ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR RESPONDENTS

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

NO. 13-1220

VERIZON AND AT&T, INC.,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties and Amici.

All parties, intervenors, and amici appearing before the Federal Communications Commission and in this Court are listed in the Brief for Petitioners.

2. Rulings under review.

Petition of US Telecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations, Memorandum Opinion and Order and Report and Order and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, 28 FCC Rcd 7627 (2013) ("*Order*") (J.A. 1).

3. Related cases.

The Order has not previously been before this Court. Counsel are not aware of any other related cases pending before this Court or any other court.

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GLOSSARY

1996 Act	Telecommunications Act of 1996
Act	Communications Act of 1934
ARMIS	Automated Reporting Management Information System
BOCs	Bell Operating Companies
Commission	Federal Communications Commission
Communications Act	Communications Act of 1934
FCC	Federal Communications Commission
GAAP	General Accepted Accounting Principles
J.A.	Joint Appendix
LECs	Local Exchange Carriers
NCTA	National Cable & Telecommunications Association
USOA	Uniform System of Accounts
USTelecom	United States Telecom Association
VoIP	Voice over Internet Protocol

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ON PETITION FOR REVIEW OF AN ORDER OF THE
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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUE PRESENTED

Section 10(a) of the Communications Act of 1934, as amended, authorizes the Federal Communications Commission ("FCC" or "Commission") to forbear from applying provisions of the Communications Act or its rules to a telecommunications carrier or class of carriers if it finds that certain criteria have been met. 47 U.S.C. § 160(a). Invoking that section, the United States Telecom Association ("USTelecom"), a trade association of telecommunications providers that includes petitioners Verizon and AT&T, Inc., unsuccessfully petitioned the FCC to forbear completely

from applying the requirement that price cap carriers maintain the Uniform System of Accounts ("USOA") required by section 220(a)(2) of the Communications Act and Part 32 of the FCC's rules implementing section 220(a)(2). *See* 47 U.S.C. § 220(a)(2); 47 C.F.R. Part 32.[1]

The issue before the Court is whether the FCC lawfully denied USTelecom's across-the-board forbearance request regarding the USOA.

STATUTORY PROVISIONS

The applicable statutes and regulations are contained in the attached appendix.

[1] USTelecom's petition also sought forbearance relief from many other requirements. The FCC ruled on USTelecom's forbearance request in two orders: (1) *USTelecom Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, Memorandum Opinion and Order and Report and Order and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, 28 FCC Rcd 7627 (2013) ("*Order*") (J.A. 1) and (2) *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, Order, 28 FCC Rcd 2605 (2013) ("*USTelecom Short Order*") (J.A. 414). Petitioners only seek review of the *Order*.

COUNTERSTATEMENT

I. BACKGROUND

A. Statutory and Regulatory Framework

1.Section 10

Section 10(a) of the Communications Act requires the FCC to forbear from applying any provision of the Communications Act or its rules if it determines: (1) that enforcement of the requirement is not necessary to ensure that rates are just, reasonable, and non-discriminatory; (2) that the regulation is not needed to protect consumers; and (3) that forbearance is consistent with the public interest. 47 U.S.C. § 160(a). The FCC, in applying the "public interest" component of the test, must consider whether forbearance "will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services." 47 U.S.C. § 160(b). The FCC may forbear under section 10(a) only if it finds that all three elements of the forbearance standard are met. *See In re Core Commc'ns, Inc.*, 455 F.3d 267, 277 (D.C. Cir. 2006); *CTIA v. FCC*, 330 F.3d 502, 508 (D.C. Cir. 2003).

Section 10(c) gives a telecommunications carrier the right to petition for forbearance. 47 U.S.C. § 160(c). To expedite decision-making, such a forbearance petition is "deemed granted" after one year (plus 90 days if extended by the FCC) "if the FCC does not deny the petition for failure to

meet the requirements for forbearance under [section 10(a)]." 47 U.S.C. § 160(c).

2. Statutory Rate Regulation Provisions

The FCC has the responsibility under the Communications Act to ensure that charges for interstate common carrier communications services are just and reasonable, 47 U.S.C. § 201(b), and free of any undue discrimination or preference, 47 U.S.C. § 202(a). The Act gives the FCC the related duty to prevent telecommunications carriers from using interstate services "that are not competitive to subsidize [interstate] services that are subject to competition." 47 U.S.C. § 254(k).

In the absence of regulatory forbearance, section 203 of the Act requires interstate telecommunications carriers to file tariffs that establish the rates, terms, and conditions of interstate communications services. 47 U.S.C. § 203. The FCC has authority to investigate the lawfulness of those tariffs, 47 U.S.C. §§ 204, 205, and to prescribe, after hearing, just and reasonable charges or practices, 47 U.S.C. § 205. The FCC also has a duty to adjudicate complaints of unlawful carrier rates and to award damages where warranted. 47 U.S.C. §§ 206-09.

In addition, section 224(b)(1) of the Act requires the FCC to ensure that the "rates, terms, and conditions for pole attachments . . . are just and

reasonable." 47 U.S.C. § 224(b)(1).[2] Section 224 requires pole attachment rates to be based on the "cost" of providing space on a pole. 47 U.S.C. § 224(d)(1), (e)(2), (3).[3] The FCC has developed cost-based rate formulae used to develop and evaluate the lawfulness of pole attachment rates. *See* 47 C.F.R. § 1.1409(e)(1), (2).

3. Section 220 and the USOA

Section 220(a) of the Act requires the FCC to establish rules "prescrib[ing] a uniform system of accounts for use by telephone companies" in order to "ensure a proper allocation of all costs to and among [the carrier's] telecommunications services, facilities, and products." 47 U.S.C. § 220(a)(2). Congress imposed this requirement to give the FCC the means to "fulfill its mandate of ensuring that carriers' rates and practices are just and reasonable." *Qwest Commc'ns Int'l, Inc. v. FCC*, 229 F.3d 1172, 1178 (D.C. Cir. 2000).

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[2] The Communications Act defines a "pole attachment" as "any attachment by a cable television system or provider of telecommunications services to a pole, duct, conduit or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4).

[3] Section 224 provides for different cost methods for establishing rates of pole attachments depending upon whether the attacher is a cable company or a provider of telecommunications services. *Compare* 47 U.S.C. § 224(d)(1) *with* 47 U.S.C. § 224(e)(2).

The USOA, codified in Part 32 of the FCC's rules (47 C.F.R. Part 32), comprises "a historical accounting system that reports the results of operational and financial events in a manner which enables both management and regulators to assess these results within a specified accounting period." 47 C.F.R. § 32.1. Specifically tailored to the telecommunications industry, the USOA provides financial data at a sufficient level of disaggregation and geographic specificity to enable the FCC to determine the costs of specific telecommunications services. *See Order*, ¶71 (J.A. 36). And by providing uniformity and consistency among carriers' books of account, Part 32 permits ready comparisons among carriers' operating results and enables industry analysis based on historical trends. *Id.*, ¶72 (J.A. 37); *2000 Biennial Regulatory Review – Comprehensive Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers*, Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19911, 19958 (¶119) (2001) ("*2001 USOA Reform Order*"); *2000 Biennial Regulatory Review*, Notice of Proposed Rulemaking, 15 FCC Rcd 20568, 20575 (¶19) (2001).

As directed by Congress, the FCC has required uniform accounts since 1935. In 1986, however, the FCC substantially revised and updated its accounting system and codified new rules in Part 32 to "provid[e] for changes

in a complex and competitive, technological and economic environment." *Revisions of the Uniform System of Accounts and Financial Reports Requirements for Class A and Class B Telephone Companies*, Report and Order, FCC 86-221, 1986 WL 291915 (¶5) (released May 15, 1986). The FCC in the Part 32 rules, *inter alia*, incorporated generally accepted accounting principles ("GAAP") into the USOA "to the extent regulatory considerations permit." 47 C.F.R. § 32.1. *Accord*, *Revision of the Uniform System of Accounts for Telephone Cos. to Accommodate Generally Accepted Accounting Principles*, 102 FCC 2d 964, 984 (1985) ("*GAAP Accounting Order*").[4]

The FCC has continued to review its Part 32 accounting requirements "in order to keep pace with changing conditions as the telecommunications industry becomes increasingly competitive." *Comprehensive Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent*

[4] "GAAP is that common set of accounting concepts, standards, procedures and conventions which are recognized by the accounting profession as a whole and upon which most nonregulated enterprises base their external financial statements and reports." *GAAP Accounting Order*, 102 FCC Rcd at 964 n.1. GAAP does "not . . . require uniform accounts among companies so long as the implementation is consistent with the principles." *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160 From Enforcement of Certain of the Commission's Cost Assignment Rules*, Memorandum Opinion and Order, 23 FCC Rcd 7302, 7316 (¶23) (2008) ("*AT&T Cost Assignment Forbearance Order*").

Local Exchange Carriers, Report and Order, 15 FCC Rcd 8690, 8691 (¶1) (2000). In 2000, the FCC made a number of reforms to its accounting requirements, including the elimination of the Part 32 requirement that carriers maintain disaggregated financial data in subsidiary record categories and report that data in an expense matrix. *Id.* at 8693 (¶4). The FCC in 2001 again made additional changes to the USOA, including substantial reforms that significantly streamlined Part 32. *2001 USOA Reform Order*, 16 FCC Rcd 19911. For example, the FCC reduced the number of Class A accounts by forty-five percent – from 296 to 164 – "maintaining only those currently used in ongoing regulatory activities under the Communications Act and the 1996 Act."[5] *Id.* at 19914 (¶5).[6]

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[5] Large incumbent local exchange carriers ("LECs"), such as Verizon and AT&T, are required to maintain Class A accounts. *See* 47 C.F.R. § 32.11(b). An incumbent LEC is a LEC that had provided local exchange service to a given area pursuant to a monopoly franchise granted by a state commission prior to the enactment of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). *See* 47 U.S.C. § 251(h). The *2001 USOA Reform Order* also reduced by 27 percent the number of Class B accounts that apply to smaller incumbent LECs. 16 FCC Rcd at 19914 (¶5).

[6] The FCC in the *2001 USOA Reform Order* also amended section 32.11 of its rules to make explicit that Part 32 applies only to "incumbent LECs,"(*id.* at 19960 (¶126)) "because they are the dominant carriers in their markets." *Id.* That determination reflects the FCC's longstanding policy of calibrating the level of regulation based upon whether a carrier is classified as a "dominant carrier," *i.e.* a carrier with market power, or a "non-dominant carrier," *i.e.*, a carrier without market power. *See* Section V, *infra*.

In 2008, the Commission granted AT&T, Verizon, and Qwest conditional forbearance from the cost assignment rules, which included several Part 32 rules. *AT&T Cost Assignment Forbearance Order*, 23 FCC Rcd 7302; *Service Quality Customer Satisfaction, Infrastructure and Operating Data Gathering*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 23 FCC Rcd 13647 (2008) ("*Verizon Qwest Cost Assignment Forbearance Order*").[7] In granting that conditional forbearance, the FCC reaffirmed the need for "USOA account data" for "regulatory purposes, including rulemakings or adjudications," and required such data "to be maintained and available to the Commission on request." *AT&T Cost Assignment Forbearance Order*, 23 FCC Rcd at 7314 (¶21).[8]

4. Price Cap Regulation for Large Incumbent LECs.

Historically, the FCC exclusively regulated the interstate access rates of all incumbent LECs pursuant to a traditional rate of return methodology. Under that cost-based form of rate regulation, a telephone company is permitted to set rates no higher than necessary to recover its legitimate

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[7] The cost assignment rules "generally require carriers to assign costs to build and maintain the network and revenues from services provided to specific categories." *Order*, ¶ 31 (J.A. 20).

