In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN ELEC. POWER SERV. CORP., *et al.,*	)	
	)	
Petitioners	)	
	)	
v.	)	No. 11-1146
	)	
FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,	)	
	)	
Respondents	)	

OPPOSITION OF FCC TO MOTION FOR STAY

The Federal Communications Commission opposes Petitioners' Motion for Stay of the FCC's revised pole attachment rule, 47 C.F.R. § 1.1409(e), which became effective on June 8, 2011. As demonstrated below, petitioners have not met the stringent standard for such extraordinary equitable relief.

INTRODUCTION

Pole attachment rates are the charges that owners of utility poles, including electric utility companies, assess when cable television operators, telecommunications carriers, and others attach their lines to existing utility poles. In the Communications Act, Congress directed the FCC to ensure that pole attachment rates are "just and reasonable." 47 U.S.C. § 224(b). Congress also has directed the FCC to "encourage the deployment . . . of advanced telecommunications capability to all Americans" by removing barriers to infrastructure development. 47 U.S.C. § 1302(b). In balancing these directives, the FCC amended its Rule 1.1409(e) to revise the pole attachment rate that pole owners within the agency's jurisdiction may charge telecommunications carriers. *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd 5240, 5295-5338 ¶¶ 126-220 (2011) ("*Report & Order*").[1]

Petitioners are electric power utilities that own poles subject to the Commission's revised rule. The crux of their request for a judicial stay is that telecommunications carriers generally will pay pole owners less for pole attachments under the revised rule and this "threat" of "economic loss" (Mot. at 14), coupled with a hypothesized loss of customer goodwill in the utilities' electric power businesses, will cause them irreparable harm.

Although the Commission released its pole attachment order on April 7, 2011, with an effective date of June 8, 2011,[2] petitioners waited until May 25, 2011 before seeking an administrative stay of the order before the Commission. The Commission's Wireline Competition Bureau, acting under its delegated authority, timely denied petitioners' request, concluding that petitioners had failed to establish the traditional prerequisites for obtaining such extraordinary relief. *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, DA 11-980 (WCB June 1, 2011) ("*Stay Order*") (*See* App. A).

Although the Bureau issued its stay denial on June 1, 2011 (the date by

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[1] The Federal Register version of the *Report & Order* attached to petitioners' motion (Exh. B) is only a synopsis of the order. We have attached the complete version of the order as Appendix B to this pleading.

[2] The Commission's order was adopted and publicly released on April 7, 2011, and provided that the relevant rule would become effective 30 days after Federal Register publication. *See Report & Order*, 26 FCC Rcd at 5343 ¶ 243. It was published in the Federal Register on May 9, 2011. 76 FED. REG. 26620.

which petitioners had requested a decision), petitioners inexplicably waited another six days before seeking a judicial stay from this Court. At approximately 9:30 p.m. on June 7, 2011, less than three hours before the challenged rule would go into effect, petitioners filed their stay motion with this Court. The motion did not seek emergency relief under D.C. Circuit Rule 18, and the revised pole attachment rule accordingly became effective as of June 8.

If petitioners were seeking action from the Court preserving the status quo, they would face a heavy burden of persuasion. A stay of an agency decision pending judicial review is always an "extraordinary" remedy. *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Here, however, petitioners seek even more drastic relief. Rather than asking the Court to preserve the status quo (the effect of a traditional stay), they effectively ask the Court to *alter* the status quo by suspending a rule that is currently in force.

Because petitioners fail to meet the stringent requirements that apply to stay requests, much less the even more exacting standard for obtaining the affirmative injunctive relief that petitioners seek here, their motion should be denied.

BACKGROUND

Pole Attachment Regulation

Concerned that owners of utility poles in some instances were charging cable television companies "monopoly rents" to attach cable television wires to their poles, *see Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 330 (2002), Congress in 1978 added section 224 to the Communications Act, 47 U.S.C. § 224. That provision directed the Commission to ensure that the rates, terms, and conditions for cable television systems to attach their cables to utility poles are just and reasonable. *Id.*, § 224(b)(1), (d)(1).[3]

