IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Great Lakes Communication Corp., *et al.*, Petitioners,	)	
v.	)	No. 19-1233
Federal Communications Commission and United States of America, Respondents.	)	

OPPOSITION OF FEDERAL COMMUNICATIONS COMMISSION TO EMERGENCY MOTION FOR STAY PENDING REVIEW

Through a practice known as access stimulation or "traffic pumping," some local exchange carriers (providers of local telephone service) artificially inflate the number and duration of long-distance calls their customers receive, thereby increasing by tens of millions of dollars annually the per-minute access charges they collect from long-distance carriers to complete those calls.[1] The Federal Communications Commission adopted rules in 2011 to curtail these arbitrage schemes. In response, some carriers developed new methods of access stimulation that sidestepped the 2011 rules. To remove the financial incentive to engage in these new arbitrage schemes, the FCC issued an order in September 2019 amending its access stimulation rules. *Updating the Intercarrier Compensation*

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[1] This Court is well-acquainted with access stimulation or "traffic pumping" schemes. *See All Am. Tel. Co., Inc. v. FCC*, 867 F.3d 81 (D.C. Cir. 2017); *N. Valley Commc'ns, LLC v. FCC*, 717 F.3d 1017 (D.C. Cir. 2013); *Farmers & Merchants Mut. Tel. Co. v. FCC*, 668 F.3d 714 (D.C. Cir. 2011).

Regime to Eliminate Access Arbitrage, FCC 19-94, 2019 WL 4785554 (rel. Sept. 27, 2019) (*Order*).

Two access-stimulating carriers and three providers of "free" conference calling services petitioned for review of the *Order*. They have now moved that certain rules "be stayed with regard to [p]etitioners" pending judicial review. Mot. 1. But petitioners do not come close to justifying their request for such extraordinary relief. As we explain below, petitioners are not likely to prevail on the merits of their claims and have not shown that they would be irreparably harmed absent a stay. Nor would a stay serve the public interest; it would leave in place arbitrage schemes that distort competition, inefficiently allocate network resources, increase the risk of service disruptions, and impose unjust and unreasonable costs on long-distance carriers and their customers. The Court should deny the motion.

BACKGROUND

When an interexchange carrier (a provider of long-distance telephone service) transmits a long-distance call to the local exchange carrier serving the call's recipient, the interexchange carrier must pay an access charge to the local carrier for completing the call. *All Am. Tel.*, 867 F.3d at 84. Taking advantage of this access charge regime, some local carriers have engaged in an arbitrage "scheme known as 'traffic pumping' or 'access stimulation,'" whereby they artificially inflate the number and duration of long-distance calls their customers receive. *Id*. at 85. As a result of this insidious practice, interexchange carriers and their customers have had to pay significant amounts to local carriers "in the form of artificially inflated and distorted access charges." *Ibid.*; *see also No. Valley Commc'ns*, 717 F.3d at 1017.

In 2011, the FCC adopted rules designed to curb access arbitrage. *Connect America Fund*, 26 FCC Rcd 17663, 17874-90 ¶¶ 656-701 (2011). Under those rules, any carrier engaged in access stimulation must file revised tariffs reducing its access rates. *Id.* ¶¶ 679-698. As defined by the 2011 rules, access stimulation occurs when a local carrier has (1) entered into a revenue sharing agreement with another party collaborating in the scheme (such as a conference calling service), *id*. ¶¶ 668-674, and (2) either an interstate terminating-to-originating traffic ratio of at least 3:1 in a calendar month or more than 100 percent growth in interstate minutes in a month compared to the same month in the preceding year, *id*. ¶¶ 675-678. The United States Court of Appeals for the Tenth Circuit upheld these rules as a reasonable exercise of the FCC's authority under 47 U.S.C. § 201(b) to prohibit unjust and unreasonable access rates. *In re FCC 11-161*, 753 F.3d 1015, 1144-47 (10th Cir. 2014).