[8] In compliance plans setting forth how they would satisfy the conditions of forbearance, AT&T, Verizon, and Qwest each committed "to maintain their Part 32 books of account." Public Notice, 26 FCC Rcd 16943, 16946 (2011).

expenses (including depreciation and taxes) plus a fair rate of return on its investment. *See, e.g.*, *Verizon Tel. Co. v. FCC*, 453 F.3d 487, 490 (D.C. Cir. 2006).

In 1990, the FCC adopted an incentive-based "price cap" system of rate regulation for access services for the largest incumbent LECs. *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786 (1990) ("*LEC Price Cap Order*"), *recon. granted in part*, 6 FCC Rcd 2637 (1991), *aff'd*, *Nat'l Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).[9] The price cap system is designed to provide incentives for efficiency and productivity by permitting those LECs that reduce their costs to earn greater profits. *See Bell Atl. Tel. Cos. v. FCC*, 79 F.3d 1195, 1198 (D.C. Cir. 1996). Under price cap regulation, the FCC accords an initial presumption of reasonableness to interstate rates that (1) are at or below a price cap for a group of services known as a "basket" and (2) are within specified pricing bands for service categories within the baskets. When a LEC files interstate access rates that are below the price caps and within price bands, the LEC's tariff receives "streamlined" review

[9] While price cap regulation is mandatory for the largest LECs, smaller LECs can elect to be regulated under either the price cap method or the rate of return system. *LEC Price Cap Order*, 5 FCC Rcd at 6818-19 (¶¶262-65).

from the FCC and generally will become effective without suspension and investigation under 47 U.S.C. § 204. *LEC Price Cap Order*, 5 FCC Rcd at 6788 (¶¶11-12). That presumption of reasonableness, however, "applies only to the suspension decision, and does not survive if the tariff is set for investigation." *Id.* at 6822 (¶293). Once a price cap tariff is designated for investigation, the carrier has the burden to show that its rates are just and reasonable. *Id.* at 6822 (¶295); *see* 47 U.S.C. §§ 201(b), 204(a).

The FCC in adopting the price cap plan stated that "price cap rates do reflect costs . . . albeit in a different manner than do rate of return rates." *LEC Price Cap Order*, 5 FCC Rcd at 6836 (¶ 405). "With respect to costs," the FCC emphasized that it would "continue to rely . . . on the [s]ection 204 investigation and [s]ection 208 complaint processes as part of [its] plan to ensure just, reasonable, and non-discriminatory rates." *Id.* at 6836 (¶406).

II. THIS PROCEEDING

A. Proceedings Leading to the *Order*

On February 16, 2012, USTelecom filed a petition requesting forbearance from 141 statutory and rule provisions. Petition for Forbearance of the United States Telecom Association (filed Feb. 16, 2012) (J.A. 128) ("USTelecom Petition"). Included in USTelecom's petition was a request that the FCC forbear from application of section 220(a)(2) of the

Communications Act and Part 32 in its entirety for price cap carriers ("across-the-board USOA forbearance request").[10] *Id.* at 34-43 (J.A. 167-76). The USTelecom petition contained two other forbearance requests relating to specific Part 32 rules. *Id.* at 34, 43-47 (J.A. 167, 176-80). USTelecom in its petition did *not* seek any other type of partial or conditional relief from Part 32. After the FCC extended consideration of the petition by ninety days, the deadline for FCC action to avoid a "deemed grant" result under the statute was May 17, 2013. *See Petition of USTelecom For Forbearance Under 47 U.S.C. § 160(c) From Enforcement Of Certain Legacy Telecommunications Regulations*, Order, 28 FCC Rcd 1077 (2013). *See* 47 U.S.C. § 160(c).

At the FCC's invitation, a number of parties filed comments and reply comments on USTelecom's petition. *See* Public Notice, 27 FCC Rcd 2326 (2012) (J.A. 231). USTelecom and several of its members filed comments in support of the across-the-board USOA forbearance request, whereas other parties, including state public utility commissions, competitive service providers, industry advocacy groups, wireless carriers, and consumer advocates opposed it.

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[10] The government refers to the "across-the-board USOA forbearance request" to distinguish that request from other forbearance requests in USTelecom's petition (including requests for forbearance from specific Part 32 accounts).

On April 18, 2013 – almost a year after the pleading cycle had ended and only a few weeks before the statutory deadline for FCC action – USTelecom filed a lengthy *ex parte* letter presenting new arguments in support of its across-the-board USOA forbearance request. Letter from Bennett Ross to Marlene Dortch, Secretary, FCC (Apr. 18, 2013) (J.A. 456) ("April 18 *Ex Parte*"). In that letter, USTelecom stated that price cap carriers would be willing to make two "voluntary commitments" that it claimed would provide the FCC with the data "it may reasonably need in discharging its regulatory responsibilities" if it forbore from applying Part 32 across-the-board to price cap carriers. *Id.* at 2 (J.A. 457).

In the ensuing two weeks, USTelecom made nine additional *ex parte* submissions. In its last *ex parte* submission – filed on the last day that *ex parte* communications were permitted and a mere two weeks before the statutory "deemed grant" provision would apply – USTelecom set forth two additional proposals that it claimed "*could be* conditions for obtaining Part 32 forbearance." Letter from Walter McCormick to Marlene Dortch, Secretary, FCC (May 3, 2013) (emphasis added) (J.A. 483) ("May 3 *Ex Parte*"). *See* 47 C.F.R. § 1.58 (barring party contacts with FCC decision-makers during the two-week period before the statutory deadline for FCC action in forbearance proceedings); Public Notice, 28 FCC Rcd 5705 (2013) (J.A. 480)

(announcing that contacts with decision-makers are prohibited with respect to the USTelecom forbearance petition as of May 3, 2013).

B. Order on Review

In an order released on May 17, 2013, the FCC granted a majority of the requests in USTelecom's petition, including some requests for forbearance from specific Part 32 rules,[11] but denied the across-the-board USOA forbearance request. *Order* (J.A. 1). With respect to the blanket USOA request, the FCC concluded that USTelecom had failed to satisfy its burden of proof as to each of the three elements of the section 10 test. *Id.*, ¶¶56-77 (J.A. 30-39).

Section 10(a)(1). The FCC first considered whether Part 32 is unnecessary to ensure that the rates and practices of price cap carriers are just and reasonable and free from unjust or unreasonable discrimination. The FCC found "a variety of current circumstances" in which Part 32 data are

[11] With respect to Part 32 rules, the FCC granted USTelecom's specific requests for conditional forbearance from the application of: (1) property record requirements in 47 C.F.R. § 32.2000(e)-(f) for incumbent LECs, and (2) the Part 32 rules relating to cost assignment (47 C.F.R. §§ 32.23, 32.27, 32.5280) for price cap carriers that had not previously been granted forbearance from those rules.

necessary to ensure that the rates of price cap LECs are just, reasonable and non-discriminatory.[12] *Id.*, ¶58 (J.A. 31). *See id.*, ¶¶61-69 (J.A. 31-35).

Pole Attachments. The FCC determined that Part 32 is necessary to its regulation of pole attachment rates under section 224 of the Communications Act. *Id.*, ¶63 (J.A. 32). Cost data for pole attachment rates are derived from Part 32 accounts, and those data enable both the agency and affected parties to evaluate whether a local exchange carrier's pole attachment rates calculated under the Commission's rate formula are just and reasonable. *Id.*[13] The FCC also uses Part 32 data when modifying the regulatory formula used to calculate pole attachment rates. *Id.*, ¶64 (J.A. 33).

The FCC considered, and rejected, USTelecom's argument that retention of the Part 32 rules is not necessary because the FCC's pole attachment rules do not explicitly require the use of Part 32 data. *Id.*, ¶65

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[12] The references to "price cap LECs" in this brief are those LECs that are subject to price cap regulation for their interstate access services, even though those carriers are subject to a different type of price regulation for their pole attachments.

[13] Under the FCC's regulatory regime, the parties first try to negotiate a pole attachment rate; if those negotiations fail, attaching parties may file a complaint with the agency using cost data reported by carriers. *Id.*, n.189 (J.A. 32). The FCC found that parties rely upon Part 32 data both in their private negotiations of pole attachment rates and in their complaint filings. *Id.*, ¶63 (J.A. 32).

(J.A. 33). *See* 47 C.F.R. § 1.1404(g)(2). The FCC explained that the administrative record contained no evidence of alternative sources of pole attachment data that would satisfy its regulatory standards. *Id.*, ¶65 (J.A. 33). Indeed, given the significant differences between GAAP and Part 32 in the treatment of certain pole attachment expenses – differences expressly acknowledged by USTelecom in the administrative proceedings below (May 3 *Ex Parte* at 4 (J.A. 485); *Order*, n.200 (J.A. 34)) – the FCC concluded that a price cap carrier's use of GAAP accounting would actually "alter the rates price cap carriers charge for pole attachments." *Order*, ¶65 & n.200 (J.A. 34).

Enforcement. The FCC found that Part 32 was an essential tool in its evaluation of the lawfulness of price cap interstate access rates. The FCC pointed out that "the fact that price cap rates cannot be raised automatically does not mean that the relationship between costs and prices is entirely eliminated." *Id.*, n.302 (J.A. 48). The FCC noted that "[e]ven under price cap regulation, allegations of unjust, unreasonable, or unreasonably discriminatory rates can arise" that require FCC adjudication. *Id.*, n.209 (J.A. 35). For example, the FCC specified that such questions had been raised (and hotly contested) in the context of certain price cap special access rates. *Id.* (citing *Special Access for Price Cap Local Exchange Carriers*, Report and

Order, 27 FCC Rcd 10557 (2011)). The FCC determined that requiring price cap carriers to maintain Part 32 accounting "ensures [the FCC's] ability to obtain the underlying data necessary to reconstruct information to determine whether improper cost accounting has occurred or to make determinations about just and reasonable rates." *Id.*, ¶53 (J.A. 29).[14]

Section 272(e)(3) Imputation. Section 272(e)(3) specifies that a Bell Operating Company ("BOC")[15] that offers integrated exchange access and long distance service must "impute to itself . . . an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange [long-distance] carriers for

[14] The FCC pointed out that it may also need Part 32 accounting data when adjusting the existing price cap regime or considering other reforms. *Id.*, ¶68 (J.A. 34).

