IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Citizens Telecommunications, *et al.*, Petitioners, v. Federal Communications Commission and United States of America, Respondents.	)))))))))	Nos. 17-2296, 17-2342, & 17-2342

MOTION OF FEDERAL COMMUNICATIONS COMMISSION TO STAY THE MANDATE

Respondent Federal Communications Commission moves this Court to stay the mandate in this case, pursuant to F.R.A.P. 41. A stay will avoid extensive and unnecessary disruption in the Business Data Services (BDS) market while the agency addresses on remand the notice issue that this Court identified with respect to one portion of a complex and interconnected order.

This case concerns the FCC's overhaul of its rules for BDS. This Court denied the petitions for review in almost every respect. *Citizens Telecomm. Co. v. FCC*, 901 F.3d 991, 996 (8th Cir. 2018). In particular, the Court affirmed as reasonable the Commission's repeal of ex ante regulation for last-mile BDS in those areas that the Commission deemed sufficiently competitive, pursuant to a competitive market test set forth in the Order. *Id.* at 1006. The Court concluded, however, that the agency did not provide adequate notice that it might similarly end ex ante regulation of TDM transport services. *Id.* at 19. The Court therefore

vacated "solely the portions of the final rule affecting TDM transport services and remand[ed] them to the FCC for further proceedings." *Id.* at 1005.

The agency is now working expeditiously to address the Court's remand. Agency staff has prepared a draft Further Notice of Proposed Rulemaking ("FNPRM") proposing to institute a new TDM transport rule, identical to the rule at issue in this case. (See Ex. A, attached, at ¶¶ 148-157.) A copy of that draft FNPRM has been publicly released, and the Commission is scheduled to vote on its adoption at the Commission's Open Meeting on October 23rd. If adopted, comments will be due 45 days after publication in the Federal Register, and reply comments will be due 30 days after comments are filed. The agency will then be able to reconsider TDM transport services with a refreshed record, and, if appropriate, adopt a rule governing the pricing of TDM transport.

F.R.A.P. 41 contemplates that a party may move to stay the Court's mandate, even absent a petition for rehearing or a petition to the Supreme Court for certiorari. *See* F.R.A.P. 41(b) ("The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, *or motion for stay of mandate*, whichever is later." (emphasis added)). Courts have stayed the mandate in situations like this one, where issuing the mandate and

vacating the rule while the agency addresses a remand would cause undue disruption and expense. *See, e.g., Peconic Baykeeper, Inc. v. Suffolk Cty.*, 600 F.3d 180, 186–87 (2d Cir. 2010) (describing stay of mandate by Sixth Circuit where agency argued "that immediate issuance of a mandate vacating the Final Rule would be unduly disruptive to state and federal permitting authorities and would trigger a rash of citizen suits" and where agency publicly announced that it planned to issue new rule); *Maryland People's Counsel v. FERC*, 768 F.2d 1354 (D.C. Cir. 1985) (staying mandate where agency had issued NPRM and where immediate vacatur "would substantially disrupt ongoing arrangements to the detriment of the gas industry and captive consumers and fuel-switchable end users alike").[1]

A stay of the mandate is warranted here. The agency is diligently working to address this Court's remand, and there is every reason to believe that the agency will be able to proceed efficiently to adopt a new TDM transport rule after a renewed opportunity for comment. The draft FNPRM seeks public comment on a

[1] Somewhat analogously, courts may rule against an agency in an APA rulemaking case and remand to the agency *without vacatur*, to allow the agency to remedy a shortcoming in a rule that is largely sound. *See, e.g., Stand Up for California! v. United States Dep't of Interior*, 879 F.3d 1177, 1190 (D.C. Cir. 2018) (upholding district court remand without vacatur to remedy lack of notice). In the D.C. Circuit, the decision whether to vacate on remand depends on "the seriousness of the order's deficiencies ... and the disruptive consequences of an interim change that may itself be changed." *Allied–Signal, Inc. v. NRC*, 988 F.2d 146, 150–51 (D.C. Cir. 1993).

specific proposed rule that is materially identical to the rule this Court vacated on notice grounds, with which the parties are already familiar. Indeed, the Court noted that, even though it deemed notice inadequate, the agency in fact previously received numerous comments addressing this rule, such that "[i]t may be true that the numerous comments received in the proceeding already discussed all relevant aspects of transport services." 901 F.3d at 1006. In these circumstances, there is no reason to presume that the agency will be unable to consider all comments received in response to the FNPRM and issue a new rule expeditiously.