Access-stimulating carriers adjusted their practices to circumvent the 2011 rules "by interposing intermediate providers of switched access service not subject to the … rules in the call route, thereby increasing the access charges" paid by interexchange carriers. *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, 33 FCC Rcd 5466, 5467 ¶ 2 (2018) (*Notice*). In response to these new arbitrage schemes, the FCC issued a notice of proposed rulemaking in 2018 seeking comment on proposed amendments to the access stimulation rules. Among other things, the Commission asked whether it should require access-stimulating carriers to assume financial responsibility for the delivery of terminating traffic to their end offices. *Id.* ¶¶ 10-12, 21-22. The agency also asked "whether, and if so how, to revise the current definition of access stimulation to more accurately and effectively target harmful access stimulation practices." *Id.* ¶ 26. Specifically, the Commission requested comment on whether it should "modify the ratios or triggers in the definition." *Ibid*.

Commenters submitted evidence that access-stimulating carriers, working in concert with intermediate access providers, had routed "*billions* of minutes" of long-distance traffic "through a handful of rural areas" in order "to increase [the] tandem switching and transport charges" they collected from interexchange carriers. *Order* ¶ 14 (internal quotation marks omitted). For example, one carrier reported that twice as many minutes were routed per month to Redfield, South Dakota (population 2,300) as were routed to Verizon's facilities in New York City (population 8.5 million). *Id.* ¶ 15. These new arbitrage schemes, like the ones targeted by the 2011 rules, involved the provision of "free" conference calling and other high-volume calling services to "a small proportion of consumers." *Id.* ¶ 20. Such services were provided "at an annual cost of $60 million to $80 million in access charges"—a cost that interexchange carriers and their customers were "forced to bear." *Ibid.* The Commission also found "evidence that the staggering volume of minutes generated by these [access stimulation] schemes can result in call blocking and dropped calls." *Id.* ¶ 3.

To reduce carriers' incentive to participate in such schemes, the FCC in September 2019 adopted rules requiring any access-stimulating local carrier "to bear financial responsibility for all interstate and intrastate tandem switching and transport charges for terminating traffic to its own end office(s) or functional equivalent whether terminated directly or indirectly." *Order* ¶ 17. Under the new rules, access-stimulating carriers would not collect access fees and would be forced to pay for services provided by intermediate carriers that they had introduced into the call path to evade the 2011 rules. The agency explained that the new rules "properly align financial incentives by making the access-stimulating [carrier] responsible for paying for the part of the call path that it dictates." *Ibid.*

The Commission also found evidence that "access stimulation may occur even when there is no access revenue sharing agreement." *Order* ¶ 4. To account for this possibility, the agency amended its rules to add two "alternate tests" for access stimulation "that require no revenue sharing agreement." *Id.* ¶ 43. One test applies to competitive local carriers, including two of the petitioners, while the second applies to "incumbent rate of return" carriers.[2]

Under the first alternate test, competitive local carriers without revenue sharing agreements are "defined as engaging in access stimulation" if they have "an interstate terminating-to-originating traffic ratio of at least 6:1." *Order* ¶ 43. This 6:1 traffic ratio, which is twice the ratio used for carriers with revenue sharing agreements, was adopted by the Commission to avoid "ensnaring" carriers that experience traffic growth "solely due to the development of their communities." *Id.* ¶ 48.

For the second alternate test, the Commission selected an even higher traffic ratio to define access stimulation by rate-of-return local exchange carriers without revenue sharing agreements. Such carriers are defined "as engaging in access stimulation" if they have "an interstate terminating-to-originating traffic ratio of at least 10:1 in a three calendar month period" and "500,000 minutes or more of

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[2] Incumbent carriers generally existed before 1996, whereas competitive carriers (like petitioners Great Lakes and Northern Valley) were formed after 1996 and compete with incumbent carriers. *See* 47 U.S.C. § 251(h); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 549 (2007). Rate-of-return carriers—incumbent carriers subject to rate-of-return regulation—are primarily "small, rural carriers." *Order* ¶ 49.

interstate terminating minutes-of-use per month in an end office in the same three calendar month period." *Order* ¶ 43.

The Commission applied a higher ratio to rate-of-return carriers for several reasons. First, "the majority of those carriers are small, rural carriers with different characteristics than competitive [carriers]." *Order* ¶ 49. The Commission concluded that because rate-of-return carriers "serve small communities and have done so for years," they "would not be able to freely move stimulated traffic to different end offices" like competitive carriers do, creating "structural disincentives" for rate-of-return carriers "to engage in access stimulation." *Id.* ¶¶ 49, 50.