[15] The BOCs are incumbent LECs that historically had been wholly-owned subsidiaries of AT&T and collectively controlled the local exchange facilities used to provide service to most of the telephone subscribers in the country. In 1982, AT&T entered into an antitrust consent decree that, *inter alia*, resulted in the divestiture of the BOCs by AT&T. *See United States v. AT&T*, 552 F. Supp. 131 (D.D.C 1982), *aff'd*, *Maryland v. United States*, 460 U.S. 1001 (1983). *See* 47 U.S.C. § 153(5) (listing the BOCs).

such service." 47 U.S.C. § 272(e)(3).[16] The FCC found Part 32 data to be necessary for the effective implementation of that statutory requirement. *Order*, ¶ 66 (J.A. 34). The FCC noted that it had conditioned its authorization of the BOCs' offering of integrated exchange and long distance service upon the BOCs' compliance with cost assignment rules designed to prevent improper cost shifting and the inclusion of section 272 imputation charges in a specific Part 32 account. *Id.* (citing *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440 (2007)) ("*Section 272 Sunset Order*"). Although the FCC subsequently granted forbearance from the cost assignment rules, the FCC pointed out that it had conditioned that forbearance upon the BOCs' maintenance of Part 32 accounts and use of Part 32 data to comply with the imputation requirement in section 272(e)(3). *Id.*

[16] "Imputation is an accounting and regulatory device that is used in recognizing intra-company transactions. In the context of access services, th[e] Commission and state commissions have long recognized the potential for LECs to use their control over their local networks to impede competition in services for which local network access is a needed input. Imputation requirements address this concern by requiring the BOC to recognize for accounting and other regulatory purposes charges for local network access equal to the amounts that an unaffiliated third party would pay for comparable access." *AT&T Cost Assignment Forbearance Order*, 23 FCC Rcd at 7318 n.102.

(citing *AT&T Cost Assignment Forbearance Order*, 23 FCC Rcd at 7318-19 (¶29)).

Section 254(k) Compliance. The FCC found that Part 32 accounting enables it to enforce compliance with section 254(k)'s prohibition on cross-subsidization. *Id.*, ¶67 (J.A. 34). The FCC explained that it had expressly conditioned its forbearance from the cost assignment rules upon the requirement that price cap carriers submit an annual certification of their compliance with section 254(k) and maintain (and provide upon request) cost accounting information necessary to ensure compliance with section 254(k). *Id.*, ¶¶45, 67 (J.A. 26, 34). *See AT&T Cost Assignment Forbearance Order*, 23 FCC Rcd at 7302 (¶30). The FCC found that Part 32 accounting gives it the means to verify the accuracy of that cost accounting information. *Order*, ¶67 (J.A. 34). *See id.*, ¶53 (J.A. 29) (Part 32 provides the underlying data "necessary to gauge whether improper cost accounting has occurred.").

Section 10(a)(2). The FCC concluded that it needs Part 32 data to ensure that telephone carriers charge consumers just and reasonable rates. *Id.*, ¶¶70-72 (J.A. 35-37). The FCC explained that the USOA is "uniquely tailored" to provide the financial data the agency needs to fulfill its statutory duties. *Id.*, ¶71 (J.A. 36).

The FCC rejected USTelecom's claim that the agency, in its *AT&T Cost Assignment Forbearance Order*, had held that price cap regulation by itself adequately protects consumers against unjust and unreasonable rates in all circumstances. The FCC pointed out that it would not have granted forbearance from the cost assignment rules without the existence of Part 32 accounting safeguards. *Id.*, ¶¶68, 70 (J.A. 34, 35) (citing *AT&T Cost Assignment Forbearance Order*, 23 FCC Rcd at 7325, 7326 (¶¶41, 44)). Indeed, the FCC noted that it had expressly conditioned that forbearance upon AT&T's provision of Part 32 data to the agency on request. *Id.* at 7661 (¶68) (J.A. 35).

The FCC also rejected USTelecom's argument that other accounting systems, such as GAAP, would adequately protect consumers in the absence of Part 32 accounting. *Order*, ¶¶71-72 (J.A. 36-37). The FCC noted that GAAP accounting is designed to give investors notice and transparency and permit financial oversight by the Securities and Exchange Commission, not to protect telecommunications consumers from unjust and unreasonable charges. As a result, GAAP accounting does "not provide the same level of disaggregation of costs and geographic specificity that Part 32 provides." *Id.*, ¶71 (J.A. 36). The FCC further emphasized that GAAP "requires conformity to a set of principles but does not require uniform treatment of plant-specific

assets as required by Part 32." *Id.*, ¶72 (J.A. 37). The FCC explained that uniformity of Part 32 accounting enables the agency to conduct consistent industry-wide analysis and oversight. *Id.*

Section 10(a)(3). The FCC concluded that USTelecom had failed to show that forbearance from Part 32 is consistent with the public interest. The FCC found, after reviewing the administrative record, that there was insufficient evidence to quantify accurately the costs of complying with Part 32. *Id.*, ¶ 74 (J.A. 37). The FCC also found that USTelecom had failed to show that the costs of Part 32 compliance outweigh the important uses of Part 32 data in telecommunications regulation. *Id.*

The FCC concluded that the record established that retaining Part 32 would enhance competition. *Id.*, ¶75 (J.A. 38). The FCC found that USTelecom had not shown that the cost savings to price cap carriers that would result from forbearance "would have any effect on competition." *Id.*, ¶74 (J.A. 38). On the other hand, the FCC determined that the record showed that Part 32 affirmatively promotes competition in the marketplace. *Id.*, ¶¶74, 75 (J.A. 37, 38). The FCC explained that the ability of cable companies and other service providers to obtain pole attachments at reasonable, cost-based rates is "key to these providers' ability to provide competition." *Id.*, ¶75 (J.A. 38). The FCC found that the availability of Part 32 data is essential

to its evaluation of whether the pole attachment rates that incumbent LECs charge are reasonable and cost-based. *Id.*

Although concluding that the public interest favored retaining its Part 32 accounting rules, the FCC acknowledged that further reform of the USOA is likely appropriate. The FCC stated that it would institute a rulemaking to review the Part 32 accounting rules to consider ways to minimize the compliance burdens on price cap carriers while ensuring that the agency retains access to the financial information it needs to fulfill its regulatory duties. *Id.*, ¶77 (J.A. 39). The FCC staff has prepared a draft notice of proposed rulemaking, which currently is under consideration by the Commissioners.

SUMMARY OF ARGUMENT

The FCC reasonably denied USTelecom's petition to forbear, across-the-board, from the USOA requirements of the Communications Act and the FCC's rules. As an initial matter, neither USTelecom nor any other party in the proceeding below challenged the lawfulness of the FCC's assignment of the burden of proof on the party seeking forbearance, and thus 47 U.S.C. § 405 bars Petitioner from raising that issue on review. If the Court reaches the issue, it should hold that the FCC acted lawfully in placing the burden of proof on USTelecom in accordance with the FCC's judicially approved rule

assigning evidentiary burdens on the party seeking forbearance. As the Tenth Circuit has held, section 10 does not specifically address the burden of proof, and the FCC assignment is a reasonable implementation of section 10 that is entitled to *Chevron* deference. *Qwest Corp. v. FCC*, 689 F.3d 1214, 1225-26 (10th Cir. 2012) ("*Qwest Phoenix*").

The FCC reasonably determined that USTelecom failed to prove that its across-the-board USOA forbearance request satisfied the section 10 forbearance standard. The central premise underlying the USOA forbearance request – *i.e.*, that price cap carriers' rates are not based upon costs, and therefore Part 32 no longer is necessary to ensure that those carriers' rates are just and reasonable – is factually incorrect. The pole attachment rates of price cap carriers <u>are</u> based upon costs, and Part 32 cost data are essential to the effective regulation of those cost-based rates. And Part 32 also plays a necessary role in the regulation of price cap carriers' interstate access rates. Part 32 data, for example, is necessary to the FCC's continued ability to effectively evaluate the lawfulness of specific price cap rates in section 204 rate investigations and section 208 adjudications.

Part 32 also is necessary to the FCC's performance of a number of its other statutory responsibilities. For example, Part 32 enables the FCC to ensure that price cap carriers comply with section 254(k)'s prohibition on

cross-subsidization. Moreover, Part 32 gives the FCC the ability to verify that the price cap LECs subject to the section 273(e)(3) imputation requirement properly record their imputation costs.

The FCC reasonably rejected Petitioners' argument that Part 32 accounting safeguards are unnecessary because the FCC can fulfill its regulatory responsibilities by price cap carriers' provision of GAAP derived cost data. In contrast to the USOA, GAAP is not specifically tailored to the telecommunications industry and does not provide financial data at a sufficient level of disaggregation and geographic specificity to enable the FCC to determine the costs of individual telecommunications services. Moreover, GAAP is a set of principles, not a uniform system of accounts, and thus would not provide the uniformity in accounting necessary to permit the FCC to conduct industry-wide analysis and oversight.

USTelecom failed to establish that the across-the-board USOA forbearance request furthered the public interest. It did not show that the costs of compliance (which it did not adequately substantiate) outweighed the important regulatory benefits in retaining Part 32. Moreover, the record shows that Part 32 enhances competition by giving the FCC the means to ensure that telecommunications providers can obtain access to the pole space they need to provide service at reasonable rates.

Petitioners are wrong in claiming that the FCC erred in not considering a partial or conditional grant of forbearance from Part 32. In addition to the across-the-board USOA request, US Telecom's petition, *inter alia*, contained two forbearance requests from specific Part 32 rules. The FCC fully addressed each request and conditionally granted the two requests for partial forbearance from Part 32. By contrast, the FCC was not obligated to grant other types of partial or conditional relief not contained in the forbearance petition itself.

Nor did the FCC act unlawfully when it denied a proposal by USTelecom, contained in *ex parte* submissions filed shortly before the statutory deadline, to grant the across-the-board USOA forbearance request subject to various conditions/voluntary commitments. This Court has warned litigants against relying on *ex parte* communications, and the last minute *ex parte* filings in this case did not afford the FCC sufficient time to carefully consider the proposal and evaluate its implications. Moreover, Petitioners do not even attempt to show how the specific voluntary commitments/conditions in the last minute *ex parte* filings would permit the FCC to make the statutory determinations necessary to conditionally grant the across-the-board USOA forbearance request.

Finally, FCC rules apply Part 32 accounting safeguards only on incumbent LECs. Incumbent LECs have been classified as "dominant" carriers with market power in their provision of interstate access. Part 32 accounting safeguards are necessary to ensure that these dominant carriers charge just and reasonable rates, and do not use their control over wholesale network facilities, *i.e.*, telephone poles, to impede competition. In contrast, Part 32 safeguards are not needed for non-dominant carriers lacking market power and the control of essential network facilities, so they are not similarly situated with the large price cap carriers.

ARGUMENT

I. THE *ORDER* IS SUBJECT TO DEFERENTIAL STANDARDS OF REVIEW.

Verizon and AT&T bear a heavy burden to establish that the *Order* on review is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this "highly deferential standard of review," the Court presumes the validity of agency action. *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 237 (D.C. Cir. 2013). *See Cellco P'ship v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004). The Court must affirm unless the FCC failed to consider relevant factors or made a clear error in judgment. *E.g.*, *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In other words, "the

question is not what [the Court] think[s] about the [forbearance] petition, but whether the *Commission's* view of the petition is reasonable." *AT&T, Inc. v. FCC*, 452 F.3d 830, 837 (D.C. Cir. 2006) (emphasis in original).

