.* Even though Watson has never had any problem keeping customer information safe, § 222 may require Watson to upgrade the security of its computer databases, which will irreparably harm the company.

17. Watson currently stores customer information, such as name, phone number, and service address, as well as information the FCC might in the future construe as CPNI, in the same database it uses for its billing system. To isolate CPNI from other data and limit access, Watson would have to upgrade its software systems and potentially move to a new, costly system. New, untested software may result in computer crashes or other bugs. Watson will also have to re-train its users in the new software. That does not merely impose financial harm; it also threatens goodwill. Transitions and revisions to computer systems are always imperfect at first. That may result in reduced service and support quality, which would erode customer goodwill.

18. Any harm to Watson from upgrading its computer systems would be irreparable. Watson would never be able to recoup the cost of new software. More importantly, if customer service suffers while the computer system is being upgraded, Watson will never be able to recover the lost goodwill.

19. Moving to Title II regulation will also impose irreparable harm to the extent § 222 is construed to prohibit carriers from using CPNI except to provide telecommunications service or related services, or prohibits the use of CPNI for marketing purposes, except within the same "categories of service" to which a customer is already subscribed. Imposing these restrictions on Watson will prevent it from efficiently marketing its services. Watson will be, in essence, forced to choose between violating an uncertain law or making unnecessary changes to the way it markets its products.

20. Watson does very little marketing. Its primary form of marketing is a direct mailing it sends two to three times per year to existing customers and non-customers. The company sends different letters to existing customers than to non-customers. Watson has determined through experience that direct mailing is the most efficient way of reaching its small service area and customer base. To the extent that Title II restricts how Watson can use CPNI to market to its existing customers, Watson will have to modify or forgo certain marketing opportunities. For example, Watson would be unable to send a direct mailing advertising a new television package to the broadband customers who are most likely to want to subscribe to it.

21. Those foregone marketing opportunities will irreparably harm Watson. The company can never recoup revenues or market share it loses from

lost opportunities to sign up customers for new levels of service. And it would be impossible to quantify the impact on its competitive position.

22. Watson currently has no formal policies and procedures for handling CPNI. It will have to develop such policies from scratch and train its employees to follow them. That may require hiring additional personnel as well as the involvement of legal counsel. Worse still, because the FCC has yet to devise specific rules for how broadband Internet access providers should handle CPNI, the whole endeavor may be a wasted effort. Watson must implement policies now—it cannot risk non-compliance—but may have to put in place entirely new policies when the FCC determines specific requirements. Watson would never be able to recoup the cost of these unnecessary efforts.

23. Watson cannot spread the expenses of those compliance efforts over a large customer base so as to reduce the impact on individual bills. If Watson had to hire just one new employee to manage compliance efforts—to say nothing of new hardware and software—that would require significant increases in the bills of the company's 600 customers. To the extent Watson cannot pass those costs along, the financial harm will be unrecoverable and irreparable. To the extent Watson attempts to pass those expenses through, it will lose some customers. And it may lose many customers to larger competitors who can spread compliance costs among a large base of customers, minimizing any impact on individual bills. Even

if Watson were eventually able to lower prices to prior levels, customers who have left once are unlikely to come back.

24. The uncertainty regarding the extent and scope of these prohibitions exacerbates the irreparable harm. Although the FCC has decided to forbear from certain specific CPNI regulatory requirements, it has also indicated that § 222 itself imposes certain duties in connection with CPNI. Order ¶¶ 462, 467. The FCC does not specify what requirements are necessary for statutory compliance. Watson would face enormous uncertainty about which rules it must obey and which rules are merely regulatory additions that have been forborne.

25. Any misjudgment by Watson about the statute's requirements could have catastrophic consequences. Watson understands that the FCC can impose large penalties—sometimes millions of dollars—for violations of CPNI rules—and has done so. Watson also understands that the FCC did not forbear from provisions of Title II that create a private right of action against carriers who violate other provisions of the statute. Watson would face grave risks as a result. Even hiring counsel—which can be prohibitive for a small company—cannot wholly insulate Watson from those risks because there is so much uncertainty about what § 222 requires of broadband Internet access providers.

26. Watson understands that the FCC has decided to forbear from applying other requirements under Title II. But the FCC has created enormous

regulatory uncertainty in the process. For example, the Order forbears, "for now," from requiring broadband Internet access providers to contribute to the Universal Service Fund, but does not forbear from applying Title II provisions that presuppose a provider's contributions into the fund. Order ¶¶57-58, 488; *see* 48 U.S.C. §254(h)(1)(A). The FCC also instructs providers to protect customer privacy without giving concrete guidance on how to do so. Order ¶¶462, 467, 468, 470. The resulting patchwork leaves Watson uncertain about its new obligations under Title II, and leaves the door open for the FCC to impose additional obligations and fees in the near future.

27. Uncertainty surrounding the FCC's forbearance from applying certain Title II provisions will jeopardize Watson's upgrade plans. Watson is currently in the process of upgrading the circuits that connect its network with the wider Internet. It is also looking into upgrading its Macon, Georgia, network from analog to digital television. Such upgrades require substantial upfront capital expenditures. Watson will have to take on debt for the capital expenditures, and commit to servicing it with revenues remaining after paying for operating expenses and overhead, like compliance costs. To the extent that the new Title II rules create uncertainty about future compliance burdens, Watson will have to err on the side of caution before committing to major long-term capital projects.

28. Harm from forgone upgrades and capital projects will be irreparable for both Watson and its customers. For example, if Watson delays rolling out higher broadband Internet access speeds or digital television, Watson will give up opportunities to win new customers, or entice existing customers to purchase more services. It will never be able to calculate the cost of those forgone opportunities. And many customers—including those in Warner Robins Air Force Base—will be deprived of those services.

Irreparable Harm from Increased Pole Attachment Rates

29. Watson understands that Georgia does not regulate pole attachment rates at the state level, and that utilities calculate the pole attachment rates Watson pays based on federal formulas. Watson also understands that it currently pays rates based on formulas applicable to "cable services" and that reclassification may cause utilities to apply formulas applicable to "telecommunications services," which may result in higher rates.

30. Watson will be harmed by any increases in pole attachment rates. Watson has pole attachment agreements with Georgia Power, Flint EMC, and Southern Rivers Energy. Watson's pole attachment fees are already high and a substantial source of costs. Watson would have to pass on any increases to pole attachment fees to customers.

31. Harm to Watson from increased pole attachment fees will be irreparable. Watson will have to pay any increases immediately—if it withheld fees some utilities would remove its equipment from their poles. If Watson does not pass along increased fees to its customers, Watson will have a difficult time spending even more capital to properly maintain and repair its network. If Watson does pass along increased fees to its customers, customer goodwill will be eroded.

I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct.

May 1, 2015

Robert Watson

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