In addition, the Commission found that a "significant number of rate-of-return [carriers] that are apparently not engaged in access arbitrage" would nevertheless "trip the 6:1 trigger" applicable to competitive carriers. *Order* ¶ 50. To prevent rate-of-return carriers from being misidentified as access stimulators, the Commission determined that such carriers should be deemed access stimulators only if they have at least a 10:1 traffic ratio "combined with more than 500,000 interstate terminating minutes-of-use per month, per end office, averaged over three calendar months." *Ibid.*

The new rules were published in the Federal Register on October 28, 2019. 84 Fed. Reg. 57629. They are scheduled to take effect on November 27, 2019.

See Order ¶ 122. Carriers engaged in access stimulation when the rules take effect will have 45 days to come into compliance with the rules. *Id*. ¶¶ 74-75.[3]

ARGUMENT

To obtain the extraordinary remedy of a stay, petitioners must demonstrate that (1) they will likely prevail on the merits, (2) they will suffer irreparable harm without a stay, (3) a stay will not harm other parties, and (4) a stay will serve the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Petitioners have failed to satisfy any of these prerequisites.

I. Petitioners Have Not Demonstrated A Likelihood Of Success On The Merits

Petitioners raise various challenges to the *Order*, but none of their claims is likely to prevail on the merits.

A. The *Notice* Satisfied The Administrative Procedure Act

Petitioners maintain that the FCC violated the Administrative Procedure Act by failing to provide adequate notice of the new rules. Mot. 15-16, 19-20. That claim is unavailing.

Petitioners contend that the *Notice* was deficient because it did not specify that the agency might adopt different access stimulation tests for different types of

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[3] Petitioners filed a petition for an administrative stay with the FCC on October 4, 2019. Acting under delegated authority, the FCC's staff denied that petition. *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, DA 19-1093 (Wireline Comp. Bur. Oct. 25, 2019) (*Stay Denial Order*).

carriers. Mot. 15-16. To comply with the APA, however, a notice of proposed rulemaking "need not specify every precise proposal which [the agency] may ultimately adopt as a rule." *Nuvio Corp. v. FCC*, 473 F.3d 302, 310 (D.C. Cir. 2006) (internal quotation marks omitted). An agency provides adequate notice under the APA if its final rule is "a logical outgrowth" of its initial notice. *Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013) (internal quotation marks omitted). A notice "satisfies the logical outgrowth test if it expressly ask[s] for comments on a particular issue or otherwise ma[kes] clear that the agency [is] contemplating a particular change." *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 700 (D.C. Cir. 2016) (internal quotation marks omitted). That is precisely what the *Notice* did here.

The *Notice* made clear that the Commission was considering "whether, and if so how, to revise the current definition of access stimulation." *Notice* ¶ 26. Indeed, the agency solicited comment on whether—and how—it should "modify the ratios or triggers in the definition." *Ibid.* In response, parties submitted evidence that even though rate-of-return carriers generally do not engage in access arbitrage, they "may have traffic ratios that are disproportionately weighted toward terminating traffic" and may experience "spikes in call volume" due to "the unique geographical areas they serve." *Order* ¶ 49. To account for this possibility, the

Commission established a separate access stimulation test (with a higher traffic ratio) for rate-of-return carriers. *Id.* ¶ 50.

The adoption of unique access stimulation triggers for carriers with different structural and operational characteristics was reasonably foreseeable after the *Notice* announced that the Commission was contemplating revisions to the definition of access stimulation "to more accurately and effectively target harmful access stimulation practices." *Notice* ¶ 26. Given the *Notice*'s questions about whether (and if so, how) to modify the triggers in the definition, "interested parties should have anticipated that the change" the FCC ultimately made "was possible." *Agape Church*, 738 F.3d at 411 (internal quotation marks omitted). That is all the APA requires.