Under section 224, a "just and reasonable" rate is tied to the "cost[]" of providing access to utility poles. *See* 47 U.S.C. § 224(d)(1) (defining "just and reasonable" rate based on "costs"). The statute itself recognizes that "cost" – an undefined term – can be interpreted in a range of ways. Thus, section 224(d)(1) defines a just and reasonable rate as ranging from a statutory minimum based on the additional costs of providing pole attachments to a statutory maximum based on the fully allocated costs that the pole owner incurs regardless of the presence of attachments.[4] In a series of orders, the Commission implemented a formula that cable television system attachers and utilities could use to determine a maximum allowable just and reasonable pole attachment rate – referred to as the "cable rate formula" – and procedures for resolving rate complaints.[5] In 1987, the Supreme Court upheld the Commission's cable rate formula against a constitutional challenge, concluding that it adequately compensates pole owners.[6]

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[3] Section 224(c) provides that the Commission will regulate pole attachments except where such matters are regulated by a state. Twenty-one states have certified that they regulate pole attachments. *See Report & Order*, 26 FCC Rcd at 5371.

[4] 47 U.S.C. § 224(d)(1); *see also* 1977 Senate Report at 19-21, *reprinted in* 1978 U.S.C.C.A.N. at 127-28.

[5] *See, e.g.*, *First Report and Order*, 68 F.C.C. 2d 1585 (1978); *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 77 F.C.C. 2d 187 (1980), *rev. denied*, *Monongahela Pwr. Co. v. FCC*, 655 F2d 1254 (D.C. Cir. 1981).

[6] *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987); *see also Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002) (upholding FCC order implement-

(footnote continued on following page)

As part of its broader effort to promote infrastructure investment and competition, Congress expanded the reach of section 224 of the Communications Act in the Telecommunications Act of 1996.[7] Among other things, Congress added "provider[s] of telecommunications service[s]" as a category of attacher entitled to pole attachments at just and reasonable rates under section 224. 47 U.S.C. §§ 224 (a)(4), (b)(1). Congress also added a new section 224(e) to the Communications Act, which provides a methodology "to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services." 47 U.S.C. § 224(e)(1)–(4). Section 224(e) provides for the determination of pole attachment rates based on "the cost of providing" space on a pole. 47 U.S.C. § 224(e)(2), (3). The statute directs how the costs should be divided, or allocated, between the pole owner and attacher, *see* 47 U.S.C. § 224(e)(2)–(3), but does not specify how such costs should be computed before allocation among the parties. Section 224(d), which the 1996 Act left unchanged, continues to govern a just and reasonable rate, based on "costs," for "any pole attachment used by a cable system solely to provide cable service." 47 U.S.C. 224(d)(3).

In 1998, the Commission adopted rules implementing the 1996 Act's new pole attachment rate formula for telecommunications carriers. *Implementation of Section 703(e) of the Telecommunications Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777 (1998), *aff'd in*

ing cable rate provision of 1996 Act against constitutional and APA challenge), *cert. denied*, 540 U.S. 937 (2003).

[7] Telecommunications Act of 1996, Pub. L. No. 95-234, 92 Stat. 33 (1978).

part, *rev'd in part*, *Gulf Power v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *rev'd*, *Nat'l Cable & Telecomms. Ass'n v. Gulf Power*, 534 U.S. 327 (2002). In upholding the Commission's action in that proceeding, the Supreme Court concluded that section 224 gives the Commission broad authority to establish just and reasonable rate levels. *See Gulf Power*, 534 U.S. at 336, 338–89. The Court specifically rejected an argument advanced by electric power utilities that "the straightforward language of [section 224's] subsections (d) and (e) establishes two specific just and reasonable rates [and] no other rates are authorized." *Id*. at 335 (citation omitted).

As a result of the statutory revisions in 1996, section 224 of the Communications Act now sets forth two separate methodologies to determine the maximum rates for pole attachments: One applies to pole attachments used by a cable television system solely to provide cable service (the cable rate formula) and the other to pole attachments used by telecommunications carriers (the "telecom rate formula"). 47 U.S.C. §§ 224(d), (e). Under section 224, pole attachments for telecommunications carriers initially were established under the cable rate formula, and were transitioned to the telecom rate formula over a five-year period. 47 U.S.C. § 224(e)(4). As the Commission initially implemented these statutory formulas, the telecom rate formula generally resulted in higher pole rental rates than the cable rate formula because the Commission elected to use a fully allocated method to apportion costs when setting the telecom rate.

The Report and Order Before the Court

On April 7, 2011, following public notice and comment, the Commission issued its *Report & Order* "comprehensively revis[ing]" the pole attachment rules.