If the mandate is not stayed in the interim, the result will be considerable uncertainty, effort, and expense with little benefit. As the Court is aware, before the FCC adopted the *Order* on review in this case, providers of TDM transport were required to file tariffs with the agency and were subject to price cap regulation, which required carriers to demonstrate that their rates for TDM transport were below a prescribed price cap index. The *Order* lifted that tariffing requirement and ex ante price cap regulation for both last-mile and TDM transport services. Many providers have already removed these services from price cap regulation, detariffed their services with the Commission, and negotiated contracts with their customers. If the *Order* is vacated, TDM transport services will presumably be subject to tariff and price cap regulation once again. That would not

only burden providers who have already substantially relied on the prior rule; it would also create an interim regulatory regime in which one set of BDS services (last-mile) are subject to a competitive market test and another (transport) are subject to tariff and price cap regulation. The Commission never adopted that hybrid regime and may again choose not to do so after addressing the Court's remand.

Simply reverting to the status quo from before the *Order* would present many other difficulties. Tariff rates are calculated with data regarding current demand, rate of inflation, and productivity, among other factors. *See* 47 C.F.R. § 61.45. Because the tariffed rates and the underlying data that were last on file may no longer be current for many providers, they may not represent appropriate rates for TDM transport services. This creates confusion about how best to regulate services during the interim. If the agency were to order that carriers simply refile potentially outdated tariffs, ratepayers and carriers alike would be subject to rates that may not fairly reflect current demands and costs. Parties may well use administrative procedures or litigation to challenge these rates.

The agency would face a different set of challenges if it instead directs carriers to file updated tariffs—either instead of the old tariffs or after reinstating the old tariffs. Developing new tariff rates would be burdensome for carriers, and

analyzing that data and those proposed rates would be burdensome for the agency. First, the agency would likely need to issue an order clarifying the procedure that price cap carriers should use to develop what are known as Tariff Review Plans (complex and voluminous spreadsheets used to demonstrate compliance with price cap regulation)[2] as well as setting forth procedures for carriers to file new tariffed rates. This process would burden outside parties, as the FCC ordinarily develops Tariff Review Plans each year by collaborating with an industry working group to update the economic assumptions for demand, inflation, productivity, and to account for any rule or other legal changes. This time-consuming process ordinarily takes approximately six months.

If carriers developed new Tariff Review Plans for the interim period and filed new tariffs, FCC staff would need to verify each as compliant with price cap regulations. Under the Communications Act and the agency's rules, customers would have the right to challenge any filed tariff before it takes effect. 47 U.S.C. § 204. Upon objection, the agency must then decide whether to suspend the effectiveness of the tariff and commence an investigation into its lawfulness. After a tariff takes effect, any person may file a complaint with the FCC challenging the lawfulness of the tariff and seek damages. 47 U.S.C. § 208. Proceedings conducted

[2] *See, e.g., Material to be Filed in Support of 2018 Annual Access Tariff Filings,* WC Docket No. 18-100, DA 18-404, 2018 WL 1959828 (WCB Apr. 25, 2018).

under section 204 or 208 are complex and time-consuming adjudications for the agency that require reviewing pleadings and evidence from multiple parties and writing several orders for the Commission's consideration.

Of course, the effort to construct, review, and adjudicate tariffs would make sense in those cases where the agency has determined that tariffs are in the public interest and will be in place for a considerable amount of time. But that may not be the case here. If the Commission were able to complete the extensive process described above before a new TDM transport rule issued, the effort could be wasted if the Commission ultimately determined once again to detariff transport services. Indeed, in light of the extensive process, it may not even be possible to put new tariffs in place before a new TDM transport rule is issued. It could easily take several months or more for the agency to issue an order about procedure, develop a Tariff Review Plan, review submitted tariffs, and adjudicate any potential disputes. By that time, a new rule could well be in place, especially given that the rulemaking is soon to be underway. Unless the new rule makes no changes to the status quo that existed before the *Order*, the efforts to revert to the previous regime would be wasted.

By contrast, it would cause little disruption or confusion to keep the current status quo in place while the agency seeks public comment and issues the new rule.

If the Court stays the mandate, the FCC proposes to file status updates every 90 days to apprise the Court of developments in the agency's rulemaking.

CONCLUSION

The Commission is working diligently to address on remand the Court's decision that notice was inadequate for its prior TDM transport rule and does not intend to appeal that decision. In the interim, the Commission respectfully asks this Court to stay the mandate to prevent the considerable and unnecessary confusion, effort, and expense that would otherwise result.