Petitioners also assert that the FCC violated the APA by adopting a rule that differed from the agency's proposal in the *Notice*. Mot. 19-20. They are wrong. "The final rule need not be the one proposed [by the agency] in the [notice]." *Agape Church*, 738 F.3d at 411. The Commission had proposed to require access-stimulating carriers to choose between (1) assuming financial responsibility for calls delivered to their networks or (2) accepting direct connections from interexchange carriers or their designated intermediate access providers. *Notice* ¶ 9. But the *Notice* also sought comment on NTCA's "independent proposal," *id.* ¶ 22, to require access-stimulating carriers to bear financial responsibility for terminating traffic without giving them "the option of electing to accept direct connections." *Id.* ¶ 21. The agency ultimately adopted a rule reflecting the approach that NTCA advocated. *Order* ¶¶ 17-18. Therefore, petitioners cannot plausibly claim that the rule "was not foreseeable in light of" the *Notice*. Mot. 20.

B. The Commission Reasonably Applied Different Traffic Ratios To Different Types Of Carriers

In defining access stimulation for carriers without revenue sharing agreements, the Commission adopted traffic ratios of 6:1 for competitive local carriers and 10:1 for rate-of-return carriers. *Order* ¶¶ 47-50. Petitioners assert that the Commission did "not explain why these particular ratios were adopted." Mot. 16. They also argue that the agency did not justify its disparate treatment of competitive carriers. Mot. 16-17.

These claims lack merit. Petitioners have not shown that the traffic ratios the Commission selected to define access stimulation were "patently unreasonable," *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 541 (D.C. Cir. 2006) (internal quotation marks omitted), or an abuse of the Commission's "wide discretion to determine where to draw administrative lines," *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000). To the contrary, the agency reasonably explained why it chose those ratios.

Specifically, the Commission explained that it adopted a 6:1 or higher terminating-to-originating traffic ratio for competitive carriers without revenue sharing agreements because "a smaller ratio" would likely "be overinclusive," and the agency wanted both "to protect non-access-stimulating [carriers] from being misidentified" and to avoid "costly disputes between carriers and confusion in the market." *Order* ¶ 47. In the Commission's considered judgment, a 6:1 ratio was "sufficient to prevent the definition from ensnaring competitive [carriers] that have traffic growth solely due to the development of their communities." *Id.* ¶ 48.

The agency also amply explained why it adopted a higher traffic ratio to define access stimulation by rate-of-return carriers. The record indicated that "the majority of those carriers are small, rural carriers with different characteristics than competitive [carriers]." *Order* ¶ 49. And the record contained no evidence that rate-of-return carriers "are currently engaged in access stimulation." *Id.* ¶ 50. The Commission found that such carriers have "structural disincentives" to engage in access arbitrage schemes. *Ibid.* "[U]nlike access-stimulating [carriers] that only serve high-volume calling providers, rate-of-return carriers, which serve small communities and have done so for years, would not be able to freely move stimulated traffic to different end offices." *Id.* ¶ 49. The Commission was also justifiably concerned that "a small but significant number of rate-of-return [carriers] that are apparently not engaged in access arbitrage would trip the 6:1 trigger" applicable to competitive carriers. *Id.* ¶ 50. For all these reasons, the Commission reasonably decided that the access stimulation test for rate-of-return carriers should be based on a 10:1 traffic ratio "combined with more than 500,000 interstate terminating minutes-of-use per month, per end office, averaged over three calendar months." *Ibid.*[4]

C. Substantial Evidence Supported The New Rules

There is no basis for petitioners' argument that "the Commission's justifications for the rules" were "unsupported or contrary to the record evidence." Mot. 18. The record amply supported the agency's decision to amend its rules to address new access stimulation schemes.

Specifically, record evidence indicated that "carriers located in remote areas with long transport distances and high transport rates" had made "arrangements with high volume service providers … for the sole purpose of extracting inflated [access charges] due to the distance and volume of traffic." *Order* ¶ 24 (internal quotation marks omitted). As a result of these arrangements, "billions of minutes of access arbitrage every year [were] being directed to access-stimulating [carriers] using expensive tandem switching providers for conference calling and other services." *Id.* ¶ 20. Although these services were "offered for 'free' to the

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[4] Petitioners also complain that the FCC gave "no explanation" why its new access stimulation definition "should not apply" to larger, non-rate-of-return incumbent local exchange carriers, known as price cap carriers. Mot. 17. But there was no reason to apply the definition to those carriers. The record contained no evidence that those incumbent carriers were engaged in schemes to intentionally inflate the volume of long-distance calls to their customers.