Among the new rules adopted in the *Report & Order*, the Commission revised 47 C.F.R. § 1.1409(e), the telecom rate rule that petitioners now ask this Court to suspend pending a decision on the merits of their petition for review.

Citing Congress's directive under 47 U.S.C. § 1302(b), the Commission explained that the *Report & Order* was "designed to promote competition and increase the availability of robust, affordable telecommunications and advanced services to consumers throughout the nation." *Id.* The Commission pointed out that "different interpretations of the term 'cost' in section 224(e) yield a range of rates from the existing fully allocated cost approach at the high end to a rate closer to incremental cost at the low end." *Id.* at 5244 ¶ 8. Balancing the statutory goal of accelerating broadband deployment against "the interest in continued pole investment," the Commission adopted "a definition of cost that yields a new 'just and reasonable' telecommunications rate" that "generally will recover the same portion of pole costs as the current cable rate." *Id.*

The Commission concluded that "the new formula will minimize the difference in rental rates paid for attachments that are used to provide voice, data, and video services, and thus will help remove market distortions that affect attachers' deployment decisions." *Id.* "Removing these barriers to telecommunications and cable deployment," the Commission explained, "will enable consumers to benefit through increased competition, affordability, and availability of advanced communications services, including broadband," while still enabling pole owners to earn a fair return when they provide access. *Id.*

ARGUMENT

PETITIONERS' TARDY STAY REQUEST SHOULD BE DENIED

Petitioners ask the Court to suspend Rule 1.1409(e), which establishes the Commission's revised telecom rate formula. Mot. at 1.[8] As petitioners acknow-ledge, that rule became effective on June 8, 2011, within hours of petitioners' late-night filing of their stay motion. Indeed, by filing their motion – which did not seek emergency relief – less than three hours before the effective date of the rule (*see* p. 3, *supra*), petitioners made it practically impossible for this Court to act on their motion until after the rule had taken effect. Thus, petitioners did not proceed in a manner directed at seeking to maintain the status quo pending the Court's review of the merits of this case. Rather, from the outset they effectively sought mandatory preliminary injunctive relief from the Court, directing the Commission to turn back the clock and *reinstate* the pre-June 8, 2011 version of the telecom rate rule.

That request for relief is subject to an even more exacting standard than the standard applicable to stay requests that merely seek to preserve the status quo. Such a drastic remedy "should be used sparingly and only in the most critical and exigent circumstances" where "the applicants' right to relief [is] indisputably clear." *Graddick v. Newman*, 453 U.S. 928, 936-37 (1981) (Powell, J., in cham-

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8 Although the conclusion to petitioners' motion asks the Court to "stay the Commission's Order pending judicial review" (Mot. at 19), petitioners clarify that they seek a stay of "only one of the revised rules" adopted in the *Report & Order – i.e.*, Rule 1.1409(e). Mot. at 2 n.1.

bers); *see also Adams v. Vance*, 570 F.2d 950, 956 (D.C. Cir. 1977) (injunctive relief that would otherwise be warranted upon a balancing of the equitable factors is not appropriate where, among other things, the order "would not merely be preservative of the status quo"). Petitioners have not come close to showing that they have an "indisputably clear" right to extraordinary injunctive relief. Nor are they even able to satisfy the stringent requirements applicable to stay requests that seek to preserve the status quo pending judicial review.

Before a party can obtain such a stay preserving the status quo, it must show that: (1) it will likely prevail on the merits; (2) it will suffer irreparable harm unless a stay is granted; (3) other interested parties will not be harmed if a stay is granted; and (4) a stay will serve the public interest. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); D.C. Cir. Rule 18(a)(1). The Supreme Court has underscored that a "stay is an 'intrusion into the ordinary processes of administration and judicial review,' … and accordingly 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.'" *Nken v. Holder*, 129 S. Ct. 1749, 1757 (2009) (citation omitted); *see also Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 376 (2008) (because injunctive relief is "an extraordinary remedy," it "may only be awarded upon a clear showing that the plaintiff is entitled to such relief"). An applicant "*must* establish that . . . he is *likely* to suffer irreparable harm in the absence of preliminary relief." *Winter*, 129 S. Ct. at 375 (emphasis added). A mere possibility of harm is insufficient. *Ibid*.[9] As we explain below, petitioners have failed to satisfy this stringent standard, let alone the heightened standard that should be applied in light of their late request for relief.

