IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NO. 11-9900

IN RE: FCC 11-161

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

PETITION FOR REHEARING EN BANC AS TO ISSUES RAISED IN TRANSCOM PRINCIPAL BRIEF

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I. RULE 35(b) STATEMENT

Transcom Enhanced Services, Inc. (Transcom) seeks *en banc* and panel rehearing of the panel decision on "Issues Involving Intercarrier Compensation" raised in the Transcom Principal Brief.[1] Rehearing under Fed. R. App. P. Rule 40(a)(2)/10th Cir. R. 40.1(A) and *en banc* rehearing under Fed. R. App. P. 35/10th Cir. R. 35.2 are both appropriate and necessary.

Rehearing in general is required because the panel decision overlooked–and therefore failed to consider or dispose–several issues directly and expressly raised in Transcom's Principal Brief. The panel decision erroneously held certain issues were not preserved for review under 47 U.S.C. §405. The panel decision misapprehended several issues of law on the points the panel decision did address.

En banc review is appropriate. The panel decision conflicts with decisions of the Supreme Court and this Court. Fed. R. App. P. 35(b)(1)(B)/10th Cir. R. 35.1(A). Further, the panel decision

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[1] The panel issued two opinions on review of an FCC order. One opinion addressed "Universal Service" and the other concerned "Intercarrier Compensation." Transcom's review points all fell within the "Intercarrier Compensation" portion of these consolidated petitions for review.

conflicts with decisions by other courts of appeals, including decisions by the D. C. Circuit the panel decision on page 88 adopts and approves for purposes of this Circuit.

The FCC *Order* mandates a fundamental restructuring of the communications marketplace, materially changes the regulations applicable to participants in that market, and will determine the prices consumers pay for communications services for years to come. The FCC changed several prior interpretations of the Act, reclassified important traffic types, and imposed new common carrier obligations on previously unregulated non-carriers. These changes so "disrupt the market" that FCC felt the need to transition-phase some (but not all) to partially ameliorate their impact. Panel decision, p. 8. This was a major action involving a primary economic sector for our country. Thus the case is of exceptional public importance, and *en banc* review is indicated under Fed. R. App. P. R.35(b)(1)(B)/10th Cir. R. 35.1(A).

II. TRAVEL OF THE CASE

A. Relevant Facts

Transcom is an "Internet" based communications-intensive private business that provides enhanced/information services to its wholesale customers. Transcom does not deal with retail customers. [JA 3156-3158, 3855-3908, 3926-3927, 3963-3964.] Transcom uses CPE that connects to the telephone exchange service that Transcom buys from CMRS and LEC exchange carriers to originate and terminate calls. [JA 3855, 3858-3859, 3883, 3926-3927.]

Transcom has never held itself out as a carrier and does not offer or provide telecommunications or telecommunications service. [*Id.*] Rather, Transcom is an ESP and an end-user of telecommunications services on the PSTN. Transcom's equipment is "end-user" "customer premises equipment" ("CPE") as defined by 47 U.S.C. §153(16), not "carrier" "telecommunications equipment" as defined by 47 U.S.C. §153(52). [JA 3154, 3157, 3158].

B. FCC Proceeding

Transcom's involvement in the proceeding below began when certain ILECs began filing comments and *ex parte* submissions complaining about ICC-related disputes with Halo Wireless, Inc.

("Halo"), one of Transcom's exchange carrier vendors. [JA at 1861-1863, 1880-1881, 1883, 2948-2953, 3915-3917.] Those submissions also attacked Transcom's regulatory status and the classification of Transcom's traffic, and alleged that Halo and Transcom were engaging in improper call signaling practices. [*Id.*] The ILECs contended that Transcom should be subject to common carrier regulation. [*Id.*]

Halo and Transcom entered the case and responded to the ILECs' contentions and assertions, through reply comments and *ex parte* meetings and filings. [JA at 2092-2104, 3149-3162, 3854-3912, 3926-3928, 3962-3968.]

The *Order* explicitly referred to Halo and its submissions,[2] but referred to Transcom only as a "high volume" "ESP" customer of Halo.[3] The *Order* repeated the ILECs' allegations regarding Halo's handling of Transcom's traffic.[4] FCC did not dispute that Transcom is an ESP and end-user rather than a carrier, and failed to address Transcom's contentions that since it was an end-user and employed

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[2] *Order* ¶¶848, 979, 1003-1006 (and associated notes).

[3] ¶¶1005-1006.

[4] ¶¶709, 712-714, 720 (and associated notes), n.1203.

CPE rather than telecommunications equipment the Act prohibits exchange access levies when Transcom purchases telephone exchange service from either an LEC *or* a CMRS.

The *Order's* "Halo" ruling did not address or distinguish prior Commission decisions approving CMRS-based telephone exchange service to ESPs, including those that provide "VoIP," yet it *sub silentio* overturned these decisions and functionally banned them.

FCC also addressed the situation where ESPs like Transcom purchase service from wireline LECs. FCC held ESPs provide "toll services" and buy "access.[5] FCC also held that ESPs are "intermediate" points instead of end-points for certain purposes.[6] The *Order* held FCC could use "ancillary authority" to subject ESPs like Transcom to common-carrier intercarrier compensation, call identifying, and no-blocking obligations.[7]

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[5] ¶¶945, 956-958. FCC improperly used different and non-statutory definitions for "access" and "toll" that encompass traffic types the statutory definitions exclude. Transcom Principal Brief, pp. 10, 15-19, 23-27, 30-35.

[6] ¶¶717, 720.

[7] ¶¶709, 712-14, 720, 848, 979, 1003-1006 and associated notes; *see also* n.1203.

C. Panel Decision

Transcom's "challenges" were addressed on panel decision pp. 93-99. The panel's summary of issues says that

> Transcom challenges three aspects of the FCC's Order: (1) the FCC's interpretation of its intraMTA rule governing reciprocal compensation between wireless providers and LECs; (2) the FCC's ancillary jurisdiction to impose call-identifying rules on non-carriers who do not originate or terminate traffic; and (3) the validity of the FCC's no-blocking rules on VoIP providers. *Id.* at 39-40, 45-48. We reject each argument. Transcom is not the called party, and Transcom has not preserved its second and third challenges.

III. ARGUMENT

A. Overview of *En Banc* Rehearing Issues.

Transcom seeks *en banc* rehearing to correct omissions and errors in the panel decision. Transcom has claimed at every level that unless and until the FCC finds that Transcom is a common carrier then Transcom is and must be an end-user and its equipment is CPE, not telecommunications equipment. Transcom has claimed at every level that these statutory classifications are determinative with regard to the FCC's permitted scope of regulation under the Act, and how traffic can be treated for compensation purposes (*e.g.* "access" or "non-access"), yet neither the FCC nor the panel ever addressed these points.

Transcom deserves a direct ruling on its statutory interpretation point that traffic associated with a non-carrier end-user's purchase of telephone exchange service cannot be assessed exchange access, given that neither the end-user nor the exchange carrier is providing telephone toll. Transcom deserves a direct ruling on its legal contention that end-user CPE is a termination point as a matter of law and cannot be an intermediate point for compensation purposes.

The panel clearly overlooked several points that Transcom directly and expressly raised and addressed in its Principal Brief. The overlooked issues were separate from, and in addition to, those that the panel did resolve through merits or exhaustion analysis. On these overlooked issues there is no finding of waiver or failure to preserve, yet there was also no merits determination. The panel was required to, but did not, address or resolve them.

The panel held that Transcom "waived" or failed to preserve" the right to review two points that concerned the FCC's promulgation of "Call Identifying" and "No-Blocking" rules insofar as they extended to entities that are not Title II common carriers. *Id.*, pp. 97-99. Transcom seeks review of the panel's holding that review is precluded on these points. The FCC actually addressed the issue in the challenged *Order* so the exhaustion requirement in 47 U.S.C. §405 was satisfied. The D.C. Circuit precedent adopted by the panel for use in this Circuit so emphasizes.