callers," the record showed that the "annual cost" of the services was "$60 million to $80 million in access charges." *Ibid*. The FCC found that *all* "long-distance customers are forced to bear" that cost, *ibid.*, "paying for services that the vast majority will never use." *Id.* ¶ 25. Although petitioners make the unsubstantiated claim that "free conferencing users pay their own way" (Mot. 18-19), nothing in the record refutes the FCC's finding that all long-distance customers subsidize access-stimulating services that "only a small proportion of consumers" use. *Order* ¶ 20.[5]

In addition, record evidence suggested that "the staggering volume of minutes generated by [access stimulation] schemes" could "result in call blocking and dropped calls." *Order* ¶ 3. For example, due to the network congestion triggered by an access stimulation scheme in Tampa, some "customers were unable to make regular calls and may not have been able to reach 911." Sprint May 16, 2019 Ex Parte at 7-8.[6] The risk of such service disruptions further justified the Commission's efforts to curb these arbitrage schemes.

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[5] *See Stay Denial Order* ¶ 12 (rejecting petitioners' unsubstantiated claim that long-distance fees paid by users of free conferencing services are sufficient to cover the access charges associated with those services).

[6] Available at https://ecfsapi.fcc.gov/file/10516158248327/Sprint%2018-155%20Ex%20Parte%20May%2016%202019.pdf).

Petitioners assert that the Commission "did not obtain relevant data from [interexchange carriers]." Mot. 18. But their stay motion does not identify what additional information they believe the agency should have obtained. In any event, the Commission rejected the notion that "not enough data was submitted in the record." *Order* ¶ 66. It reasonably concluded that seeking more evidence would needlessly delay the adoption of rules to address an arbitrage problem that was already well documented. *Id.* ¶ 36. The decision not to seek more data fell well within the agency's broad discretion in conducting this proceeding. *See* 47 U.S.C. § 154(j); *see also United States v. FCC*, 652 F.2d 72, 90 (D.C. Cir. 1980) (the Commission "must decide when enough data is enough").

Petitioners contend that the Commission "disregarded" their "expert's economic analysis" because he did not consider the data that petitioners "implored the Commission to obtain" from interexchange carriers." Mot. 18. Not so. The Commission discounted the economic analysis of petitioners' expert because it "assume[d] away … the use of [access] charges to fund access stimulators' operations" and failed to "take into account the cost that access stimulators impose on larger networks and their subscribers." *Order* ¶ 31.

Petitioners further assert that it was arbitrary for the agency to assume that its new rules would benefit consumers after petitioners "presented data demonstrating the FCC's 2011 reforms have not yielded lower long-distance rates for consumers." Mot. 19. But as the Commission's staff explained when it denied the request for an administrative stay, petitioners' data were "irrelevant—or at best, tangentially relevant"—because they "fail[ed] to control for the effects of access arbitrage, relevant reforms, and other issues." *Stay Denial Order* ¶ 11. Petitioners do not seriously dispute that "any increase in the price of long-distance service is partly attributable to the increased presence of access arbitrage." *Ibid.* The Commission cited "ample record data clearly demonstrating the costs that access stimulation imposes on [interexchange carriers] and their customers." *Ibid.*; *see Order* ¶¶ 9, 20, 22, 24. Those data fully justified the Commission's conclusion that its new rules would benefit consumers.

D. The Commission Had Authority To Adopt The Rules

This Court has held that the FCC has authority under 47 U.S.C. § 201(b) to prohibit access stimulation schemes. *See All Am. Tel.*, 867 F.3d at 85; *Farmers & Merchants,* 668 F.3d at 721. The agency exercised that authority here, finding that "the practice of imposing tandem switching and tandem switched transport access charges on [interexchange carriers] for terminating access-stimulation traffic … is unjust and unreasonable under [Section] 201(b) … and is therefore prohibited." *Order* ¶ 92.

Petitioners nonetheless assert that "the *Order* exceeds the Commission's jurisdiction in three independent ways." Mot. 20. These arguments lack merit.