A. Petitioners Have Failed To Show That They Are Likely To Prevail On The Merits.

Petitioners mount two central challenges to the lawfulness of revised Rule 1.1409(e). First, they claim that the "Commission's actions are at odds with both the plain language of § 224(e) of the Act and Congressional intent." Mot. at 4. Second, they contend that the Commission's action was arbitrary and capricious. *Id*. Neither argument has merit.

Petitioners contend that this is a "*Chevron I*" case in which "Congress' intent is clear from the face of the Act." Mot. at 4. Not so. As the Commission explained in the course of a comprehensive analysis of the statutory language and legislative history, "cost" is not specifically defined in section 224(e). *Report &*

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[9] Petitioners rely on cases suggesting that this Court applies a sliding-scale approach to stay applications under which a strong showing on one of the traditional stay criteria can compensate for a weaker showing on another. *See* Mot. at 3 (citations omitted). More recently, members of this Court have questioned whether the sliding-scale approach to preliminary injunctive relief remains good law in light of subsequent Supreme Court precedent. *See, e.g.*, *Davis v. Pension Benefit Guaranty Corp*., 571 F.3d 1288, 1295-96 (D.C. Cir. 2009) (Kavanaugh, J., joined by Henderson, J., concurring) (opining that "the old sliding-scale approach to preliminary injunctions . . . is no longer controlling, or even viable," and noting recent Supreme Court precedent "in the related context of stays") (citations and internal quotation marks omitted); *see also Sherley v. Sebelius*, 2011 WL 1599685, *4 (D.C. Cir. Apr. 29, 2011) (discussing *Davis*). This Court need not resolve that question in order to dispose of this motion, because petitioners fail to establish *any* of the four traditional stay criteria.

Order, 26 FCC Rcd at 5308 ¶¶ 156-61. While Congress established a rate formula in section 224(e) for charges for pole attachments used by telecommunications carriers, it did not specify a cost methodology. As the Commission observed, "section 224(e)(1) states that the Commission shall prescribe regulations 'in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services,' and that '[s]uch regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates.'" *Report & Order*, 26 FCC Rcd at 5308 ¶ 156 (quoting 47 U.S.C. § 224(e)(2)). Thus, section 224(e) describes how "[a] utility shall apportion the cost of providing space" on a pole, but it does not define the term "cost." *Id.* Accordingly, the Commission reasonably concluded that the term "the cost of providing space" is ambiguous and that, as the agency charged with administering the Communications Act, it has the authority to interpret that ambiguous term. *Id.*

The Supreme Court similarly rejected a "plain meaning" argument akin to petitioners' argument here when addressing Congress's use of the undefined term "cost" in 47 U.S.C. § 252. As the Court explained, "the unadorned term" "cost" "is 'a mere chameleon' and a 'virtually meaningless' term." *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 500-01 (2002) (internal citations omitted). Likewise, this Court has noted that the "generality" of terms such as "just and reasonable" does not lend itself to an immutable meaning but rather "opens a rather large area for the free play of agency discretion, limited of course by the familiar 'arbitrary' and 'capricious' standard in the Administrative Procedure Act." *Bell Atl. Tel. Cos. v. FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996).

Petitioners also argue that the "plain language of the Act clearly mandates a *different* rate" for telecom service providers under section 224(e) as compared to cable systems under section 224(d) and that "[t]he Act also expressly contemplates that the Telecom Rate formula would yield rates *higher* than those yielded by the Cable Rate formula." Mot. at 5. But petitioners cite no statutory language compelling that conclusion. The relevant text refers to the "cost of providing space," 47 U.S.C. §§ 224(e)(2), (3), and the Commission explained that it had focused "on those costs arising from the actual provision of space for pole attachments, as opposed to costs that arise regardless of the absence or presence of attachments." *Report & Order*, 26 FCC Rcd at 5312 ¶ 165. The Commission further explained that its approach gave "meaning to the methodology for allocating costs under sections 224(e)(2) and (e)(3)." *Id.* at 5310 ¶ 161.