The panel decision did make a *partial* merits ruling on Transcom's review points related to the "IntraMTA rule." Panel decision, pp. 93-97. Transcom seeks review of the merits determinations because they conflict with decisions by this Court

and the Supreme Court. Transcom also requests that the Court address the remaining Transcom "intraMTA" points that the panel decision did not resolve.

B. Rehearing Point 1: The panel decision overlooked several review points expressly raised and extensively discussed in Transcom's Principal Brief.

Transcom's Principal Brief had two major headings under which its individual legal points were presented. Section I had three discrete points laid out in Parts I.A.-I.C, which appeared in Principal Brief pp. 12-23. Section II had six primary points (Parts II.A.-II.F) argued in Principal Brief pp. 27-49. Parts II.B. and II.F. each included two sub-points that further segregated and substantiated the error Transcom was bringing to the Court's attention.

The panel decision found waiver or failure to preserve for Part II.F.1 and II.F.2, and only partially resolved the substantive merits of Transcom's challenge to the FCC's "intraMTA rule" in Parts II.D. and E.[8] The panel decision implicitly rejected some but not all of the arguments in Part I.B. for wireless service, by holding that calls do not terminate with Transcom for purposes of the "intraMTA rule," but the panel did not address this issue in the context of "wireline"

[8] Transcom will explain how the panel decision did not fully resolve the "intraMTA rule" challenge below.

service–even though on pages 85-86 the panel decision holds that the FCC can (and did) treat "wireline VoIP" differently from wireless.

The panel did not rule on Transcom's contention that imposing exchange access charges on Transcom's traffic violates the Communications Act even if Transcom is an "intermediate" point rather than a termination point for "wireless" or "wireline." Transcom Principal Brief pp. 20-21.[9] The panel did not address or dispose *any* of Transcom's review points contesting the FCC's determinations for "wireline" traffic, when Transcom purchases telephone exchange service from an LEC rather than a CMRS provider. For example, Transcom's Principal Brief on pages 30-36 (under Parts II.B. and II.C.) clearly spoke to the situation where Transcom purchases telephone exchange service from a LEC rather

[9] "This is so even if the call started out somewhere else before it got to the end-user CPE, which then sent the call back out." "This was always the case even though from an end-to-end perspective the ESP is 'in the middle' of a communication, as the gateway between participants." The characterization of Transcom's position on panel decision page 93 is not correct.

than a CMRS, by noting that Transcom's traffic was "between two LECs."[10]

The panel did not discuss Transcom's challenge to the FCC's holding that the FCC violated the statutory bright-line distinction between carriers and end-users (Parts I.A, I.C., II.A), and the related argument that the statutes says that end-user CPE is an end-point where calls originate and terminate for compensation purposes (Part I.B). The panel overlooked Transcom's argument that the FCC illegally imposed common carrier status on Transcom for purposes of intercarrier compensation (Part II.A., B. and C.),[11] and regulated end-users in ways not allowed by the Act. *Id.*

The panel did not dispose Transcom's statutory argument that enhanced/information service providers do not provide telephone

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[10] See especially Transcom Principal Brief p. 33 ("This cryptic comment cannot justify an attempt to 'carve out' traffic that *is* between two LECs.")

[11] The panel decision holds on page 90 that "rate regulation is not the same as a no-blocking obligation." FCC did not assert waiver and the panel did not find that Transcom failed to preserve the common carrier challenge as it relates to compensation (rate regulation). Thus the waiver holdings in panel decision pp. 97-99 do not apply to these issues.

toll service and therefore do not receive exchange access,[12] so exchange access cannot apply as a matter of law. (Part II.B.2. and II.C.) In particular, the panel did not address Transcom's argument that the Act does not permit a requirement that Transcom's LEC vendors pay exchange access charges to other carriers for Transcom's traffic, since neither Transcom nor its exchange service vendor are providing "telephone toll" as defined in §153(55). Transcom Principal Br. pp. 30-36.

Telephone toll is by definition a telecommunications service. Since Transcom is not a carrier it cannot be a provider of telephone toll as a matter of law. "Telephone exchange service" is separately defined in §153(54), and is not the same as "telephone toll." When an exchange carrier provides telephone exchange service to an end-user it is not providing telephone toll. Exchange access charges are not allowed under the unambiguous terms of the Act.

The panel had an extraordinary number of issues on its plate, so one can understand why some were "overlooked." Transcom,

[12] Section 153(20) defines "exchange access" and makes clear that exchange access applies only to "telephone toll services."

however, has a right to a ruling on its properly-preserved points at this level, so rehearing is necessary.

C. <u>Rehearing Point 2: The panel decision misapprehends and misapplies 47 U.S.C. §405, and is inconsistent with the D.C. Circuit precedent the panel adopts for purposes of this Circuit.</u>

The panel decision holds that Transcom "waived" and/or "failed to preserve" any challenge to the FCC's extension of its new "Call-Identifying" and "No-Blocking" rules to non-carriers. This ruling was based on an interpretation of the "exhaustion" requirement in 47 U.S.C. §405(a). Panel decision, pp. 98-99.

Panel decision page 99 notes its exhaustion decision as to Transcom is the same as that for VON on No-Blocking. The panel decision on the VON No-Blocking issue expressly relies on a test used in the D.C. Circuit, and adopts it for this Circuit. Panel Decision page 88, *citing EchoStar Satellite, LLC v. FCC*, 704 F.3d 992 (D.C. Cir. 2013); *Sprint Nextel Corp. v. FCC*, 524 F.3d 253 (D.C. Cir. 2008); *Time Warner Entm't Co. v. FCC*, 144 F.3d 75 (D.C. Cir. 1998) and *New England Pub. Commc'ns Council, Inc. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003). But the panel decision misapplies those cases, because they recognize that §405 is satisfied when the FCC actually addresses the issue even if no party raises it below.

The panel decision exclusively considers exhaustion in terms of whether a party sufficiently "raised" the issue. Panel decision, pp. 87-88. Transcom continues to assert that the record citations it and VON supplied showed that the issue was raised by a party, but that question is ultimately irrelevant.

Section 405 reflects Congress' desire that the FCC have an "opportunity to pass" on an issue before judicial review can occur. *See* §405(a)(2). But an individual party is not always required to specifically raise the issue. Even if no party raised the issue, §405 is satisfied if the Commission nonetheless expressly addressed and ruled on the question. In this case the FCC obviously did have an "opportunity to pass" because it seized the opportunity and ruled on the matter.

> Although we have said that [47 U.S.C. §405(a)] codifies the normal exhaustion doctrine, the text does not refer to the necessity of a party raising an argument before the Commission–as does the typical exhaustion statute–but only that the Commission have an "opportunity to pass" on a question of fact or law raised in the petition.

Time Warner Entm't, 144 F.3d at 79 (internal citations omitted).

> On its face, §405, commands only that the Commission be afforded the opportunity to pass on issues. There is no requirement that this opportunity be afforded in any particular manner, or by any particular party. Thus to allow the Church to seek review of issues raised by the

> majority and challenged by the dissenters complies with both §405's requirements and its objectives.

Office of Communications of United Church of Christ v. FCC, 465 F.2d 519, 523-524 (D.C. Cir., 1972).

> The Order's discussion of the FCC's authority satisfies us that §405's requirements have been met. *See Order* ¶¶45-47, 55-57, 18 FCC Rcd. at 20905 ¶10. … Even if no other party brought the matter to the agency's attention, the FCC's independent contemplation of the issue satisfies §405's mandate.

Echostar, 704 F.3d at 996 (emphasis added).