Reciprocal Compensation. Petitioners argue that the *Order* "conflicts with" the Communications Act's provisions concerning reciprocal compensation of carriers' costs. Mot. 20 (citing 47 U.S.C. § 252(d)(2)(A)(i), 252(d)(2)(B)(i)). According to petitioners, the *Order* "deprives" them "of access revenues without any reciprocal obligation on other carriers to accept traffic from" petitioners. Mot. 21. That argument fails because the *Order* does not alter other carriers' "reciprocal obligation" to accept incoming calls delivered by access-stimulating carriers. To be sure, the *Order* makes access-stimulating carriers responsible for the cost of completing calls to their customers—costs which they can pass along to those customers. *Order* ¶ 79. But the Tenth Circuit held that "reciprocal obligation" under the Act can mean an obligation for carriers to complete calls without access charges, and to "recover their costs from their end-user customers rather than from other carriers." *See In re FCC 11-161*, 753 F.3d at 1113, 1128.

Network "Edge." There is likewise no merit to petitioners' contention (Mot. 21) that the *Order* usurps states' authority to set the network "edge" ("the points at which a carrier must deliver terminating traffic to avail itself of bill-and-keep"). *See In re FCC 11-161*, 753 F.3d at 1126. "Shifting the financial responsibility for the delivery of traffic to access-stimulating [carrier] end offices does not move the network edge or affect a state's ability to determine that edge." *Order* ¶ 105. "Under [47 U.S.C. §] 252(d)(2), states continue to enjoy authority to arbitrate terms and conditions in reciprocal compensation," including "the edge of [carriers'] networks." *In re FCC 11-161*, 753 F.3d at 1126 (internal quotation marks omitted). This authority applies to all intercarrier compensation agreements, whether produced via negotiation, *see* 47 U.S.C. § 252(a), (e), or arbitration, *see id.* § 252(b), (c). The *Order* "does not interfere with" any agreements governed by Section 252 or "affect a state's rights or responsibilities" under Section 252 with respect to such agreements. *Order* ¶ 105.

Taking. Petitioners argue that the *Order* violates the Fifth Amendment's Takings Clause. Mot. 21-22. This argument is baseless.

In assessing whether a regulation effects a taking, courts examine (1) the "economic impact of the regulation on the claimant," (2) the extent to which the regulation interferes with "investment-backed expectations," and (3) the "character of the governmental action." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Petitioners fail to "satisfy the heavy burden" of establishing "a regulatory taking" under this three-factor test. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493 (1987).

First, the economic impact of the new rules is not "likely to be so significant as to demonstrate a regulatory taking." *Order* ¶ 79. Petitioners remain "free to respond in a number of ways" to mitigate any economic disadvantage the rules might cause, "such as by changing end-user rates … or by seeking revenue elsewhere, for example, through an advertising-supported approach to offering free services." *Ibid*.

Second, the rules do not upset "any reasonable investment-backed expectations." *Order* ¶ 80. For more than a decade, the FCC has put carriers on notice that it intended to take measures "to address problems associated with access stimulation." *Ibid*.; *see id*. n.263 (citing FCC orders on access stimulation dating back to 2007). If petitioners opted to invest in access arbitrage schemes, they did so at their own risk.

Finally, "the character of the governmental action here cuts against a finding of a regulatory taking" because the *Order* involves "'adjusting the benefits and burdens of economic life to promote the common good,'" not "a 'physical invasion' by government." *Order* ¶ 81 (quoting *Penn Cent.*, 438 U.S. at 124). The *Order* advances "legitimate governmental interests" by "discouraging inefficient marketplace incentives, promoting efficient communications traffic exchange, and guarding against implicit subsidies contrary to the universal service framework" under 47 U.S.C. § 254. *Ibid*.

II. Petitioners Have Not Shown Irreparable Injury

This Court "has set a high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). "Such injury must be both certain and great, actual and not theoretical, beyond remediation, and of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (internal quotation marks omitted). To obtain a stay, petitioners "must provide proof" that irreparable harm "is certain to occur in the near future." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Petitioners fail to meet this demanding standard.