The legislative history cited by petitioners (Mot. at 5-6) does not foreclose the Commission's reasonable reading of the statute, as the agency comprehensively demonstrated. *See id.* at 5311-13 ¶¶ 162-66. In particular, the Commission rejected the utilities companies' argument that it should rely on the language of the House version of the proposed legislation, which had not been enacted. Rather, it explained that its approach was "consistent with the statutory language actually adopted, regardless of the House's interpretation of 'cost' for the purpose of its unadopted amendments to section 224." *Id.* at 5312 ¶ 165.[10]

[10] Petitioners read too much into the Eleventh Circuit's statement in *Alabama Power* that the telecom rate "'provided in 47 U.S.C. § 224(e) yields a higher rate for telecommunications attachments than the Cable Rate provides for cable attachments.'" *See* Mot. at 6 (quoting *Alabama Power Co.*, 311 F.3d at 1371 n.23). That statement merely reflected that under the Commission's regulations

(footnote continued on following page)

Equally unavailing is petitioners' suggestion (Mot. at 9) that the Commission lacks the authority to establish different *maximum* rates for pole space for urban and rural areas. The Commission explained that utilities should recover *at least* the "cost of providing space" in all areas, but that such costs should no longer include certain capital costs for the pole. *Report & Order*, 26 FCC Rcd at 5301-02 ¶ 144. At the same time, the Commission sought to minimize any undue burden on utility ratepayers that the exclusion of capital costs might entail. *Id.* at 5304 ¶ 149 (quoting S. Rep. No. 95-580, at 21 (1977)). The Commission's revised formula thus allows utilities to recover the *greater* of (1) the "cost of providing space" (which excludes capital costs) in every area or (2) a percentage of fully allocated costs (including capital costs) that varies based on the location of the pole (66% in urban areas and 44% in rural areas). *Id*. at 5305 ¶ 152. The Commission justified the urban/rural rate difference by explaining that "there typically are fewer attachers in non-urban areas," and that a one-size-fits-all formula that fails to distinguish between urban and rural areas "would increase the burden pole attachment rates pose for providers of broadband and other communications services in non-urban areas, as compared to urban areas," *id.* at 5305 ¶ 150. Petitioners ignore this aspect of the Commission's decision in their stay motion.

Petitioners state that the Commission "reverse[d] course on fifteen years of regulatory precedent" in adopting its revised rule. Mot. at 2. But it is well estab-

at the time, the telecom rate established in section 224(e) yielded a higher rate for telecommunications attachments than the cable rate provided for cable attachments. The Eleventh Circuit's empirical observation did not suggest that the statute *compels* different rates.

lished that an agency may change its policy, so long as it demonstrates an awareness that it is changing position, as well as that "the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). That axiom of administrative law reflects the commonsense proposition that an agency is "not required to 'establish rules of conduct to last forever.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (citation omitted).[11]

Here, as in *Fox Television Stations*, the Commission both acknowledged its policy change and explained in detail why such a change was necessary and within its statutory authority. The Commission recognized that it had relied on a fully-allocated cost approach when it initially implemented section 224(e) in 1998. *Report & Order*, 26 FCC Rcd at 5300 ¶ 141. However, experience had shown "that this approach . . . resulted in higher rates than necessary, as well as rate disparities and disputes over whether the cable or telecom formula applies, negatively impacting communications service providers' investment decisions to expand their networks and services." *Id.* at 5308 ¶ 157. That outcome also undermined "Congress' policies underlying the 1996 Act to encourage the widest deployment pos-

[11] For this reason, petitioners are wrong in claiming that the Commission's construction of the Communications Act is not entitled to deference because it reflects a change of policy (Mot. at 10). The Supreme Court "has rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question." *Rust v. Sullivan*, 500 U.S. 173, 186 (1991) (*quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 862(1984)).

sible of advanced communications services, such as broadband Internet access, by promoting competition and removing barriers to infrastructure investment." *Id.* Moreover, the Commission emphasized that there is no "category or type of costs that are caused by the attacher that are not recovered through the new telecom rate." *Id.* at 5321 ¶ 182. In light of these considerations, the Commission's decision to change course was not arbitrary and capricious.

Petitioners further assert that the Commission acted arbitrarily because, while citing its goal of removing "'market distortions that affect attachers' deployment decisions,'" it allegedly presented no evidence "meaningfully linking" the new telecom rate formula "with broadband deployment decisions." Mot. at 10. In fact, the Commission cited extensive record evidence that "pole rental rates play a significant role in the deployment and availability of voice, video, and data networks." *Report & Order*, 26 FCC Rcd at 5316 ¶ 172; *see generally id.* at 5316-21 ¶¶ 172-181. That evidence demonstrated that the new (generally lower) telecom rate will promote the statute's goals of broadband deployment and availability.