The *Order* directly held FCC could impose its "Call-Identifying" and "No-Blocking" rules on non-carriers under Title I. Order ¶718 and note 1232; ¶974 and note 2043. The *Order* discussed its reasoning and specifically ruled that the Commission could impose these very rules on non-carriers using Title I "ancillary authority."[13] Transcom's Principal Brief Parts II.F.I. and II challenged ancillary jurisdiction (authority) under Title I. The brief rebutted the portions of the *Order* where the FCC's discussion on this precise issue was contained. Transcom contended the FCC was wrong when it held it

[13] The FCC held that extension of these rules to non-carriers under Title I was necessary in order to have "effective performance" of its Title II oversight over carriers. Transcom Principal Brief Parts II.F.I. and II. challenged that conclusion.

could use ancillary authority as a means to impose common carrier duties on non-carriers. Transcom Principal Brief, pp. 46-48.[14]

The FCC's Response to Transcom's brief on pp. 21-24, 26 cited to the *Order's* discussion, and a similar argument appears in the FCC's VON brief pp. 11, 17, 19. The issue joined here was exactly the same as what FCC ruled on below. The panel was surely aware that the FCC actually passed on the issue because petitioners and respondent all pointed to the relevant parts of the *Order* where the FCC addressed it.

The FCC's "independent contemplation of the issues" raised by Transcom on review "satisfies §405's mandate." *Echostar, supra.* The Commission necessarily saw the question as part of the case, since it analyzed and ruled on that question. *Time Warner*, *supra.* Panel decision page 91 relied on *Time Warner* and *EchoStar* yet the panel's exhaustion holding is inconsistent with those cases and the D.C. Circuit test the panel adopts for use in this Circuit.

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[14] Briefing and argument concluded before the D.C. Circuit issued *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014). Transcom submitted a Rule 28(j) letter advising of *Verizon's* impact on the question whether the FCC could use ancillary authority to impose common carrier compensation, call-signaling and no-blocking duties on non-carriers. Doc. 01019189162, Filed Jan. 21, 2014.

The panel misapprehended the exhaustion requirement in §405, as interpreted by the very cases the panel adopted for use in this Circuit. The issue is properly before the Court. Rehearing is necessary, and then there must be a ruling on the merits of Transcom's points II.F.1. and 2 challenging the FCC's jurisdiction and authority to apply its common carrier "Call-Identifying" and "No-Blocking" rules to non-common carriers.

D. Rehearing Point 3: The panel decision overlooks and misapprehends the legal issues pertaining to Transcom's challenge to the FCC's interpretation of the "intraMTA rule"; the result conflicts with applicable decisions by this Circuit and the U.S. Supreme Court.

Panel decision page 95 notes that the FCC's interpretation of the intraMTA rule "ignores" Transcom's presence "in the middle of the call" and affirms that approach. This is error. Transcom's presence and attributes cannot be "ignored" when Transcom's rights, duties, obligations and status are being determined. Common sense, and the Act, dictate that a party's rights, duties and obligations necessarily turn on that party's legal classification, based on the legal definition of the functions being performed and the service being offered by that entity. If an entity is providing "information service" rather than "telecommunications service" then the FCC cannot impose common carrier obligations on that entity. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986-999 (2005); *Verizon v. FCC*, 740 F.3d 623. The panel decision to "ignore" Transcom when assessing how Transcom is to be treated is inconsistent with the Supreme Court's *Brand X* holding that a party's regulatory classification as a carrier or

information service provider is determinative of the party's rights, duties and obligations.

The panel also affirms the Commission's revival of the "end-to-end" theory for compensation purposes that was rejected by the D.C. Circuit in *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1 (D.C. Cir. 2000), and *Worldcom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). The panel distinguishes these two cases on two principal grounds, on pages 95-97. First, they "involv[ed] "dial-up internet." Second, the panel claims that Transcom is "not the called party." The panel erred in the analysis it did conduct and failed to fully address *all* of Transcom's arguments. Even if, *arguendo*, the analysis that was done is correct so far as it goes–with the result that Transcom is not the "called party"–the panel erred by stopping there and then going on to reach the conclusion on page 95 that "this conclusion requires Halo (as a common carrier) to pay access charges."

First, the panel did not explain how the Act permits the imposition of exchange access charges on Transcom's traffic. The *Worldcom* court noted that 47 U.S.C. §153(20) says that "exchange access" can be levied only on "telephone toll" traffic. This

observation is not limited to "dialup." Neither Halo nor Transcom were providing "telephone toll." Halo was not serving any IXC, including the one depicted on the diagram appearing on decision page 94.[15] Halo was providing "telephone exchange service" to Transcom.[16] Although the D.C. Circuit in *Bell Atlantic* and *Worldcom* instructed FCC to explain, to this day neither the FCC nor the panel has addressed the question of whether the Act can be read to allow exchange access charge levies against an entity that is not providing telephone toll.

Transcom is an end-user and is not a carrier. End-users use "CPE" while carriers employ "telecommunications equipment." *Compare* 47 U.S.C. §153(16) *with* §153(52). The statutory definition for CPE unambiguously states that CPE is an end-point where calls "terminate" whereas the definition of "telecommunications equipment" does not. Sections 153(16), 153(20), 153(54), 251(b)(5)

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[15] That picture is incorrect in any event, because it does not include a representation of Transcom's customer, which is not the IXC that is pictured and stands between the IXC and Transcom. *See* Transcom Reply Brief page 18.

[16] The FCC admitted that this was so on page 19 of its Transcom Brief. The panel failed to comprehend the mandatory legal consequence of FCC's admission even though Transcom pointed it out on Transcom Response Brief page 10.

and 252(d)(2) refer to a "termination" but do not include a "called party" condition.

Neither the FCC nor the panel ever addressed Transcom's statutory interpretation points, which Transcom has presented and preserved from the beginning.

The panel also misinterpreted the *Order*. FCC held that the calls in issue are not intraMTA for purposes of 47 C.F.R. §20.11. FCC held that Halo was not the "originating carrier" but it did not hold that Halo is subject to access charges. *See Order* ¶¶1006.[17] Instead, FCC characterized Halo's service to Transcom as "transiting."[18] *Order* ¶1311 later held that "transiting" is "non-access." So while it is true the FCC held that the traffic in issue is not "intraMTA" it **also held it is non-access**, which means that

[17] The FCC also did not hold that Transcom is subject to access charges in the wireless "MTA rule" discussion. A different part of the *Order* (¶¶956-958)–which was focused on *wireline* traffic–held that "VoIP" is subject to exchange access. As explained above, Transcom challenged that part of the *Order* but the panel overlooked those points of error.

[18] "Where a provider is merely providing a transiting service, it is well established that a transiting carrier is not considered the originating carrier for purposes of the reciprocal compensation rules."

Halo is not subject to access charges under the FCC's own interpretation of its rules.

The panel failed to fully engage on all the issues, and by skipping over several it incorrectly leaped to the wrong conclusion and purported to affirm an FCC finding that was never in fact made.

The panel did not in any manner deal with Transcom's showing that the FCC's intraMTA holding was an unexplained course-reversal from its prior actions encouraging wireless companies to support VoIP providers and treating VoIP providers as both wireless end-users *and a termination point*. Transcom Principal Brief pp. 36-42. The FCC never justified–in the *Order* or in briefing– the abrupt course-reversal in treatment of CMRS-provided telephone exchange services to VoIP providers.

The Administrative Procedure Act's requirement of reasoned decision-making demands that an agency acknowledge and explain the reasons for a changed interpretation. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-517 (2009) [and cases cited therein]; *Qwest Corp. v. FCC*, 689 F.3d 1214, 1224-1225 (10th Cir., 2012). Transcom had "reliance interests" at stake (Transcom

Principal Brief p. 40). The FCC (and now the panel) "brush[ed] aside" this issue. The panel failed to follow binding precedent of the Supreme Court and this Court when it did not "require the Commission to offer a 'reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy.'" *Qwest Corp.*, 689 F.3d at 1225. Binding precedent dictated that the panel remand for an explanation since the FCC failed to even acknowledge that it was abandoning prior policy.

IV. CONCLUSION AND PRAYER

The panel decision overlooked several separate and distinct Transcom points of error. Section 405 does not prevent review. The panel decision merits rulings are contrary to binding precedent from this Circuit and the Supreme Court.