The Court must review the FCC's interpretation of the Communications Act in accordance with the standard of review articulated in *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, the Court "employ[s] traditional tools of statutory construction" to determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842, 843 n.9. If so, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. Where "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Under those circumstances, the Court should "uphold the FCC's interpretation as long as it is reasonable, even if there may be other reasonable, or even more reasonable, views." *Earthlink, Inc. v. FCC*, 462 F.3d 1, 7 (D.C. Cir. 2006) (internal quotation marks omitted). *See id.* at 12 (court owes deference to Commission's reasonable construction of section 10).

II. PETITIONERS' CLAIM THAT THE FCC ERRED IN ASSIGNING USTELECOM THE BURDEN OF PROOF IS NOT PROPERLY BEFORE THE COURT AND, IN ANY EVENT, IS BASELESS.

In considering the petition, the FCC assigned the burden on USTelecom to prove that the three elements of the forbearance statute were satisfied. Verizon and AT&T challenge that approach, contending that 47 U.S.C. § 160 places the burden of proof on the FCC, not the forbearance petitioner. As shown below, that argument is not properly before the court, and is baseless in any event.

A. Section 405 Bars Petitioners From Challenging The FCC's Assignment Of The Burden Of Proof.

Section 405 of the Communications Act bars a petitioner from raising on judicial review an issue of law or fact on which the FCC "has been afforded no opportunity to pass." 47 U.S.C. § 405. While section 405 does not require the party seeking judicial review to have raised the issue below, "the argument does have to have been meaningfully raised by someone." *Coal. for Noncommercial Media v. FCC*, 249 F.3d 1005, 1008 (D.C. Cir. 2001). Neither Petitioners nor anyone else argued in the proceedings below that section 10 forbids the FCC from assigning the burden of proof on the party seeking forbearance. Thus, that issue is not properly before the Court.

See Qwest Corp. v. FCC, 482 F.3d 471, 475 (D.C. Cir. 2007) (quoting *Core*, 455 F.3d at 276) (the Court "'strictly construes'" section 405").

Petitioners note that they had raised the burden of proof issue in comments they filed almost six years ago in a rulemaking addressing the procedures to be used in forbearance proceedings. Pet. Brief at 34 n.5. Comments presented to the agency years earlier in a different agency docket, however, do not afford the FCC "a fair opportunity" to consider *in this case* whether section 10 forbade the FCC from assigning USTelecom the burden of proof. *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1182 (D.C. Cir. 2003).

B. The FCC Lawfully Applied Its Judicially Approved Rule Placing The Burden Of Proof On USTelecom.

The FCC lawfully assigned USTelecom the burden of proof (including the burden of persuasion) to establish that the forbearance criteria set forth in section 10 have been satisfied. *Order*, ¶7 (J.A. 6). *See id.*, ¶10 (J.A. 7). That assignment adheres to the rule the FCC adopted in 2009 placing evidentiary burdens on the party seeking forbearance.[17] It comports with the FCC's consistent practice in assigning burdens in individual forbearance proceedings, *see id.*, n.18 (J.A. 7), a practice upheld by the Tenth Circuit in

[17] *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, 24 FCC Rcd 9543, 9554 (¶¶ 20-23) (2009) ("*Forbearance Procedures Order*"), 74 Fed. Reg. 39219-01.

Qwest Phoenix, 689 F.3d at 1225-26, as a reasonable implementation of section 10. And it accords with the "ordinary default rule" in American jurisprudence "'that plaintiffs bear the risk of failing to prove their claims.'" *Forbearance Procedures Order*, 24 FCC Rcd at 9554 (¶20 & n.75) (quoting *Schaffer v. Weast*, 546 U.S. 49, 56 (2005)). *See* 5 U.S.C. § 556(d) (in the absence of statutory direction, "the proponent of a rule or order has the burden of proof").

Placing the burden of proof on the party seeking forbearance also enhances informed agency decision-making. As the FCC observed, "[i]f the petitioner does not support the case for forbearance with sufficient evidence and persuasive arguments, the Commission cannot make an informed and reasoned determination that the statutory criteria are met." *Forbearance Procedures Order*, 24 FCC Rcd at 9556 (¶21).

Petitioners in their brief only obliquely mention that the FCC has a rule that squarely assigns the burden of proof to the party seeking forbearance. *See* Pet. Brief at 34 n.5.[18] And Petitioners fail to acknowledge that the Tenth Circuit in *Qwest Phoenix* specifically rejected the argument that they now

[18] Petitioners rely heavily upon concurring and dissenting opinions of individual commissioners, *see* Pet. Brief at 35-37, without acknowledging that those non-binding, individual commissioner opinions are flatly inconsistent with the *FCC's* rules and precedent.

raise in this court: that the FCC bears the burden of proof under section 10. Rather, the Tenth Circuit upheld application of the FCC's rule assigning the burden of proof to the forbearance petitioner as a reasonable implementation of section 10. 689 F.3d at 1225-26.

Petitioners argue that the FCC erred in assigning USTelecom the burden of proof because "Congress spoke directly to the question of the burden in a forbearance proceeding and placed it squarely on the Commission." Pet. Brief at 34. That argument is clearly wrong.[19] The Communications Act has a number of provisions that explicitly assign the "burden of proof" to various parties in various FCC proceedings.[20] And

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[19] The Court need not decide whether the FCC properly assigned the burden of proof in order to affirm the order on review if, as we demonstrate below, the Court agrees that the evidence in the record does not satisfy the statutory conditions for forbearance.

[20] *See, e.g.*, 47 U.S.C. § 159(c)(3) (in hearings to revoke a license for failure to pay the regulatory fee, "the burden of proceeding with the introduction of evidence and the burden of proof shall be on the licensee"); 47 U.S.C. § 204(a)(1) (in a tariff investigation, "the burden of proof to show that the new or revised charge . . . is just and reasonable shall be upon the carrier"); 47 U.S.C. § 220(c) (the "burden of proof to justify every accounting entry questioned by the Commission shall be on the person making such entry"); 47 U.S.C. § 309(e) (in a hearing for a broadcast license "[t]he burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant"); 47 U.S.C. § 325(e)(6) (in proceedings involving allegations of unauthorized satellite broadcast retransmissions "the burden of proof shall be on a television broadcast station to establish that the satellite carrier retransmitted the station . . . [and with one exception,] [t]he burden of proof shall be on the satellite carrier with respect to all defenses.")

where Congress intends the FCC to bear the burden, it similarly does so with explicit statutory language. *See* 47 U.S.C. § 312(d) (in hearings to revoke a station license or construction permit, "both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission"); 47 U.S.C. § 316(b) (in hearings to modify a station license or construction permit, "both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission"). The absence of the words "burden of proof" or comparable language in section 10 shows there is no statutorily-mandated allocation of the burden of proof in forbearance proceedings. *See Qwest Phoenix*, 689 F.3d at 1225 (section 10 "says nothing about [evidentiary burdens]").

In the absence of a specific statute to the contrary, section 4(j) of the Communications Act grants the FCC authority to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j). *See FCC v. Schreiber*, 381 U.S. 279, 289 (1965); *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940). *See also* 47 U.S.C. § 154(i) (authorizing the FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Communications Act], as may be necessary in the execution of its functions"). The FCC's assignment of the burden of proof to the forbearance

petitioner falls comfortably within its broad discretion under sections 4(i) and 4(j).

Petitioners argue that section 10's directive that "the Commission shall forbear" if the statutory criteria are met shows Congress intended the FCC to bear the burden of proof in ruling on a forbearance petition. Pet. Brief at 35. In other words, under Petitioners' reading of section 10, the FCC has the burden affirmatively to *disprove* each of the conditions that a petitioning carrier must satisfy to obtain forbearance. That argument is at odds both with the statutory language and this Court's precedent.

By its express terms, section 10(a) requires the FCC to forbear only "if [it] determines that": (1) the provision is "not necessary" to ensure just, reasonable and non-discriminatory rates and terms of service; (2) the provision is "not necessary" to protect consumers; and (3) "forbearance" – that is, not applying a provision – is "consistent with the public interest." 47 U.S.C. § 160(a)(1)-(3). Petitioners' reading of section 10, however, presumes that the statutory prerequisites for forbearance are satisfied – unless the FCC affirmatively proves otherwise. That reading cannot be reconciled with statutory language requiring the FCC to forbear only "if" the agency specifically "determines" that the regulatory obligation at issue is "*not*"

needed and that forbearance would serve the public interest. 47 U.S.C. § 160(a)(1)-(3) (emphasis added).

Moreover, this Court has long held that the "three prongs of the forbearance test 'are conjunctive,' meaning that [t]he Commission could properly deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied.'" *Core*, 455 F.3d at 277 (citation omitted). As Petitioners construe section 10, however, the FCC must forbear if it fails to make even one affirmative finding that the provision *is* needed – an interpretation that is at odds with this Court's precedent.

Petitioners contend that "[t]he FCC has the burden in a forbearance proceeding because the statute imposes clear obligations on the agency," *i.e.*, the obligation to forbear if the statutory criteria are met. Pet. Brief at 34. Petitioners confuse substantive duties with evidentiary burdens. The Communications Act contains various provisions which oblige the FCC to act if certain criteria are met but which require regulatees to establish those criteria. For example, in a broadcast licensing proceeding, the FCC "shall determine" "whether the public interest, convenience, and necessity will be served by the granting of [an] application," 47 U.S.C § 309(a), but the

applicant bears "[t]he burden of proof" to establish the statutory criteria.[21] 47 U.S.C. § 309(e).

Equally without merit is Petitioners' contention that section 10(c), which provides that a forbearance petition is "deemed granted" if the FCC fails to rule on that petition within the prescribed period, shows that the FCC bears the burden of proof. *See* Pet. Brief at 36. As the FCC pointed out in the *Forbearance Procedures Order*, section 10(c) simply means that it "must attend promptly to forbearance petitions," 24 FCC Rcd at 9556 (¶22), a construction of section 10 the Tenth Circuit found reasonable in *Qwest Phoenix*, 689 F.3d at 1225-26. *See AT&T Corp.*, 452 at F.3d 836 (section 10(a)(3)'s purpose is to force the Commission to act within the statutory deadline). By requiring action on a forbearance petition within a specified period, Congress did not address evidentiary burdens at all, let alone dictate that the burden of proof must be on the FCC.

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[21] Petitioners' claim that the FCC "must have the burden in a forbearance proceeding" because it can forbear on its own motion (Pet. Brief at 35) also erroneously conflates evidentiary burdens and substantive duties. The Communications Act expressly provides for FCC-initiated proceedings in which regulated entities bear the burden of proof. *See, e.g.*, 47 U.S.C. § 204(a) (authorizing the FCC to suspend and investigate tariffs setting new rates "either upon complaint or upon its own initiative" but assigning the carrier the "burden of proof" to show those rates are reasonable whether the FCC initiated the investigation on its own motion or at a party's request.).

Even if the text of section 10 were sufficiently ambiguous to make Petitioners' reading a plausible one – which it is not – the FCC's reasonable reading of the statute would be controlling under *Chevron*. *See Earthlink*, 462 F.3d at 7 (FCC's reasonable interpretation of section 10 is owed deference, even if there are other, more reasonable interpretations).

III. THE COMMISSION REASONABLY DENIED USTELECOM'S ACROSS-THE-BOARD USOA FORBEARANCE REQUEST.

A. The FCC Reasonably Applied The Section 10 Forbearance Standard In Denying USTelecom's Request For Blanket Forbearance From The USOA.