B. Petitioners Have Failed To Demonstrate That They Will Suffer Irreparable Injury Absent A Stay.

"The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Wisconsin Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C. Cir. 1985) (quoting *Sampson v. Murray*, 415 U.S. 61, 88 (1974)). To obtain the extraordinary relief they seek, petitioners therefore must demonstrate that the irreparable injury they allege is "both certain and great," "actual and not theoretical." *Id.* In other words, petitioners must provide "proof indicating that the [alleged] harm *is certain to occur in the near future,*" *id.*

(emphasis added), if Rule 1.1409(e) remains in effect pending judicial review. Petitioners' unsubstantiated and vague claims of harm do not clear this high hurdle. Rather, they rest on allegations of a "threat" of "economic loss" (Mot. at 14), coupled with dubious speculation that petitioners will lose customer goodwill under the Commission's revised telecom rate (*id.* at 15-16).

"It is . . . well settled that economic loss does not, in and of itself, constitute irreparable harm. . . . 'The key word in this consideration is *irreparable*.'" *Wisconsin Gas,* 758 F.2d at 674 (quoting *Virginia Petroleum Jobbers*, 259 F.2d at 925). Although economic loss may support a stay application if the movant demonstrates that such loss will be "both certain and great," *id.*, petitioners have failed to make either showing here. For example, petitioners predict – without any supporting evidence – that the "negotiation positions occupied by pole owners and pole attachers will be disrupted" (Mot. at 12) by the revised telecom rate formula. Even if such injury could qualify as irreparable harm, petitioners have failed to adduce any evidence demonstrating the imminence or likelihood of that injury here.[12] Indeed, any such claim is undercut by petitioners' delay in seeking a judi-

[12] For that reason, this case is unlike the Eighth Circuit decisions cited by petitioners (Mot. at 12) in which the stay applicant had made a substantial evidentiary showing of the adverse effect on ongoing negotiations of a failure to grant a stay. *See Iowa Util. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996); *Brady v. NFL*, 2011 WL 1843832 *7 (8th Cir. May 16, 2011). Nor does *Robertson v. Cartinhour*, 2011 WL 1752189, *1 (D.C. Cir. Apr. 19, 2011) (unpublished), support petitioners' claim of irreparable injury. In that case, proof of economic loss was sufficient only because the stay applicant had established that the defendant was likely to fraudulently "dissipate the only assets available for relief." *Id.* at *3. In other words, absent a grant of extraordinary interim relief, the applicant would be deprived of *any* remedy even if he were to ultimately prevail.

cial stay.

Nor have petitioners attempted to demonstrate that any alleged losses would be "great," *Wisconsin Gas*, 758 F.2d at 674. They have offered no evidence, for example, quantifying the magnitude of the economic harm that they allegedly face if Rule 1.1409(e) remains in effect during this litigation. Thus, the Court has no basis for determining whether any such harm, even if it should occur, would be significant or trivial. Indeed, the rule does not even apply in 21 states where petitioners may have some, most or even all of their operations. *See* n. 3.

Similarly, petitioners' assertion (Mot. at 16) that they may be unable to "recoup losses incurred by under-recovery of rents paid pending appeal" constitutes precisely the sort of speculative claim of pure "economic loss" that this Court has routinely rejected in denying stay applications. *See, e.g., Wisconsin Gas,* 758 F.2d at 674; *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 763 (D.C. Cir. 1985) ("the mere possibility that after this litigation is concluded, and assuming petitioners prevail, the court might not decree refund, and the Commission might then also refuse to provide it because of reliance on its overturned decision, is in no way enough to satisfy our clear and oft-repeated standard."). Moreover, any such harm "could be mitigated through negotiations with attachers." *Stay Order* ¶ 10. In analogous situations, parties have provided for contingencies by including in their agreements provisions that take into account a change of law that may result from litigation. *See, e.g., SBC Commc'ns, Inc. v. FCC*, 407 F.3d 1223, 1230 (D.C. Cir. 2005); *In the matter of Connect America Fund*, 26 FCC Rcd 4554, 4778 (2011).