The Court should grant rehearing and then hold unlawful and vacate the *Order*.

Respectfully submitted,

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July 7, 2014

CERTIFICATE OF COMPLIANCE WITH CONSISTENCY, TYPE-VOLUME, TYPEFACE, TYPE STYLE, PRIVACY REDACTION AND VIRUS SCAN REQUIREMENTS

1. The hard copies to be submitted to the Court within two business days are exact copies of the version submitted electronically.

2. This filing complies with the volume limitations in Fed. R. App. P. 40(b) and the Order Governing Rehearing Procedures because it contains 4,163 words (including footnotes) as calculated by the Microsoft Word "Word Count" utility.

3. This filing complies with the typeface requirements of Fed. R. App. P. 32 and 10th Cir. R. 32 and the type style requirements of Fed. R. App. P. 32 because this filing has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Bookman Old Style font.

4. All required privacy redactions have been made.

5. The electronic filing was scanned for viruses with Kaspersky Endpoint Security, updated on July 7, 2014, and according to the program is free of viruses.

/s/ W. Scott McCollough
July 7, 2014

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2014 I caused the foregoing document to be filed through (ECF), leading to electronic service to all parties in this case that are registered CM/ECF users.

/s/ W. Scott McCollough
July 7, 2014

ADDENDA COVER PAGE (10th CIR. R. 35.2(B))

Addendum I: Opinion On "Issues Involving Intercarrier Compensation" (May 23, 2014)

Addendum II: Judgment (May 23, 2014)

FILED
United States Court of Appeals
Tenth Circuit

May 23, 2014

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DIRECT COMMUNICATIONS CEDAR VALLEY, LLC, a Utah limited liability company; TOTAH COMMUNICATIONS, INC., an Oklahoma corporation; H & B COMMUNICATIONS, INC., a Kansas Corporation; THE MOUNDRIDGE TELEPHONE COMPANY OF MOUNDRIDGE, a Kansas business organization; PIONEER TELEPHONE ASSOCIATION, INC., a Kansas corporation; TWIN VALLEY TELEPHONE, INC., a Kansas corporation; PINE TELEPHONE COMPANY, INC., an Oklahoma corporation; PENNSYLVANIA PUBLIC UTILITY COMMISSION; CHOCTAW TELEPHONE COMPANY; CORE COMMUNICATIONS, INC.; NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES; NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION; CELLULAR SOUTH, INC.; AT&T, INC.; HALO WIRELESS, INC.; THE VOICE ON THE NET COALITION, INC.; PUBLIC UTILITIES COMMISSION OF OHIO; TW TELECOM INC.; VERMONT PUBLIC SERVICE BOARD; THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS; CENTURYLINK INC.; GILA RIVER INDIAN COMMUNITY; GILA RIVER TELECOMMUNICATIONS, INC.; ALLBAND COMMUNICATIONS COOPERATIVE; NORTH COUNTY

11-9900

Consolidated Case Nos.:
11-9581, 11-9585, 11-9586, 11-9587, 11-9588, 11-9589, 11-9590, 11-9591, 11-9592, 11-9594, 11-9595, 11-9596, 11-9597, 12-9500, 12-9510, 12-9511, 12-9513, 12-9514, 12-9517, 12-9520, 12-9521, 12-9522, 12-9523, 12-9524, 12-9528, 12-9530, 12-9531, 12-9532, 12-9533, 12-9534, 12-9575

COMMUNICATIONS CORPORATION; UNITED STATES CELLULAR CORPORATION; PR WIRELESS, INC.; DOCOMO PACIFIC, INC.; NEX-TECH WIRELESS, LLC; CELLULAR NETWORK PARTNERSHIP, A LIMITED PARTNERSHIP; U.S. TELEPACIFIC CORP.; CONSOLIDATED COMMUNICATIONS HOLDINGS, INC.; NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS; RURAL TELEPHONE SERVICE COMPANY, INC.; ADAK EAGLE ENTERPRISES LLC; ADAMS TELEPHONE COOPERATIVE; ALENCO COMMUNICATIONS, INC.; ARLINGTON TELEPHONE COMPANY; BAY SPRINGS TELEPHONE COMPANY, INC.; BIG BEND TELEPHONE COMPANY, INC.; THE BLAIR TELEPHONE COMPANY; BLOUNTSVILLE TELEPHONE LLC; BLUE VALLEY TELECOMMUNICATIONS, INC.; BLUFFTON TELEPHONE COMPANY, INC.; BPM, INC., d/b/a Noxapater Telephone Company; BRANTLEY TELEPHONE COMPANY, INC.; BRAZORIA TELEPHONE COMPANY; BRINDLEE MOUNTAIN TELEPHONE LLC; BRUCE TELEPHONE COMPANY; BUGS ISLAND TELEPHONE COOPERATIVE; CAMERON TELEPHONE COMPANY, LLC; CHARITON VALLEY TELEPHONE CORPORATION; CHEQUAMEGON COMMUNICATIONS COOPERATIVE, INC.; CHICKAMAUGA TELEPHONE CORPORATION; CHICKASAW TELEPHONE COMPANY; CHIPPEWA COUNTY TELEPHONE COMPANY;

CLEAR LAKE INDEPENDENT
TELEPHONE COMPANY; COMSOUTH
TELECOMMUNICATIONS, INC.;
COPPER VALLEY TELEPHONE
COOPERATIVE; CORDOVA
TELEPHONE COOPERATIVE;
CROCKETT TELEPHONE COMPANY,
INC.; DARIEN TELEPHONE
COMPANY; DEERFIELD FARMERS'
TELEPHONE COMPANY; DELTA
TELEPHONE COMPANY, INC.; EAST
ASCENSION TELEPHONE COMPANY,
LLC; EASTERN NEBRASKA
TELEPHONE COMPANY; EASTEX
TELEPHONE COOP., INC.; EGYPTIAN
TELEPHONE COOPERATIVE
ASSOCIATION; ELIZABETH
TELEPHONE COMPANY, LLC;
ELLIJAY TELEPHONE COMPANY;
FARMERS TELEPHONE
COOPERATIVE, INC.; FLATROCK
TELEPHONE COOP., INC.; FRANKLIN
TELEPHONE COMPANY, INC.;
FULTON TELEPHONE COMPANY,
INC.; GLENWOOD TELEPHONE
COMPANY; GRANBY TELEPHONE
LLC; HART TELEPHONE COMPANY;
HIAWATHA TELEPHONE COMPANY;
HOLWAY TELEPHONE COMPANY;
HOME TELEPHONE COMPANY (ST.
JACOB, ILL.); HOME TELEPHONE
COMPANY (MONCKS CORNER, SC);
HOPPER TELECOMMUNICATIONS
COMPANY, INC.; HORRY TELEPHONE
COOPERATIVE, INC.; INTERIOR
TELEPHONE COMPANY; KAPLAN
TELEPHONE COMPANY, INC.; KLM
TELEPHONE COMPANY; CITY OF
KETCHIKAN, ALASKA, d/b/a KPU
Telecommunications; LACKAWAXEN
TELECOMMUNICATIONS SERVICES,
INC.; LAFOURCHE TELEPHONE