Section 10 establishes the standard under which the FCC must evaluate forbearance petitions. Under this statute, the FCC may grant a forbearance petition only if it determines: (1) that enforcement of the requirement is not needed to ensure that rates are just, reasonable, and non-discriminatory; (2) that the regulation is not necessary to protect consumers; and (3) that a grant of forbearance is consistent with the public interest. 47 U.S.C. § 160(a). *See Core*, 455 F.3d at 277. The Commission reasonably determined that none of the statutory criteria was met.

1. The FCC Reasonably Determined That Part 32 Is Needed To Ensure That The Rates Of Price Cap Carriers Are Just, Reasonable, And Non-Discriminatory.

Part 32 has a unique and essential role in telecommunications regulation. Tailored to the telecommunications industry, Part 32 accounts contain the underlying financial data necessary to enable the FCC to allocate the LECs' costs to specific telecommunications services and facilities. *See* 47 U.S.C. § 220(a)(2); *Order*, ¶71 (J.A. 36). Those data provide the FCC with the means to fulfill its statutory obligations to ensure that telecommunications rates are just, reasonable, and non-discriminatory. *Order*, ¶71 (J.A. 36). *See* 47 U.S.C. §§ 201(b), 202(a), 254(k), 224(b)(1).

Petitioners do not dispute that Part 32 data enable the FCC accurately to allocate telephone company costs to specific telecommunications services or facilities. Instead, they argue that Part 32 no longer serves any regulatory purpose for price cap carriers because the FCC "no longer sets rates for companies such as Verizon and AT&T based on costs." Pet. Brief at 2. As shown below, that argument is faulty for two reasons. First, as a factual matter Petitioners *do* maintain cost-based rates, *i.e.*, pole attachment rates, and Part 32 data are essential to the regulation of those rates. Second, although price cap regulation has altered the manner in which accounting data is used, Part 32 still plays a necessary role in the regulation of price cap

carriers' access rates. *See Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, 1999 (¶12) (2005) ("*2005 Special Access NPRM*"). *See also Order*, nn. 124, 302 (J.A. 23, 48).

a. Retention Of Part 32 Is Needed For Effective Regulation Of Incumbent LECs' Cost-Based Pole Attachment Rates.

Under the FCC's rules, pole attachment rates in the first instance are established through private negotiations between the pole attacher and the carrier. *Order*, n.189 (J.A. 32). Both parties in these negotiations routinely rely upon cost data developed by Part 32. *Id.*, ¶63 (J.A. 32). If the negotiations fail, the attaching party can file a complaint with the FCC. *Id.*, n.189 (J.A. 32). *See* 47 C.F.R. Part 1, Subpart J. In that administrative adjudication, both the complainant and the defendant carrier rely upon the Part 32-derived cost data. *Order*, ¶63 (J.A. 32). And the FCC also uses Part 32-derived data to determine whether the disputed pole attachment rate is reasonable and, if not, to set a lawful rate. *Id.* In addition, the FCC relies upon Part 32-derived data in modifying the formula by which pole attachment rates are calculated. *Id.*, ¶64 (J.A. 33). Thus, Part 32 is essential to many aspects of pole attachment regulation.

Moreover, the establishment of reasonable, cost-based pole attachment rates is necessary to broadband infrastructure development. *See, e.g.*, *Implementation of Section 224 of the Act*, 25 FCC Rcd 11864, 11912-13 (¶ 115-16) (2010), *aff'd*, *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir.), *cert. denied*, 134 S. Ct. 118 (2013). And 47 U.S.C. § 1302(a) requires "the FCC to 'encourage the deployment' of broadband Internet capability." *Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) (quoting 47 U.S.C. § 1302(a)). Thus, ensuring reasonable pole attachment rates, facilitated by Part 32 accounting, is necessary for the FCC's performance of its responsibility under 47 U.S.C. § 1302(a).

Petitioners argue that Part 32 data are not necessary to ensure just and reasonable pole attachment rates because neither section 224(d) nor the FCC's implementing rules specifically require the submission of pole attachment data derived from Part 32. Pet. Brief at 23 (citing 47 C.F.R. § 1.404(g)(2)). However, the pole attachment data price carriers file with the FCC in fact *are* "developed from Part 32 accounts." *Order*, ¶63 (J.A. 32). And in the absence of Part 32 data, "neither the Commission nor interested parties could ascertain or verify that pole attachment rates based on the Commission's rate formula reflect actual costs, or that these calculations

produce just and reasonable rates in accordance with [FCC] rules." *Id.*, ¶63 (J.A. 33). *See* NCTA Comments at 2-4 (J.A. 297-99).

Petitioners contend that "[w]hatever need the FCC may have for pole attachment data in the future could be satisfied by obligating price cap carriers to continue filing 'the pole attachment data currently filed as part of ARMIS [Automated Reporting Management Information System] Report 43-01.'" Pet. Brief at 23 (quoting *Petition of Qwest Corporation for Forbearance from Enforcement of the Commission's ARMIS and 492A Reporting Requirements Pursuant to 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 23 FCC Rcd 18483, 18491 (¶13) (2008) ("*Qwest ARMIS Forbearance Order*")). In fact, the FCC has forborne from requiring the filing of the ARMIS Report 43-01, as long as carriers continue to file the same pole attachment data that previously had been filed in that report. *Qwest ARMIS Forbearance Order*, 23 FCC Rcd at 18491 (¶13). *See Order*, ¶¶63, 65 (J.A. 32, 33). However, whether pole attachment data are filed as part of the ARMIS Report 43-01 or in some other form, Part 32 – which gives the FCC the tools to allocate cost elements to specific services – is necessary to the FCC's ability to verify the accuracy of those data.

Petitioners' suggestion that pole attachment information derived in accordance with GAAP is a viable alternative to Part 32 data is unpersuasive.

Order, ¶65 (J.A. 33). *See* Pet. Brief at 23. USTelecom's own evidence shows that "certain expense categories under Part 32 . . . do not have a precise corollary under GAAP," and that price cap carriers would have to "develop . . . methods to replicate necessary pole attachment data for filing purposes" in the absence of Part 32-derived data. April 18 *Ex Parte* at 5, 6 (J.A. 460, 461). Moreover, as the FCC pointed out, use of GAAP-derived data would "actually alter the rates price cap carriers charge for pole attachments." *Order*, ¶65 (J.A. 34).

Petitioners counter that there is "no evidence" to support the proposition that use of GAAP-derived data would affect rates, Pet. Brief at 24. Given the undisputed evidence of "significant" differences in the treatment of certain pole attachment expenses under Part 32 and GAAP, that contention is unsound. May 3 *Ex Parte*, at 4 (J.A. 485); *see Order*, n.200 (J.A. 34). *See also* May 3 *Ex Parte* at 5 (J.A. 486) (USTelecom acknowledging that an increase in "overall cost inputs" could result from "moving from Part 32 rules to GAAP accounting"). Equally unpersuasive is Petitioners' claim that the FCC "acknowledged the weakness" of its analyses by stating that it would "'explore more fully' the use of GAAP in another proceeding." Pet. Brief at 24 (quoting *Order*, n.200 (J.A. 34)). What the FCC actually said, however, was that it would explore more fully

USTelecom's suggestions "regarding possible *modification* of GAAP pole attachment data," *Order*, n.200 (J.A. 34) (emphasis added), an inquiry consistent with the FCC's reasonable determination that existing GAAP-derived data are not currently a viable alternative to Part 32 data.

b. Part 32 Is Necessary For Effective Evaluation Of Price Cap Access Rates.

"Although price cap regulation diminished the direct link between changes in allocated accounting costs and change in prices, it did not sever the connection between accounting costs and prices entirely." *2005 Special Access NPRM*, 20 FCC Rcd at 1999 (¶12). *See Order*, nn.124, 302 (J.A. 23, 48). Part 32 accounting data has an important role in the FCC's ability to fulfill its statutory duty to ensure that price cap rates for interstate access services are just and reasonable, 47 U.S.C. § 201(b), and free of any undue discrimination or preference, 47 U.S.C. § 202(a). *See Order*, n.209 (J.A. 35); *AT&T Cost Assignment Forbearance Order*, 23 FCC Rcd at 7315 (¶22).

Although rates within the price caps are accorded an initial presumption of reasonableness, they are not deemed lawful. That presumption does not apply where the rate is above the price cap or where the FCC has set the price cap rate for investigation under section 204(a). *LEC Price Cap Order*, 5 FCC Rcd at 6822 (¶295). In addition, aggrieved parties can challenge even presumptively reasonable price cap rates in complaints

filed under section 208. 47 U.S.C. § 208. "[T]he [s]ection 204 investigation and [s]ection 208 complaint processes [are both] part of [the FCC's] plan to ensure just, reasonable, and non-discriminatory [price cap] rates." *LEC Price Cap Order*, 5 FCC Rcd at 6836 (¶406). *See Order*, n.209 (J.A. 35).[22]

Part 32 provides the FCC with the raw data necessary to determine the elements of the carrier's costs in providing service and the tools to "gauge whether improper cost accounting has occurred." *Order*, ¶43 (J.A. 25). Although the evidence in a specific investigation or adjudication depends upon the precise issues raised, the Part 32 data "could be critical" to the FCC's ability to determine whether individual price cap rates are just, reasonable, and non-discriminatory. *AT&T Cost Assignment Forbearance Order*, 23 FCC Rcd at 7315 (¶22). *See id.* ("Complaints under section 208 [are] an important mechanism for enforcing the provisions of the Act, including the justness and reasonableness of [price cap] rates"). Part 32 data also can play an important role when the FCC "adjust[s] [its] existing price

[22] The FCC recently suspended and set for investigation a price cap tariff filed by Petitioner AT&T because that price cap filing raised "substantial questions regarding [its] lawfulness." *Suspension and Investigation of AT&T Special Access Tariffs*, Order, 28 FCC Rcd 16525, 16526 (¶ 3) (WCB 2013). Although AT&T subsequently elected to withdraw the tariff, it shows that Petitioners are wrong in claiming that price cap regulation by itself is "sufficient to ensure just and reasonable rates." Pet. Brief at 22.

cap regime" or considers other regulatory reforms. *Order*, ¶68 (J.A. 35); *AT&T Cost Assignment Forbearance Order*, 23 FCC Rcd at 7313 (¶19).

c. Retention Of Part 32 Is Necessary For The FCC's Prevention Of Cross-Subsidization Under Section 254(k).

Section 254(k) prohibits a telecommunications provider from using "services that are not competitive to subsidize services that are subject to competition." 47 U.S.C. § 254(k). Part 32 "deters cost misallocations by providing the initial information needed to identify cross-subsidization and thus protects regulated services from bearing the cost of an incumbent LEC's competitive operations." *Biennial Regulatory Review 2004*, Staff Report, 20 FCC Rcd 263, 277 (WCB 2005). *See Order*, ¶¶43, 53 (J.A. 25, 29). The FCC thus reasonably determined that retention of Part 32 is necessary to the FCC's ability to verify carriers' compliance with section 254(k). *Order*, ¶67 (J.A. 34).