Petitioners Great Lakes and Northern Valley assert that the *Order* will destroy their businesses *if* they continue to serve high-volume customers. *See* Pet. Exh. FF ¶ 19; Pet. Exh. EE ¶ 23. As they concede, however, they can mitigate such harm by ending their relationships with high-volume customers. Pet. Exh. FF ¶ 20; Pet. Exh. EE ¶ 24. The CEOs of Great Lakes and Northern Valley have expressed their "view" that even if these carriers drop high-volume customers, they will ultimately face financial ruin. Pet. Exh. FF ¶ 20; Pet. Exh. EE ¶ 24. Such unsubstantiated claims of harm are not sufficiently "certain" to justify a stay. *Wis. Gas*, 758 F.2d at 674. Insofar as the CEOs believe that their companies will not be able to "function long-term" under the rules (*see* Pet. Exh. FF ¶ 20; Pet. Exh. EE ¶ 24), their speculative assertions of future harm lack the imminence necessary to establish "a clear and present need" for a stay. *Mexichem*, 787 F.3d at 555 (internal quotation marks omitted).

Essentially, Great Lakes and Northern Valley contend that they will suffer irreparable harm if they must bear the costs of complying with the new rules. But "ordinary compliance costs are typically insufficient to constitute irreparable harm." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005); *see also Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) (same); *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 527-28 (3d Cir. 1976) (same).

The other three petitioners, providers of "free" conferencing services, argue that the new rules will force them "to move their traffic to an urban carrier that has higher originating volumes." Mot. 23; *see* Pet. Exh. GG ¶ 9; Pet. Exh. HH ¶ 9; Pet. Exh. II ¶ 9. Claiming that the *Order*'s 45-day compliance period will not afford sufficient time to find another carrier and to relocate their conferencing equipment, these petitioners assert that "it is unavoidable" that they "will experience a significant loss of customers at best and, much more likely, will be forced out of business." Pet. Exh. GG ¶ 12; Pet. Exh. HH ¶ 12; Pet. Exh. II ¶ 12. Those claims are wholly speculative. They ignore the possibility that petitioners could seek an extension of the compliance deadline through the FCC's waiver process. *See* 47 C.F.R. § 1.3. And even assuming that the rules will cause conferencing service providers to lose customers, "it is well settled that economic loss does not, in and of itself, constitute irreparable harm." *John Doe Co. v. CFPB*, 849 F.3d 1129, 1134 (D.C. Cir. 2017) (internal quotation marks omitted).

III. A Stay Would Harm Other Parties And The Public Interest

A stay in this case would harm interexchange carriers and their customers. The new rules are reasonably designed to dismantle arbitrage schemes that impose unjust and unreasonable costs on both providers and consumers of long-distance telephone service. As a result of access arbitrage, "long-distance customers" throughout the nation have been "forced to bear the costs of 'free' conferencing and other services" that "only a small proportion of consumers" use. *Order* ¶ 20. If a stay is granted, petitioners' arbitrage schemes will persist, and interexchange carriers and their customers will continue to shoulder the cost of inequitable access charges artificially generated by petitioners' access stimulation schemes.

In addition, a stay would not serve the public interest. Access stimulation distorts competition "because access-stimulation revenues subsidize the costs of high-volume calling services, granting providers of those services a competitive advantage over companies that collect such costs directly from their customers." *Order* ¶ 26. Although roughly 75 million consumers use "free" high-volume calling services, those services "are paid for by the more than 455 million subscribers of voice services across the United States, most of whom do not use high-volume calling services." *Id.* ¶ 25. Under the new rules, "valuable network resources … will no longer be assigned to such low-value use," and the waste caused by access stimulation will be eliminated. *Id.* ¶ 27. If the rules are stayed, however, implicit subsidies and inefficiencies will continue to skew competition in the telecommunications market.

A stay also increases the risk of network failures. If left unchecked, "the staggering volume of minutes generated" by petitioners' access stimulation schemes could "result in call blocking and dropped calls," including the disruption of 911 calls seeking emergency assistance. *Order* ¶ 3.

Thus, even if petitioners could establish that the new rules will substantially harm them, the balance of the equities weighs heavily against a stay.

CONCLUSION

For the foregoing reasons, the Court should deny the motion for stay.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I, James M. Carr, hereby certify that on November 14, 2019, I filed the foregoing Opposition of Federal Communications Commission to Emergency Motion for Stay Pending Review with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

s/ James M. Carr

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