COMPANY, LLC; LA HARPE
TELEPHONE COMPANY, INC.;
LAKESIDE TELEPHONE COMPANY;
LINCOLNVILLE TELEPHONE
COMPANY; LORETTO TELEPHONE
COMPANY, INC.; MADISON
TELEPHONE COMPANY;
MATANUSKA TELEPHONE
ASSOCIATION, INC.; MCDONOUGH
TELEPHONE COOP., INC.; MGW
TELEPHONE COMPANY, INC.; MID
CENTURY TELEPHONE COOP., INC.;
MIDWAY TELEPHONE COMPANY;
MID-MAINE TELECOM LLC; MOUND
BAYOU TELEPHONE &
COMMUNICATIONS, INC.;
MOUNDVILLE TELEPHONE
COMPANY, INC.; MUKLUK
TELEPHONE COMPANY, INC.;
NATIONAL TELEPHONE OF
ALABAMA, INC.; ONTONAGON
COUNTY TELEPHONE COMPANY;
OTELCO MID-MISSOURI LLC;
OTELCO TELEPHONE LLC;
PANHANDLE TELEPHONE
COOPERATIVE, INC.; PEMBROKE
TELEPHONE COMPANY, INC.;
PEOPLE'S TELEPHONE COMPANY;
PEOPLES TELEPHONE COMPANY;
PIEDMONT RURAL TELEPHONE
COOPERATIVE, INC.; PINE BELT
TELEPHONE COMPANY; PINE TREE
TELEPHONE LLC; PIONEER
TELEPHONE COOPERATIVE, INC.;
POKA LAMBRO TELEPHONE
COOPERATIVE, INC.; PUBLIC
SERVICE TELEPHONE COMPANY;
RINGGOLD TELEPHONE COMPANY;
ROANOKE TELEPHONE COMPANY,
INC.; ROCK'S COUNTY TELEPHONE;
SACO RIVER TELEPHONE LLC;
SANDHILL TELEPHONE

COOPERATIVE, INC.; SHOREHAM TELEPHONE LLC; THE SISKIYOU TELEPHONE COMPANY; SLEDGE TELEPHONE COMPANY; SOUTH CANAAN TELEPHONE COMPANY; SOUTH CENTRAL TELEPHONE ASSOCIATION; STAR TELEPHONE COMPANY, INC.; STAYTON COOPERATIVE TELEPHONE COMPANY; THE NORTH-EASTERN PENNSYLVANIA TELEPHONE COMPANY; TIDEWATER TELECOM, INC.; TOHONO O'ODHAM UTILITY AUTHORITY; UNITEL, INC.; WAR TELEPHONE LLC; WEST CAROLINA RURAL TELEPHONE COOPERATIVE, INC.; WEST TENNESSEE TELEPHONE COMPANY, INC.; WEST WISCONSIN TELCOM COOPERATIVE, INC.; WIGGINS TELEPHONE ASSOCIATION; WINNEBAGO COOPERATIVE TELECOM ASSOCIATION; YUKON TELEPHONE CO., INC.; ARIZONA CORPORATION COMMISSION; WINDSTREAM CORPORATION; WINDSTREAM COMMUNICATIONS, INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,

Respondents,

and

SPRINT NEXTEL CORPORATION; LEVEL 3 COMMUNICATIONS, LLC; CENTURYLINK, INC.; CONNECTICUT

PUBLIC UTILITIES REGULATORY AUTHORITY; INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE; ORGANIZATION FOR THE PROTECTION AND ADVANCEMENT OF SMALL TELEPHONE COMPANIES, a/k/a ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES (OPASTCO); WESTERN TELECOMMUNICATIONS ALLIANCE; NATIOINAL EXCHANGE CARRIER ASSOCIATION, INC.; ARLINGTON TELEPHONE COMPANY; THE BLAIR TELEPHONE COMPANY; CAMBRIDGE TELEPHONE COMPANY; CLARKS TELECOMMUNICATIONS CO.; CONSOLIDATED TELEPHONE COMPANY; CONSOLIDATED TELCO, INC.; CONSOLIDATED TELCOM, INC.; THE CURTIS TELEPHONE COMPANY; EASTERN NEBRASKA TELEPHONE COMPANY; GREAT PLAINS COMMUNICATIONS, INC.; K. & M. TELEPHONE COMPANY, INC.; NEBRASKA CENTRAL TELEPHONE COMPANY; NORTHEAST NEBRASKA TELEPHONE COMPANY; ROCK COUNTY TELEPHONE COMPANY; THREE RIVER TELCO; RCA - The Competitive Carriers Association; RURAL TELECOMMUNICATIONS GROUP, INC.; CENTRAL TEXAS TELEPHONE COOPERATIVE, INC.; VENTURE COMMUNICATIONS COOPERATIVE, INC.; ALPINE COMMUNICATIONS, LC; EMERY TELCOM; PENASCO VALLEY TELEPHONE COOPERATIVE, INC.; SMART CITY TELECOM; SMITHVILLE COMMUNICATIONS, INC.; SOUTH SLOPE COOPERATIVE

TELEPHONE CO., INC.; SPRING
GROVE COMMUNICATIONS; STAR
TELEPHONE COMPANY; 3 RIVERS
TELEPHONE COOPERATIVE, INC.;
WALNUT TELEPHONE COMPANY,
INC.; WEST RIVER COOPERATIVE
TELEPHONE COMPANY, INC.; RONAN
TELEPHONE COMPANY; HOT
SPRINGS TELEPHONE COMPANY;
HYPERCUBE TELECOM, LLC;
VIRGINIA STATE CORPORATION
COMMISSION; MONTANA PUBLIC
SERVICE COMMISSION, VERIZON;
AT&T, INC.; SPRINT NEXTEL
CORPORATION; LEVEL 3
COMMUNICATIONS, LLC;
CENTURYLINK INC.; COX
COMMUNICATIONS, INC.; NATIONAL
TELECOMMUNICATIONS
COOPERATIVE ASSOCIATION;
INDEPENDENT TELEPHONE &
TELECOMMUNICATIONS ALLIANCE;
ORGANIZATION FOR THE
PROTECTION AND ADVANCEMENT
OF SMALL TELEPHONE COMPANIES,
a/k/a ORGANIZATION FOR THE
PROMOTION AND ADVANCEMENT
OF SMALL TELECOMMUNICATIONS
COMPANIES (OPASTCO); METROPCS
COMMUNICATIONS, INC.;
ARLINGTON TELEPHONE COMPANY;
THE BLAIR TELEPHONE COMPANY;
CAMBRIDGE TELEPHONE COMPANY;
CLARKS TELECOMMUNICATIONS
CO.; CONSOLIDATED TELEPHONE
COMPANY; CONSOLIDATED TELCO,
INC.; CONSOLIDATED TELCOM, INC.;
THE CURTIS TELEPHONE COMPANY;
EASTERN NEBRASKA TELEPHONE
COMPANY; GREAT PLAINS
COMMUNICATIONS, INC.; K. & M.
TELEPHONE COMPANY, INC.;

NEBRASKA CENTRAL TELEPHONE COMPANY; NORTHEAST NEBRASKA TELEPHONE COMPANY; ROCK COUNTY TELEPHONE COMPANY; THREE RIVER TELCO; NATIONAL EXCHANGE CARRIER ASSOCIATION, INC. (NECA), COMCAST CORPORATION; VONAGE HOLDINGS CORPORATION; RURAL TELECOMMUNICATIONS GROUP, INC.; NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION; CENTRAL TEXAS TELEPHONE COOPERATIVE, INC.; VENTURE COMMUNICATIONS COOPERATIVE, INC.; ALPINE COMMUNICATIONS, LC; EMERY TELCOM; PENASCO VALLEY TELEPHONE COOPERATIVE, INC.; SMART CITY TELECOM; SMITHVILLE COMMUNICATIONS, INC.; SOUTH SLOPE COOPERATIVE TELEPHONE CO., INC.; SPRING GROVE COMMUNICATIONS; STAR TELEPHONE COMPANY; 3 RIVERS TELEPHONE COOPERATIVE, INC.; WALNUT TELEPHONE COMPANY, INC.; WEST RIVER COOPERATIVE TELEPHONE COMPANY, INC.; RONAN TELEPHONE COMPANY; HOT SPRINGS TELEPHONE COMPANY; HYPERCUBE TELECOM, LLC,

Intervenors.

STATE MEMBERS OF THE FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE,

Amicus Curiae.

PETITION FOR REVIEW OF ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION (FCC No. 11-161)

Before **BRISCOE**, **HOLMES**, and **BACHARACH**, Circuit Judges.

BACHARACH, Circuit Judge.