Petitioners do not dispute that Part 32 gives the FCC the tools to detect cross-subsidization and thus effectively enforce section 254(k). Instead, they argue that there is no danger of cross-subsidization in a price cap regime. Pet.

Brief at 28. That claim not only is inconsistent with FCC decisions,[23] but it also ignores the fact that Congress itself reached the opposite conclusion by adopting section 254(k) six years after the FCC extended price cap regulation to large incumbent LECs.[24]

Equally baseless is Petitioners' claim that competition has eliminated the need for the FCC to retain accounting safeguards to prevent cross-subsidization. Petitioners' generalized claims about "intense competition," Pet. Brief at 27, hardly establish that price cap LECs face effective competition in every service and geographic market so as to make unnecessary accounting safeguards against cross-subsidization. In any event, in seeking across-the-board forbearance from section 220 and the Part 32

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[23] *See, e.g.*, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, 16 FCC Rcd 22745, 22761 (¶29 & n.70) (2001) ("*Review of Regulatory Requirements*") (the FCC "has found that an incumbent LEC might improperly exercise its existing market power through cross-subsidization, raising its rivals' costs, or improper discrimination"); *Applications of Ameritech Corp.*, 14 FCC Rcd 14712, 14795-14825 (¶¶ 186-251) (1999), *vacated in part on other grounds*, *Ass'n of Commc'ns Enters. v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).

[24] Petitioners mistakenly contend the FCC, in granting price cap carriers forbearance from cost assignment rules, "implicitly recognized" that Part 32 safeguards are unnecessary to prevent cross-subsidization in a price cap regime. Pet. Brief at 28. In granting forbearance from the cost assignment rules, the FCC explicitly reaffirmed the need to retain Part 32, and expressly conditioned forbearance on the requirement that such data "be maintained and available to the Commission on request." *E.g.*, *AT&T Cost Assignment Forbearance Order*, 23 FCC Rcd at 7314 (¶21).

rules, USTelecom emphasized that it was not seeking forbearance from section 254(k). *See* April 18 *Ex Parte* at 11 (J.A. 466). Petitioners would keep intact the FCC's duty to enforce section 254(k) but deny the agency the means to perform that duty.

Finally, Petitioners assert that the lack of agency requests for Part 32 data to enforce compliance with section 254(k) shows that Part 32 safeguards are unnecessary. Pet. Brief at 28. That claim, however, overlooks the deterrent effect that Part 32 provides. Carriers are less likely to violate section 254(k) when they know the FCC has the ability to readily detect carrier cross-subsidization and cost misallocation by requesting Part 32 data.

d. Part 32 Is Necessary For Effective Implementation Of Section 272(e)(3)'s Imputation Requirement.

The FCC, recognizing that Part 32 rules are necessary to the proper recording of the BOCs' section 272(e)(3) imputation costs, has long required BOCs to use Part 32 data to comply with section 272(e)(3). *See Order*, ¶ 66 (J.A. 34). The FCC specifically conditioned its authorization of the BOCs' provision of integrated exchange and long distance service upon the BOCs' compliance with cost assignment rules designed to prevent improper cost shifting and the BOCs' inclusion of section 272 imputation charges in a Part 32 account. *Section 272 Sunset Order*, 22 FCC Rcd at 16486-87, 16491-92 (¶¶94, 104). *See Order*, ¶66 (J.A. 34). When the FCC subsequently granted

the BOCs forbearance from the cost assignment rules, it conditioned that forbearance upon the BOCs' maintenance of Part 32 accounts and use of Part 32 data to comply with the imputation requirement in section 272(e)(3). *E.g.*, *AT&T Cost Assignment Forbearance Order*, 23 FCC Rcd at 7318-19 (¶29). And the BOCs, in compliance plans explaining how they would satisfy the conditions of forbearance, committed to use Part 32 accounting in complying with the imputation requirement. *E.g.*, AT&T Compliance Plan, WC Docket No. 07-21 (filed July 24, 2008), at 6.

Petitioners do not dispute that Part 32 accounting is required and used to accurately record imputation costs required by section 272(e)(3). Instead, they argue that "[a]s long as a BOC keeps accurate records of the imputation amounts mandated by [s]ection 272(e)(3), it should make no difference if" Part 32 or some other accounting is used. Pet. Brief at 25-26. However, Part 32 gives the FCC the tools to verify whether or not "the BOC keeps accurate records of the imputation amounts." Pet. Brief at 25. Petitioners have identified no alternative accounting method that would enable the FCC to ensure enforcement with section 272(e)(3).

2. The FCC Reasonably Determined That Part 32 Is Needed To Protect Consumers From Unlawful Charges.

As shown above, Part 32 is necessary to ensure that price cap carriers charge consumers just, reasonable, and non-discriminatory rates. *Order*, ¶70 (J.A. 35). The FCC thus reasonably determined that USTelecom failed to satisfy its burden under the second (and closely related) prong of the statutory forbearance standard to show that continued enforcement of Part 32 is "not necessary for the protection of consumers.'" *Order*, ¶¶70-72 (J.A. 35-37).

Petitioners rely upon language in the cost assignment forbearance orders that price cap regulation protects consumers from unlawful charges in claiming that Part 32 safeguards are unnecessary to protect consumers. Pet. Brief at 30 (quoting *Verizon/Qwest Cost Assignment Forbearance Order*, 23 FCC Rcd at 18488 (¶10) & *AT&T Cost Assignment Forbearance Order*, 23 FCC Rcd at 7312 (¶18)). That reliance is misplaced. Although the FCC in the language quoted by Petitioners recognized that price cap regulation is one way the FCC protects consumers against unreasonable rates by dominant carriers, it did *not* suggest that price cap regulation by itself – and in the absence of Part 32 accounting safeguards – is sufficient to protect ratepayers from unlawful charges in all circumstances. Indeed, the FCC in granting conditional forbearance from the cost assignment rules emphasized the need

for "USOA account data" to perform its regulatory duties, and conditioned forbearance on the carriers' commitment to maintain such data and make it available to the FCC at its request. *E.g.*, *AT&T Cost Assignment Forbearance Order*, 23 FCC Rcd at 7314 (¶21).[25] *See Order*, ¶¶68, 70 n.216 (J.A. 34, 36). Although Petitioners construe the condition differently than the FCC, *see* Pet. Brief at 29, 30 n.4, the FCC's reasonable interpretation of its own order is entitled to deference. *See Cellco P'ship v. FCC*, 700 F.3d 534, 544 (D.C. Cir. 2012) (recognizing the "high level of deference due to an agency in interpreting its own orders"). *Order*, ¶¶68, 70 (J.A. 34, 35).

The FCC reasonably rejected Petitioners' claim that GAAP accounting would protect consumers in the absence of Part 32 accounting. *Order*, ¶¶71-72 (J.A. 36-37). GAAP principles are incorporated into Part 32 "to the extent regulatory considerations permit," 47 C.F.R. § 32.1, but they are not sufficient by themselves to protect ratepayers from unjust and unreasonable charges. GAAP simply is not designed to protect ratepayers from unjust or unreasonably discriminatory rates, and does not supply financial data at a level of disaggregation sufficient to permit the FCC to track cost elements to specific telecommunications services. *Order*, ¶71 (J.A. 36). Moreover, in

[25] In compliance plans describing how they would satisfy the conditions of forbearance, AT&T and Verizon each committed "to maintain their Part 32 USOA books of account." Public Notice, 26 FCC Rcd at 16946.

contrast to Part 32, GAAP does not establish a uniform chart of accounts, and the FCC needs uniformity in regulatory accounting "to conduct consistent, industry-wide analysis and oversight" in its rulemakings and other endeavors. *Id.*, ¶72 (J.A. 37).

3. The FCC Reasonably Determined That Forbearance Is Not In The Public Interest.

The FCC reasonably concluded that USTelecom had failed to show under the third part of the statutory forbearance standard that its across-the-board USOA forbearance request furthers the public interest. USTelecom did not adequately substantiate the costs of complying with Part 32; it did not show that compliance costs outweighed the regulatory benefits in enforcing Part 32; and it did not demonstrate that the cost savings to price cap carriers of granting forbearance "would have any effect on competition." *Id.*, ¶74 (J.A. 38).

On the other hand, the record established that continued enforcement of Part 32 has significant competitive benefits. *Id.*, ¶75 (J.A. 38). For effective competition to exist in the telecommunications marketplace, providers must have access to essential wholesale facilities at reasonable rates, and the FCC found that enforcement of Part 32 ensures that cable companies and other telecommunications providers have access to the essential network facilities, *i.e.*, incumbent LECs' poles, that they need to compete at reasonable, cost-

based rates. *Id.* *See AT&T Cost Assignment Forbearance Order*, 23 FCC Rcd at 7318 n.102 (recognizing price cap carriers' ability "to use their control over their local networks to impede competition in services for which local network access is a needed input").

Petitioners do not mention, let alone attempt to controvert, the significant pro-competitive benefits that Part 32 provides in ensuring competitors' access to essential network facilities. Instead they argue that grant of the across-the-board USOA forbearance request would ensure a "level playing field" for all carriers. Pet. Brief at 32. However, a "level playing field" cannot be achieved unless telecommunications providers that compete with incumbent LECs have access to the LECs' network facilities necessary for their provision of service. Moreover, Petitioners do *not* urge symmetrical regulation for all telecommunications providers. Instead, they want forbearance only for the largest incumbent LECs, the price cap carriers, leaving small rural incumbent LECs subject to Part 32 regulation. *See* USTelecom Petition at 43 (J.A. 176).

Petitioners claim that the FCC "dismissed" claims regarding the costs of complying with Part 32 "without any substantive analysis." Pet. Brief at 47. That claim is incorrect. The FCC in its *Order* carefully analyzed and evaluated specific record allegations regarding the compliance costs of

AT&T, Cincinnati Bell, and ASC. *See Order*, ¶74 & n.227 (J.A. 38) Petitioners fail to acknowledge, let alone attempt to refute, the FCC's response to these allegations.

Instead, Petitioners allege that the FCC acted arbitrarily because it relied upon cost evidence submitted in the *AT&T Cost Assignment Forbearance Order* while finding inadequate the cost evidence in this case. Pet. Brief at 44-46. That argument is baseless. The compliance costs cited in the *AT&T Cost Assignment Forbearance Order* have no bearing in this case, as they involved different costs submitted in a different proceeding to justify forbearance from different rules.

IV. PETITIONERS' CLAIM THAT THE FCC ERRED BY NOT GRANTING CONDITIONAL OR PARTIAL FORBEARANCE LACKS MERIT.

In its petition and for more than thirteen months thereafter, USTelecom asked for blanket "forbearance for all price cap regulated carriers from . . . Part 32," USTelecom Petition at 34 (J.A. 167), without the slightest suggestion that the agency should consider a partial or conditional grant of

the across-the-board USOA forbearance request.[26] It was only in a series of *ex parte* communications filed mere weeks before the statutory "deemed lawful" deadline did USTelecom proffer, in stages, four "voluntary commitments" that "could be conditions" for forbearance. *April 18 Ex* Parte at 2 (J.A. 457) (proposing two voluntary commitments); May 3 *Ex Parte* at 2 (J.A. 483) (proposing two more voluntary commitments).[27] Contrary to petitioners' claim, the FCC acted lawfully in not conditionally granting the across-the-board forbearance request.