In an attempt to bolster their allegations of economic loss, petitioners claim that they will face irreparable injury from "the loss of goodwill on the part of the[ir] . . . electric customers" because those customers will be required to "cross subsidize the resulting shortfall in rental revenue during the period" of judicial review. Mot. at 15-16. While loss of goodwill sometimes can establish irreparable injury if it is proven to be "certain and great," *Wisconsin Gas*, 758 F.2d at 674, petitioners again have failed to provide such proof.[13] The sole declaration that petitioners submitted in support of their stay motion simply reports the unremarkable fact that one state trade association anticipated that the FCC's revised rates would "'apply once the FCC order becomes effective.'" Bynum Decl., Mot. Exh. D. at ¶ 4. Nor is petitioners' speculation regarding a loss of customer goodwill even plausible: The notion that customers of regulated, historical monopoly, electric utilities will make purchasing decisions based on fluctuations in revenue that the utilities obtain from pole attachers during the pendency of this litigation – which might or might not even be reflected in actual rates – strains credulity. And if a loss of revenue attributable to the Commission's revised rate formula ultimately could be passed on to utilities' customers, petitioners themselves have acknowledged that "'the impact of revised Rule 1.1409(e) is unlikely to motivate a rate change by itself.'" *Stay Order* ¶ 9 (citing Stay Request at 5 n.13); *see also Report & Order*, 26 FCC Rcd at 5305 ¶ 151 ("because there are far more attachments by cable operators [whose rate formula has not changed] than by telecommunications carriers paying the telecom rate," the actual change in utilities' current

[13] None of the cases cited by petitioners (*see* Mot. at 15) establish that an unsubstantiated allegation of loss of goodwill is sufficient to demonstrate the requisite irreparable injury.

pole attachment cost recovery from existing attachments "is likely to be relatively modest.").

C. A Stay Would Harm Other Parties.

Petitioners dismiss the potential harm to other parties if the Court were to suspend the Commission's revised telecom rate rule and instead reinstate the prior rule. Petitioners assert, without any citation or supporting evidence, that telecom service providers had been paying the higher rate for many years and presumably had budgeted to continue to pay that rate for the "foreseeable future." Mot at 16. On that basis, petitioners conclude that if that higher rate were to remain in effect "during the pendency of the appeal [it] will certainly not disrupt their business operations or hinder broadband deployment." *Id.* But, as the Commission's staff noted in denying petitioners' request for an administrative stay, petitioners themselves have acknowledged that some existing contractual arrangements "'simply incorporate by reference the extant Commission telecom formula.'" *Stay Order* ¶ 13. Thus, "the new telecom rate formula would benefit attachers currently under those types of agreements . . . [and] granting a stay would deny those attachers the benefit of the lower rate." *Id.* Nothing in petitioners' motion refutes this reasoning.

D. A Stay Would Harm The Public Interest.

The Commission concluded that revising the telecom rate formula to reduce the costs of attaching broadband lines to utility poles was a major step toward reducing barriers to broadband deployment, consistent with the agency's statutory mandate to "take immediate action to accelerate" broadband "deployment . . . by removing barriers to infrastructure investment." 47 U.S.C. § 1302(b). As the *Report & Order* noted, the Commission had previously "identified [its] pole attachment rules as a means to advance the deployment of broadband." *Report & Order*, 26 FCC Rcd at 5299 ¶ 136 (citation omitted). That strong public interest – which transcends the personal interests of petitioners here – would be thwarted by a stay of the Commission's revised telecom rate rule.

Finally, there is no merit to petitioners' claim that, if the new rule remains in effect during this litigation, it will "unleash[] turmoil and uncertainty on pole attachment relationships." Mot. at 18. The Commission's staff rejected that claim, explaining that it was the prior disparity between telecom and cable rates that had adversely affected cable operators' "incentives to use their existing networks to provide new, advanced services." *Stay Order* ¶ 12. By contrast, the new rate will "'better enable providers to compete on a level playing field, will eliminate distortions in end-user choices between technologies, and lead to provider behavior being driven more by underlying economic costs than arbitrary price differentials.'" *Id.* (quoting *Report & Order*, 26 FCC Rcd at 5303 ¶ 147).

CONCLUSION

For the foregoing reasons, petitioners' stay motion should be denied.

Respectfully submitted,

Austin C. Schlick
General Counsel

Peter Karanjia
Deputy General Counsel

Richard K. Welch
Acting Associate General Counsel

/s/ C. Grey Pash, Jr.

C. Grey Pash, Jr.
Counsel

Federal Communications Commission
Washington, D. C. 20554
(202) 418-1751

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