Argued for Petitioners:

James Bradford Ramsey, National Association of Regulatory Utility Commissioners, Washington, D.C., Russell Blau, Bingham McCutchen LLP, Washington, D.C., Robert Allen Long, Jr., Covington & Burling, Washington, D.C., Michael B. Wallace, Wise Carter Child & Caraway, Jackson, Mississippi, Pratik A. Shah, Akin Gump Strauss Hauer & Feld LLP, Washington, D.C, Russell Lukas, Lukas, Nace, Gutierrez & Sachs, LLP, McLean, Virginia, Joseph K. Witmer, Pennsylvania Public Utility Commission, Harrisburg, Pennsylvania, Christopher F. Van de Verg, Annapolis, Maryland, Lucas M. Walker, Molo Lamken, Washington, D.C., Don Lee Keskey, Public Law Resource Center PLLC, Lansing, Michigan, Harvey Reiter, Stinson Morrison Hecker LLP, Washington, David Bergmann, Columbus, Ohio, E. Ashton Johnston, Lampert, O'Connor & Johnston, P.C., Washington, D.C., Heather Marie Zachary, Wilmer Cutler Pickering Hale and Dorr, Washington, D.C., and William Scott McCollough, McCollough Henry, Austin, Texas.

Argued for Respondents:

Richard Welch, James M. Carr, and Maureen Katherine Flood, Federal Communications Commission, Washington, D.C.

Argued for Respondents-Intervenors:

Scott H. Angstreich, Huber, Hansen, Todd, Evans & Figel, Washington, D.C., Howard J. Symons, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., and Samuel L. Feder, Jenner & Block LLP, Washington, D.C.

Appearances for Petitioners:

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Don Lee Keskey, Public Law Resources Center PLLC, Lansing Michigan, for Consolidated Telco, Inc.

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David LaFuria and Russell Lukas, Lukas, Nace, Gutierrez & Sachs, LLP, McLean, Virginia, for United States Cellular Corporation.

David LaFuria, Todd Bradley Lantor, and Russell Lukas, Lukas, Nace, Gutierrez & Sachs, LLP, McLean, Virginia, for Petitioners PR Wireless, Inc. and Docomo Pacific, Inc.

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Russell Blau, Bingham McCutchen LLP, Washington, D.C., for Consolidated Communications Holdings, Inc.

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David Cosson, Washington, D.C., H. Russell Frisby, Jr., Dennis Lane, and Harvey Reiter, Stinson Morrison Hecker LLP, Washington, D.C., for Rural Independent Competitive Alliance, Rural Telephone Service Company, Inc., Adak Eagle Enterprises LLC, Adams Telephone Cooperative, Alenco Communications, Inc., Arlington Telephone Company, Bay Springs Telephone Company, Big Bend Telephone Company, The Blair Telephone Company, Blountsville Telephone LLC, Blue Valley Telecommunications, Inc., Bluffton Telephone Company, Inc., BPM, Inc., Brantley Telephone Company, Inc., Brazoria Telephone Company, Brindlee Mountain Telephone LLC, Bruce Telephone Company, Bugs Island Telephone Cooperative, Cameron Telephone Company, LLC, Chariton Valley Telephone Corporation, Chequamegon Communications Cooperative, Inc., Chickamauga Telephone Corporation, Chicksaw Telephone Company, Chippewa County Telephone Company, Clear Lake Independent Telephone Company, Comsouth Telecommunications, Inc., Copper Valley Telephone Cooperative, Cordova Telephone Cooperative, Crockett Telephone Company, Inc., Darien Telephone Company, Deerfield Famers' Telephone Company, Delta Telephone Company, Inc., East Ascention Telephone Company, LLC, Eastern Nebraska Telephone Company, Eastex Telephone Coop., Inc., Egyptian Telephone Cooperative Association, Elizabeth Telephone Company, LLC, Ellijay Telephone Company, Farmers Telephone Cooperative, Inc., Flatrock Telephone Coop., Inc., Franklin Telephone Company, Inc., Fulton Telephone Company, Inc., Glenwood Telephone Company, Granby Telephone Company LLC, Hart Telephone Company, Hiawatha Telephone Company, Holway Telephone Company, Home Telephone Company (St. Jacob Illinois), Home Telephone Company (Moncks Corner, South Carolina), Hopper Telecommunications Company, Inc., Horry Telephone Cooperative, Inc., Interior Telephone Company, Kaplan Telephone Company, Inc., KLM Telephone Company, City of Ketchikan, Alaska, Lackawaxen Telecommunications Services, Inc., Lafourche Telephone Company, LLC, La Harpe Telephone Company, Inc., Lakeside Telephone Company, Lincolnville Telephone Company, Loretto Telephone Company, Inc., Madison Telephone Company, Matanuska Telephone Association, Inc., McDonough Telephone Coop., Inc., MGW Telephone Company, Inc., Mid Century Telephone Coop., Inc., Midway Telephone Company, Mid-Maine Telecom, LLC, Mound Bayou Telephone & Communications, Inc., Mondville Telephone Company, Inc., Mukluk Telephone Company, Inc., National Telephone of Alabama, Inc.,

Ontonagon County Telephone Company, Otelco Mid-Missouri LLC, Otelco Telephone LLC, Panhandle Telephone Cooperative, Inc., Pembroke Telephone Company, Inc., People's Telephone Company, Peoples Telephone Company, Piedmont Rural Telephone Cooperative, Inc., Pine Belt Telephone Company, Pine Tree Telephone LLC, Pioneer Telephone Cooperative, Inc., Poka Lambro Telephone Cooperative, Inc., Public Service Telephone Company, Ringgold Telephone Company, Roanoke Telephone Company, Inc., Rock County Telephone Company, Saco River Telephone LLC, Sandhill Telephone Cooperative, Inc., Shoreham Telephone LLC, The Siskiyou Telephone Company, Sledge Telephone Company, South Canaan Telephone Company, South Central Telephone Association, Star Telephone Company, Inc., Stayton Cooperative Telephone Company, The North-Eastern Pennsylvania Telephone Company, Tidewater Telecom, Inc., Tohono O'Odham Utility Authority, Unitel, Inc., War Telephone LLC, West Carolina Rural Telephone Cooperative, Inc., West Tennessee Telephone Company, Inc., West Wisconsin Telecom Cooperative, Inc., Wiggins Telephone Association, Winnebago Cooperative Telecom Association, Yukon Telephone Co., Inc.

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David Cosson, Washington, D.C., for Eastern Nebraska Telephone Company, and H. Russell Frisby, Jr., Dennis Lane, and Harvey Reiter, Stinson Morrison Hecker LLP,

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Yaron Dori, Robert Allen Long, Jr., and Gerard J. Waldron, Covington & Burling, Washington, D.C., for Centurylink, Inc.

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J. G. Herrington and David E. Mills, Dow Lohnes, PLLC, Washington, D.C., for Cox Communications.

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Genevieve Morelli, The Independent Telephone & Telecommunications Alliance, Washington, D.C., for Independent Telephone & Telecommunications Alliance.

Gerard J. Duffy, Blooston, Mordkofsky, Dickens, Duffy & Prendergrast, LLP, Washington, D.C., for Western Telecommunications Alliance.

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Craig Edward Gilmore, L. Charles Keller, and David H. Solomon, Wilkinson, Barker, Knauer, LLP, Washington, D.C., for T-Mobile USA, Inc.

Caressa Davison Bennet, Kenneth Charles Johnson, Anthony Veach, and Daryl Altey Zakov, Bennet & Bennet, Bethesda, Maryland, for Rural Telecommunications Group, Inc. and Central Telephone Cooperative, Inc.

<u>Appearances for Amicus Curiae:</u>

James Hughes Cawley, Pennsylvania Public Utility Commission, Harrisburg, Pennsylvania, and James Bradford Ramsay, National Association of Regulatory Utility Commissioners, Washington, D.C., for State Members of the Federal-State Joint Board on Universal Service.