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[26] USTelecom in its petition did make two separate requests for partial forbearance from certain Part 32 rules applicable to price cap carriers: it asked the FCC to grant (1) all price cap carriers forbearance from the specific Part 32 rules containing property record requirements, and (2) certain price cap carriers forbearance from the specific Part 32 rules relating to cost assignments. USTelecom Petition at 34, 43-47 (J.A. 167, 176-80). The FCC in its *Order* fully considered, and conditionally granted, both requests. *Order*, ¶¶ 30-51, 78-92 (J.A. 19-28, 39-44).

[27] These "voluntary commitment[s]" were that price cap carriers would (1) "continue filing the same [type of] pole attachment information that is filed today," in part by "develop[ing] methods to replicate [the] necessary pole attachment data for filing purposes," April 18 *Ex Parte Letter* at 5,6 (J.A. 460, 461); (2) "voluntarily commit to maintain an annual subaccount/identifier or other record to track transactions subject to section 272(e)(3)," *id.* at 7 (J.A. 462); (3) limit increases to the cost input to the FCC pole attachment rate formulae for three years, May 3 *Ex Parte* Letter at 2-3 (J.A. 483-84); and (4) retain the ability to provide financial data depicting existing Part 32 account structures for five years. *Id.* at 3 (J.A. 484). Each time Petitioners describe the fourth condition in their brief, they fail to mention that the condition was to be in effect only for a limited period of time. Pet. Brief at 14, 40-41.

Those voluntary commitments/conditions, offered by USTelecom so late in the proceeding, did not permit meaningful comment on the proposals by interested parties to the proceeding. Nor did the compressed timing allow for careful analysis of the voluntary commitments or a full examination of their implications in the context of a complicated and inter-related field of regulation. Those significant challenges were magnified by the statutory "deemed grant" deadline looming just two weeks from USTelecom's last proposal.[28] *See Globalstar, Inc. v. FCC*, 564 F.3d 476, 484 (D.C. Cir. 2009) (warning that "relying on . . . *ex parte* submissions" is "a risky strategy," particularly where the *ex parte* filing is submitted shortly before the FCC adopts its decision) (internal quotations omitted).[29]

Moreover, USTelecom did not satisfy its burden to demonstrate that a conditional grant of the across-the-board USOA forbearance request was warranted. It did not attempt to justify the imposition of the specific voluntary commitments/conditions set forth in its last minute *ex parte* filings.

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[28] When forbearance petitioners submit new data or proposals in the record late in the process, the FCC is not able to extend comment deadlines for interested persons because inaction by the forbearance deadline will cause the petition to be "deemed granted." 47 U.S.C. § 160(c).

[29] Petitioners in their brief argue only that the FCC "could have" adopted partial or conditional forbearance. Pet. Brief at 40, 41. They do not claim that the FCC "should" have granted such relief, let alone attempt to show why such relief was warranted.

Nor did USTelecom purport to explain why the adoption of these voluntary commitments/conditions would enable the FCC to make the determinations necessary under section 10 to conditionally grant the across-the-board USOA forbearance request.

Petitioners' position apparently is that agency precedent imposed a duty on the FCC, within the strict statutory time constraints, not only to rule upon the multitude of forbearance requests actually contained in USTelecom's petition, but also to consider on its own the possibility of partial or conditional relief that the petition itself did not ask for. Pet. Brief at 39-40. That argument is baseless. To be sure, the FCC has *authority* to grant partial or conditional relief, *see* 47 U.S.C. § 160(c) ("the Commission *may* grant or deny a petition in whole or part") (emphasis added), and it has occasionally exercised that authority, *e.g.*, *AT&T Cost Assignment Forbearance Order*, 23 FCC Rcd at 7314 (¶ 21). But as we have explained, the FCC rules, practice, and precedent establish that the party seeking forbearance – not the FCC – bears the burden of proof to justify a forbearance request. *E.g.*, *Forbearance Procedures Order*, 24 FCC Rcd at 9554 (¶¶20-23). *See* Section II, *supra*. Petitioners are wrong, therefore, to argue that the FCC must parse a forbearance request for unsupported possibilities of partial or conditional relief.

Petitioners fault the FCC for not considering a specific form of partial forbearance, *i.e.*, forbearance from the "Part 32 accounts that are unrelated to pole attachments and [s]ection 272(e)(3) imputation." *See* Pet. Brief at 41. No party at any stage of the proceedings below asked the FCC to grant that form of partial relief. Thus, section 405(a) bars Petitioners from raising that specific issue on review. 47 U.S.C. § 405(a). In any event, as shown above, the FCC's need for Part 32 data extends far beyond pole attachments and section 272(e)(3) imputations. Given the wide-ranging uses for Part 32 data, the FCC reasonably found that it was unable to make the determinations required by section 10 to support a partial forbearance grant. 47 U.S.C. § 160(a).

Finally, the FCC's decision to initiate a rulemaking proceeding to consider possible modification and calibration of the Part 32 rules in today's current environment will permit interested parties – including Verizon and AT&T – to file comments addressing the many complex issues raised by possible revisions of the USOA. Petitioners' contention that the FCC did not fully consider the forbearance petition because it decided instead to conduct a rulemaking on USOA reforms, Pet. Brief at 41, is wrong. As we have shown, the FCC did consider the merits of across-the-board USOA forbearance request on the merits and found it wanting.

V. THE FCC REASONABLY REQUIRES PART 32 ACCOUNTING ONLY FOR INCUMBENT LECS.

Since the emergence of competition into the telecommunications marketplace in the 1970s, the FCC has classified common carriers as either "dominant" or "non-dominant," on the basis of their power in the marketplace. *See, e.g.*, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Authorization Therefor*, First Report and Order, 85 FCC 2d 1 (1980) ("*Competitive Carrier First Report*"). *See MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218, 221 (1994). The FCC has reduced, eliminated, or not applied regulatory requirements imposed on non-dominant carriers, *i.e.*, those carriers that '[lack] market power necessary to sustain prices either unreasonably above or below costs," while retaining regulatory safeguards upon "dominant carriers," *i.e.*, carriers with market power. *Competitive Carrier First Report*, 85 FCC 2d at 6 (¶6). *See generally MCI Telecomm. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

The FCC has classified incumbent LECs as "dominant" carriers with market power in the provision of interstate access. *See Technology Transitions*, Order, Report and Order and Further Notice of Proposed Rulemaking, FCC 14-5, 2014 WL 407096 (¶58) (released Jan. 31, 2014). The FCC has long recognized that incumbent LECs have the ability to "exercise [their existing market power through cross-subsidization, raising

[their] rivals' costs, or improper discrimination." *E.g.*, *Review of Regulatory Requirements*, 16 FCC Rcd at 22761 (¶29). The FCC thus reasonably subjects these carriers to various types of regulation, including Part 32 accounting safeguards, that are not placed upon non-dominant providers. *2001 USOA Reform Order*, 16 FCC Rcd at 19960 (¶126). *See generally* 47 U.S.C. § 251(c) (imposing obligations on incumbent LECs that are not placed on competitive LECs).

The FCC reasonably determined to continue to apply Part 32 accounting safeguards on incumbent LECs, including price cap carriers. As the FCC pointed out in its *Order*, price cap LECs possess control over wholesale network facilities, *i.e.*, telephone poles, that are essential to their competitors' ability to compete in the marketplace. *Order*, ¶75 (J.A. 38). *See AT&T Cost Assignment Forbearance Order*, 23 FCC Rcd at 7318 n.102 (the FCC has "long recognized the potential for LECs to use their control over their local networks to impede competition in services for which local network access is a needed input"). By requiring incumbent LECs to adhere to Part 32 accounting, the FCC is able to ensure that cable companies and other telecommunications service providers are able to obtain the essential wholesale facilities that they need to compete at reasonable, cost-based prices. *Id.*

Classified as non-dominant carriers (*see Hyperion Telecomms., Inc.*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8536, 8598-99 (¶ 4) (1997)), non-incumbents "[lack] market power necessary to sustain prices either unreasonably above or below costs." *Competitive Carrier First Report*, 85 FCC 2d at 6 (¶6). In addition, these providers generally lack control over essential wholesale network facilities that their rivals must use to provide service. Thus, unlike incumbent LECs, the application to Part 32 on these companies is not needed to protect ratepayers from unjust or unreasonable charges.

Petitioners complain that the FCC's application of Part 32 only to incumbent LECs arbitrarily "treats similarly situated parties differently," Pet. Brief at 42, but they do not attempt to show that the companies not subject to Part 32 are similarly situated to them. Not only do incumbent LECs differ from non-incumbents in their market power and control of essential wholesale network facilities, but companies providing Voice over Internet Protocol ("VoIP") and wireless service offer different services using different facilities than do incumbent LECs providing wireline telephone service. *See* Consumer Advocates Comments at 12-19 (J.A. 275-82). Moreover, the relief Petitioners seek would create disparate treatment among two groups of incumbent LECs: large price cap LECs would be relieved of Part 32

accounting requirements, leaving only the small, rural carriers subject to Part 32. *See* USTelecom Petition at 34 (J.A. 167).

Equally unpersuasive is Petitioners' claim that Part 32 hampers price cap carriers' ability to compete because "competing carriers," such as wireless carriers, which are not subject to Part 32, are gaining market share. Pet. Brief at 43. Large incumbent LECs, including the Petitioners, can and do offer wireless telephone service through affiliated entities that are not subject to Part 32. In fact, Petitioners' wireless affiliates are the largest wireless carriers in the country. *See Applications of AT&T Inc., Cellco P'ship d/b/a Verizon Wireless, Grain Spectrum, LLC and Grain Spectrum II*, 29 FCC Rcd 12878, 12879 (¶ 2) (2013) ("AT&T reported more than $127 billion in revenues, of which its wireless services accounted for approximately 52 percent, and had approximately 107 million wireless subscribers"); *id.* at 12280 (¶ 4) ("in 2012, Verizon Wireless's domestic revenues were $75.8 billion, representing approximately 65 percent of Verizon's aggregate revenues"). Thus, the "competing carriers" to which Petitioners are losing market share include their own affiliates.

VI. THE COURT SHOULD NOT ORDER THE FCC TO GRANT FORBEARANCE.

For the reasons set forth in this brief, the Court should deny the petition for review, thereby making it unnecessary to address Petitioners' request for

relief. If the Court does rule in Petitioners' favor, however, it should not grant Petitioners' request to order the FCC to forbear from enforcing Part 32. *See* Pet. Brief at 47.

Congress entrusted the FCC with determining whether the forbearance standards set forth in section 10(a)(1)-(3) are satisfied. 47 U.S.C. § 160(a)(1)-(3). After the FCC makes that statutory determination and rules on the merits of a forbearance petition, an aggrieved party can file a timely petition for review invoking the Court's jurisdiction "to enjoin, set aside, suspend (in whole or in part), or to determine the validity" of the Commission's order. 28 U.S.C. § 2342(1). *See* 47 U.S.C. § 402(a). As the Supreme Court has emphasized, typically "the function of the reviewing court ends when an error of law is laid bare." *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952). Thus, consistent with this Court's usual practice in the forbearance context, *see*, *e.g.*, *AT&T Corp. v. FCC*, 236 F.3d 729, 738 (D.C. Cir. 2001), if the Court determines that the FCC erred, it should remand the case for further consideration without ordering the agency to grant forbearance.