Respectfully submitted,

Thomas M. Johnson, Jr.
General Counsel

David M. Gossett
Deputy General Counsel

Richard K. Welch
Deputy Associate General Counsel

/s/ Matthew J. Dunne

Matthew J. Dunne
Counsel

Federal Communications Commission
Washington, D.C. 20554

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements and Type Style Requirements

1. This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(a) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

   ☒ this document contains 1,752 words, *or*

   ☐ this document uses a monospaced typeface and contains ____ lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   ☒ this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman, *or*

   ☐ this document has been prepared in a monospaced spaced typeface using _____ with _____.

/s/ Matthew J. Dunne

Matthew J. Dunne
Counsel
Federal Communications Commission
Washington, D. C. 20554
(202) 418-1740

CERTIFICATE OF FILING AND SERVICE

I, Matthew J. Dunne, hereby certify that on October 10, 2018, I filed the foregoing Motion of Federal Communications Commission To Stay The Mandate with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit using the electronic CM/ECF system. The participants in the case, listed below, who are registered CM/ECF users will be served electronically by the CM/ECF system.

s/ Matthew J. Dunne

Matthew J. Dunne
Counsel
Federal Communications Commission
Washington, D. C. 20554
(202) 418-1740

[Service List Continued from Previous Page]

Service List:

Russell P. Hanser Brian W. Murray Melissa L. Turcios WILKINSON & BARKER Suite 800N 1800 M Street, N.W. Washington, DC 20036 *Counsel for Citizens Telecommunications Co. of MN, LLC et al.*	Ethan D. Jeans WILKINSON & BARKER Suite 470 1755 Blake Street Denver, CO 80202 *Counsel for Citizens Telecommunications Co. of MN, LLC et al.*
Kevin J. Saville CITIZENS TELECOMMS CO. OF MN., LLC 2378 Wilshire Blvd Mound, MN *Counsel for Citizens Telecommunications Co. of MN, LLC*	Robert Nicholson Robert J. Wiggers Jefferson B. Sessions, III U.S. DEP'T OF JUSTICE 950 Pennsylvania Avenue, N.W. Washington, DC 20530 *Counsel for United States of America*
Ryan S. Baasch LATHAM & WATKINS Suite 1000 885 Third Avenue New York, NY 10022 *Counsel for NCTA-The Internet & Television Association et al.*	James H. Barker Matthew A. Brill Matthew T. Murchison LATHAM & WATKINS Suite 1000 555 11th Street, N.W. Washington, DC 20004 *Counsel for NCTA-The Internet & Television Association et al.*

[Service List Continued from Previous Page]

Colleen Boothby Sara Kuehnle LEVINE & BLASZAK Suite 900 2001 L Street, N.W. Washington, DC 20036 *Counsel for Ad Hoc Telecommunications User Comm.*	Markham C. Erickson STEPTOE & JOHNSON 1330 Connecticut Ave., N.W. Washington, DC 20036 *Counsel for Granite Telecommunications, LLC et al.*
Elizabeth A. Bonner Varun S. Goel John Nakahata H. Henry Shi Timothy J. Simeone Christopher J. Wright HARRIS & WILTSHIRE The Eighth Floor 1919 M Street, N.W. Washington, DC 20036 *Counsel for Windstream Services, LLC et al.*	C. Frederick Beckner, III Kurt Johnson Jonathan E. Nuechterlein Christopher Shenk James P. Young SIDLEY & AUSTIN 1501 K Street, N.W. Washington, DC 20005 *Counsel for AT&T et al.*
Craig J. Brown CENTURYLINK, INC. Suite 1230 931 14th Street Denver, CO 80202 *Counsel for CenturyLink*	Mark Cooper CONSUMER FEDERATION OF AMERICA Suite 200 1620 I Avenue N.W. Washington, DC 20006 *Counsel for Consumer Federation of America*

[Service List Continued from Previous Page]

Bruce Kushnick NEW NETWORKS INSTITUTE 185 Marine Avenue Brooklyn, NY 11209 *Counsel for New Networks Institute*	Phillip Berenbroick John Bergmayer Harold Feld PUBLIC KNOWLEDGE Suite 410 1818 N Street, N.W. Washington, DC 20036 *Counsel for Public Knowledge*
Edward H. Bergin JONES & WALKER 201 St. Charles Avenue New Orleans, LA 70170 *Counsel for CenturyLink, Inc.*	Russel Blau Andrew D. Lipman MORGAN & LEWIS 1111 Pennsylvania Avenue, N.W. Washington, DC 20004 *Counsel for Access Point, Inc. et al.*