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Issues Involving Intercarrier Compensation

Exercising its rulemaking authority under the Communications Act of 1934 and the Telecommunications Act of 1996, the FCC overhauled the intercarrier compensation regime and adopted a "uniform national bill-and-keep framework . . . for all telecommunications traffic exchanged with a [local exchange carrier]." 2 R. at 403 ¶ 34. To ease the transition to a new regime of bill-and-keep, the FCC also adopted a comprehensive plan to phase out the old intercarrier compensation system. *See id.* at 403-04 ¶ 35. The Petitioners challenge the plan on grounds that it exceeded the FCC's authority, was arbitrary and capricious, and resulted in a denial of due process.[1] These challenges are rejected.

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[1] This opinion involves arguments the Petitioners and Intervenors presented in the following briefs:

- Joint Intercarrier Compensation Principal Brief of Petitioners (July 17, 2013);
- Additional Intercarrier Compensation Issues Principal Brief (Pet'rs) (July 11, 2013);
- AT&T Principal Brief (July 16, 2013);
- Voice on the Net Coalition, Inc. Principal Brief (July 15, 2013);
- Transcom Principal Brief (July 12, 2013);
- National Association of State Utility Consumer Advocates Principal Brief (July 12, 2013);
- Windstream Principal Brief (July 17, 2013);
- Incumbent Local Exchange Carrier Intervenors' Brief in Support of Petitioners (July 15, 2013).

I. The FCC's Restructuring of the Telecommunications Market

In assessing the Petitioners' challenges to this plan, we must take into account what the FCC was trying to accomplish.

A. The Old Regime

The FCC adopted the plan against the backdrop of two types of arrangements. One provided reciprocal compensation for local calls, and the other involved charges for long-distance carriers to connect to a local carrier's network. In the Order, the FCC revamped this regime, exercising authority over all traffic exchanged with a local exchange carrier ("LEC"), including intrastate calls. *See id.* at 632 ¶ 739, 642 ¶¶ 761-62.

Before 1996, regulation of telecommunications was generally divided between the FCC and state commissions. The FCC regulated interstate service, and state commissions regulated intrastate service. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986). Under this division of authority, states granted exclusive franchises to LECs within their designated service areas. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Through these franchises, the LECs owned the local telecommunications networks. *Id.*

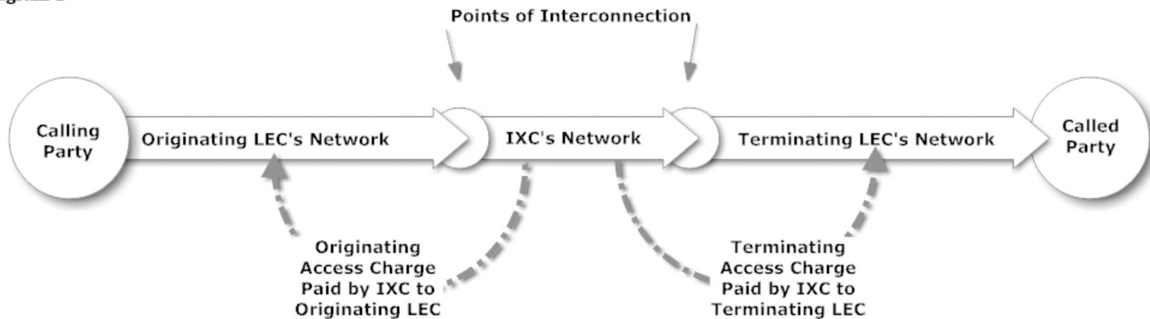
In 1996, Congress set out to restructure the market to enhance competition. These efforts led to enactment of the Telecommunications Act of 1996. In this statute, Congress empowered the FCC and created a new breed of competitors (called "Competitive LECs" or "CLECs"). *See id.* at 378 n.6; *MCI Telecomm. Corp. v. Bell Atl. Pa.*, 271 F.3d 491, 498 (3d Cir. 2001).

Under the new statute, all LECs would assume certain duties. *See* 47 U.S.C. § 251. One of these duties involved the establishment of arrangements for "reciprocal compensation" in the "transport and termination of telecommunications." *Id.* at § 251(b)(5). This statutory duty includes two key terms underlying the present litigation: "reciprocal compensation" and "telecommunications." In the Order, the FCC recently interpreted these terms to cover all traffic, including intrastate service and use of local networks by long-distance carriers. *Id.* at 643 ¶ 764, 644 n.1374, 647 ¶ 772, 754-55 ¶ 971.

This interpretation reflects a departure from the FCC's previous reading of the 1996 Act. In the past, for example, the FCC had narrowly read the phrase "reciprocal compensation" as limited to local traffic. *See Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 4 (D.C. Cir. 2000). Under the FCC's previous interpretation, the parties or state commissions set the charges for intrastate traffic between two LECs. Supp. R. at 20-21 ¶ 53.

The charges were called "access charges" because long-distance carriers (called "IXCs") paid LECs for the opportunity to use their networks at the start- and end-points of the calls. *See id.* at 19 ¶ 48. This system is known as "exchange access." 47 U.S.C. § 153(20).

In exchange access, long-distance calls start (or "originate") on an LEC's network, continue on the IXC's network to another local telephone exchange, and end (or "terminate") on the network of another LEC. This process is illustrated in Diagram 1:

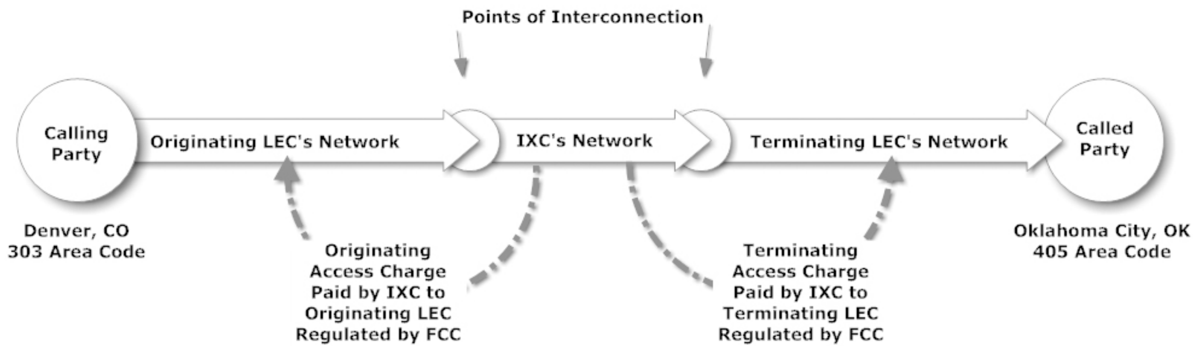


Under the old regime, compensation between local- and long-distance carriers involved one of three combinations:

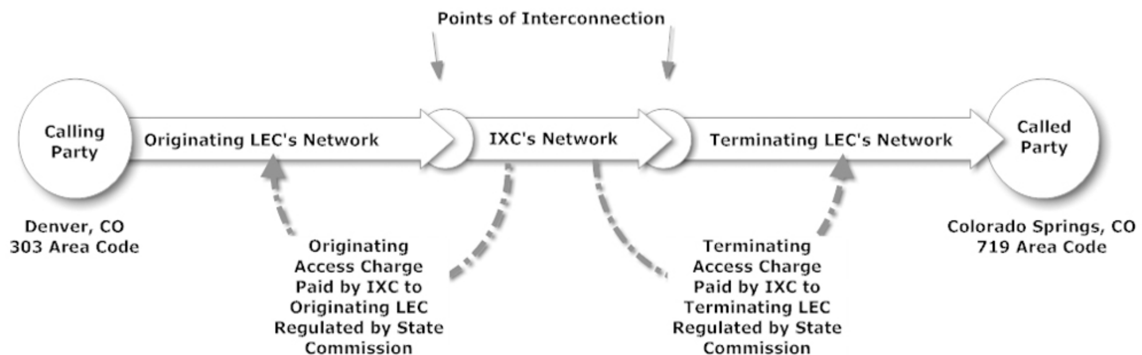
- between an IXC and two LECs for an interstate call,
- between an IXC and two LECs for a call within the boundaries of a single state, and
- between two LECs.