CONCLUSION

The Court should deny the petition for review.

Respectfully submitted,

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February 19, 2014

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

VERIZON AND AT&T, INC., PETITIONERS, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	NO. 13-1220

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 13,520 words.

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February 19, 2014

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TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
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§ 154. Federal Communications Commission

* * * * * *

(i) Duties and powers

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

(j) Conduct of proceedings; hearings

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

* * * * * *

47 U.S.C. § 160

UNITED STATES CODE ANNOTATED
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CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER I. GENERAL PROVISIONS

§ 160. Competition in provision of telecommunications service

(a) Regulatory flexibility

Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that--

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive effect to be weighed

In making the determination under subsection (a)(3) of this section, the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

(c) Petition for forbearance

Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by

that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a) of this section. The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

(d) Limitation

Except as provided in section 251(f) of this title, the Commission may not forbear from applying the requirements of section 251(c) or 271 of this title under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) State enforcement after commission forbearance

A State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a) of this section.

47 U.S.C. § 201(b)

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§ 201. Service and charges

* * * * * *

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C. § 202(a)

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§ 202. Discriminations and preferences

(a) Charges, services, etc.

It shall be unlawful for any common carrier to make any 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, or to make or give 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.

* * * * * *

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§ 204. Hearings on new charges; suspension pending hearing; refunds; duration of hearing; appeal of order concluding hearing

(a)(1) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or a revised charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or revised charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or revised charges as by its decision shall be found not justified. At any hearing involving a new or revised charge, or a proposed new or revised charge, the burden of proof to show that the new or revised charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(2)(A) Except as provided in subparagraph (B), the Commission shall, with respect to any hearing under this section, issue an order concluding such hearing within 5 months after the date that the charge, classification, regulation, or practice subject to the hearing becomes effective.

(B) The Commission shall, with respect to any such hearing initiated prior to November 3, 1988, issue an order concluding the hearing not later than 12 months after November 3, 1988.

(C) Any order concluding a hearing under this section shall be a final order and may be appealed under section 402(a) of this title.

(3) A local exchange carrier may file with the Commission a new or revised charge, classification, regulation, or practice on a streamlined basis. Any such charge, classification, regulation, or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action under paragraph (1) before the end of that 7-day or 15-day period, as is appropriate.

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a) of this section.

47 U.S.C. § 205

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§ 205. Commission authorized to prescribe just and reasonable charges; penalties for violations

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $12,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

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§ 208. Complaints to Commission; investigations; duration of investigation; appeal of order concluding investigation

(a) Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(b)(1) Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.

(2) The Commission shall, with respect to any such investigation initiated prior to November 3, 1988, issue an order concluding the investigation not later than 12 months after November 3, 1988.

(3) Any order concluding an investigation under paragraph (1) or (2) shall be a final order and may be appealed under section 402(a) of this title.

47 U.S.C. § 220

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§ 220. Accounts, records, and memoranda

(a) Forms

(1) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to this chapter, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys.

(2) The Commission shall, by rule, prescribe a uniform system of accounts for use by telephone companies. Such uniform system shall require that each common carrier shall maintain a system of accounting methods, procedures, and techniques (including accounts and supporting records and memoranda) which shall ensure a proper allocation of all costs to and among telecommunications services, facilities, and products (and to and among classes of such services, facilities, and products) which are developed, manufactured, or offered by such common carrier.

(b) Depreciation charges

The Commission may prescribe, for such carriers as it determines to be appropriate, the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the classes of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

(c) Access to information; burden of proof; use of independent auditors

The Commission shall at all times have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carriers, and the provisions of this section respecting the preservation and destruction of books, papers, and documents shall apply thereto. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry and the Commission may suspend a charge or credit pending submission of proof by such person. Any provision of law prohibiting the disclosure of the contents of messages or communications shall not be deemed to prohibit the disclosure of any matter in accordance with the provisions of this section. The Commission may obtain the services of any person licensed to provide public accounting services under the law of any State to assist with, or conduct, audits under this section. While so employed or engaged in conducting an audit for the Commission under this section, any such person shall have the powers granted the Commission under this subsection and shall be subject to subsection (f) of this section in the same manner as if that person were an employee of the Commission.

(d) Penalty for failure to comply

In case of failure or refusal on the part of any such carrier to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, memoranda, documents, papers, and correspondence as are kept to the inspection of the Commission or any of its authorized agents, such carrier shall forfeit to the United States the sum of $6,000 for each day of the continuance of each such offense.

(e) False entry; destruction; penalty

Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by any such carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction, to a fine of not less than $1,000 nor more than $5,000 or imprisonment for a term of not less than one year nor more than three years, or both such fine and imprisonment: *Provided*, That the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, or documents which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

(f) Confidentiality of information

No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by a court.

(g) Use of other forms; alterations in prescribed forms

After the Commission has prescribed the forms and manner of keeping of accounts, records, and memoranda to be kept by any person as herein provided, it shall be unlawful for such person to keep any other accounts, records, or memoranda than those so prescribed or such as may be approved by the Commission or to keep the accounts in any other manner than that prescribed or approved by the Commission. Notice of alterations by the Commission in the required manner or form of keeping accounts shall be given to such persons by the Commission at least six months before the same are to take effect.

(h) Exemption; regulation by State commission

The Commission may classify carriers subject to this chapter and prescribe different requirements under this section for different classes of carriers, and may, if it deems such action consistent with the public interest, except the carriers of any particular class or classes in any State from any of the requirements under this section in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates.

(i) Consultation with State commissions

The Commission, before prescribing any requirements as to accounts, records, or memoranda, shall notify each State commission having jurisdiction with respect to any carrier involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations.

(j) Report to Congress on need for further legislation

The Commission shall investigate and report to Congress as to the need for legislation to define further or harmonize the powers of the Commission and of State commissions with respect to matters to which this section relates.

47 U.S.C. § 224

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§ 224. Pole attachments

(a) Definitions

As used in this section:

(1) The term "utility" means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "State" means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(4) The term "pole attachment" means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(5) For purposes of this section, the term "telecommunications carrier" (as defined in section 153 of this title) does not include any incumbent local exchange carrier as defined in section 251(h) of this title.
(b) Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations

(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions

are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to

this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of this title.

(2) The Commission shall prescribe by rule regulations to carry out the provisions of this section.
(c) State regulatory authority over rates, terms, and conditions; preemption; certification; circumstances constituting State regulation

(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section, for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that--

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments--

(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter--

(i) within 180 days after the complaint is filed with the State, or

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.
(d) Determination of just and reasonable rates; “usable space” defined

(1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) As used in this subsection, the term “usable space” means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

(3) This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e) of this section, this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service.
(e) Regulations governing charges; apportionment of costs of providing space

(1) The Commission shall, no later than 2 years after February 8, 1996, prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.

(2) A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(3) A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.

(4) The regulations required under paragraph (1) shall become effective 5 years after February 8, 1996. Any increase in the rates for pole attachments that result from the adoption of the regulations required by this subsection shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.
(f) Nondiscriminatory access

(1) A utility shall 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.

(2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.
(g) Imputation to costs of pole attachment rate

A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(h) Modification or alteration of pole, duct, conduit, or right-of-way

Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.

(i) Costs of rearranging or replacing attachment

An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).

47 U.S.C. § 254(k)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART II. DEVELOPMENT OF COMPETITIVE MARKETS

§ 254. Universal service

* * * * * *

(k) Subsidy of competitive services prohibited

A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

* * * * * *

47 U.S.C. § 272(e)(3)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART III. SPECIAL PROVISIONS CONCERNING BELL OPERATING COMPANIES

§ 272. Separate affiliate; safeguards

* * * * * *

(e) Fulfillment of certain requests

* * * * * *

(3) shall charge the affiliate described in subsection (a) of this section, or impute to itself (if using the access for its provision of its own services), an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service; and

* * * * * *

47 U.S.C. § 405

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV. PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date

upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

47 U.S.C. § 1302(a)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 12. BROADBAND

§ 1302. Advanced telecommunications incentives

(a) In general

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

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47 C.F.R. § 32.1

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 32. UNIFORM SYSTEM OF ACCOUNTS FOR
TELECOMMUNICATIONS COMPANIES
SUBPART A. PREFACE

§ 32.1 Background.

The revised Uniform System of Accounts (USOA) is a historical financial accounting system which reports the results of operational and financial events in a manner which enables both management and regulators to assess these results within a specified accounting period. The USOA also provides the financial community and others with financial performance results. In order for an accounting system to fulfill these purposes, it must exhibit consistency and stability in financial reporting (including the results published for regulatory purposes). Accordingly, the USOA has been designed to reflect stable, recurring financial data based to the extent regulatory considerations permit upon the consistency of the well established body of accounting theories and principles commonly referred to as generally accepted accounting principles.

47 C.F.R. § 32.11

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 32. UNIFORM SYSTEM OF ACCOUNTS FOR
TELECOMMUNICATIONS COMPANIES
SUBPART B. GENERAL INSTRUCTIONS

§ 32.11 Classification of companies.

(a) For purposes of this section, the term “company” or “companies” means incumbent local exchange carrier(s) as defined in section 251(h) of the Communications Act, and any other carriers that the Commission designates by Order. Incumbent local exchange carriers' successor or assign companies, as defined in section 251(h)(1)(B)(ii) of the Communications Act, that are found to be non-dominant by the Commission, will not be subject to this Uniform System of Accounts.

(b) For accounting purposes, companies are divided into classes as follows:

(1) Class A. Companies having annual revenues from regulated telecommunications operations that are equal to or above the indexed revenue threshold.

(2) Class B. Companies having annual revenues from regulated telecommunications operations that are less than the indexed revenue threshold.

(c) Class A companies, except mid-sized incumbent local exchange carriers, as defined by § 32.9000, shall keep all the accounts of this system of accounts which are applicable to their affairs and are designated as Class A accounts. Class A companies, which include mid-sized incumbent local exchange carriers, shall keep Basic Property Records in compliance with the requirements of §§ 32.2000(e) and (f).

(d) Class B companies and mid-sized incumbent local exchange carriers, as defined by § 32.9000, shall keep all accounts of this system of accounts which are applicable to their affairs and are designated as Class B accounts. Mid-sized incumbent local exchange carriers shall also maintain subsidiary record categories necessary to provide the pole attachment data currently provided in the Class A accounts. Class B companies shall keep Continuing Property Records in compliance with the requirements of §§ 32.2000(e)(7)(i)(A) and 32.2000(f).

(e) Class B companies and mid-sized incumbent local exchange carriers, as defined by § 32.9000 of this part, that desire more detailed accounting may adopt the accounts

prescribed for Class A companies upon the submission of a written notification to the Commission.

(f) The classification of a company shall be determined at the start of the calendar year following the first time its annual operating revenue from regulated telecommunications operations equals, exceeds, or falls below the indexed revenue threshold.

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

VERIZON AND AT&T, INC.,
PETITIONERS

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
RESPONDENTS

CERTIFICATE OF SERVICE

I, Laurel Bergold, hereby certify that on April 2, 2014, I electronically filed the foregoing Final Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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