The three different combinations led to three different types of access charges, each with its own mode of regulation:

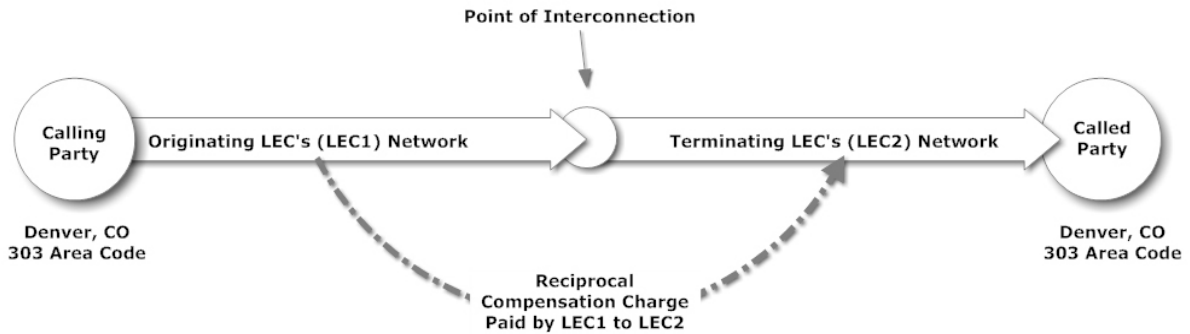
- *Interstate IXC-LEC Traffic*: For this kind of traffic, the IXC paid an access charge to the originating LEC and a terminating interstate access charge to the terminating LEC. The access charges were regulated by the FCC. Supp. R. at 21 ¶ 53. For example, Diagram 2 illustrates a call from Denver to Oklahoma City:



- *Intrastate IXC-LEC Traffic*: For traffic within a single state by an IXC and LEC, the IXC paid an access charge to the originating LEC and an access charge to the terminating LEC. The access charge was governed by state law and was typically set above interstate rates. *Id.* This illustration reflects a typical intrastate call, one from Denver to Colorado Springs:

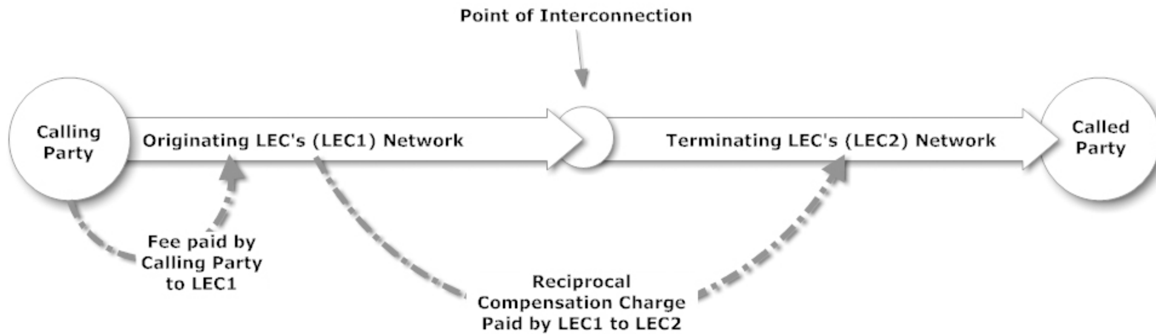


- *Local LEC-LEC Traffic*: For local traffic between two LECs, the LECs paid each other consistently with their reciprocal compensation arrangement. The arrangement was either negotiated by the parties or set by the states using a methodology prescribed by the FCC under 47 §§ 201(b) and 251(b)(5). *Id.* An example appears in Diagram 4, which shows a call from someone in Denver to another person in Denver:

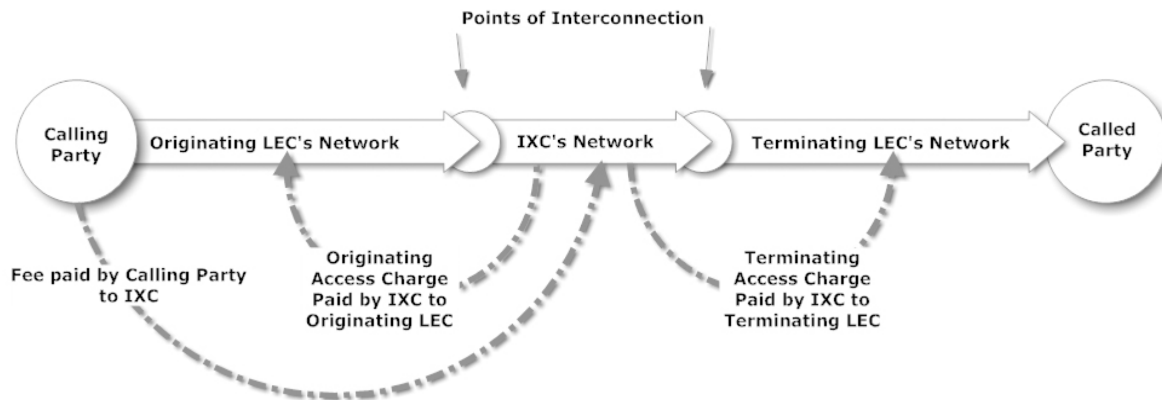


Each arrangement assumed that the calling party should pay for the call. 2 R. at 634 ¶ 744. This assumption was based on the view that the callers were the only persons that benefited from the call and that they should bear all of the costs. *Id.* Thus, callers paid their own carriers, which in turn paid other carriers for access to their networks to reach the person being called. Diagram 5 shows the payments for local- and long-distance calls:

Diagram 5
Local Phone Call



Long-Distance Phone Call



B. The New Regime

In the Order, the FCC restructured this system in three ways. First, the FCC reinterpreted the 1996 law to cover all traffic, including traffic subject to charges for access to a network. *Id.* at 642 ¶ 761-62. Second, the FCC claimed that it could prevent state commissions from approving access charges for intrastate calls in the absence of an

agreement between the parties. *Id.* at 644 ¶ 766. Third, the FCC rejected the idea that a caller should bear the full cost of the call; thus, the FCC prescribed a new system, known as "bill-and-keep," for all traffic. *Id.* at 632 ¶ 741; *see id.* at 634 ¶ 744, 640 ¶ 756.

"Bill-and-keep" anticipates that carriers will recover their costs from their end-user customers rather than from other carriers. *See id.* at 631 ¶ 737, 648 ¶ 775 n.1408. In moving to "bill-and-keep," the FCC reasoned that the parties to a call should split the costs because both enjoy the benefits. *Id.* at 634 ¶ 744, 640 ¶ 756, 649 n.1409. Once bill-and-keep is fully implemented for all traffic exchanged with an LEC, the calling party and the called party will divide the costs. *Id.* at 649 n.1409.

C. The Transition from the Old Regime to the New Regime

Recognizing that the change would disrupt the market, the FCC opted to gradually transition to bill-and-keep. In the transition period, incumbent LECs ("ILECs") could recover some, but not all, of their lost intercarrier compensation revenue through the FCC's funding mechanisms. *Id.* at 683-84 ¶¶ 847-48.

The length of the transitional period will vary for different types of LECs. To determine the transitional period, the FCC classifies ILECs based on the way that they are regulated: "Price-cap ILECs" are LECs that must set rates at or below a price cap, and "rate-of-return ILECs" are allowed to charge based on a set rate of return. *Nat'l Rural Telecomm. Ass'n v. FCC*, 988 F.2d 174, 177-78 (D.C. Cir. 1993). For price-cap ILECs, the FCC set a six-year period to gradually decrease reciprocal compensation charges and

access charges for termination; for rate-of-return ILECs, the transition for these intercarrier charges will last nine years. 2 R. at 661-63 ¶ 801, 661-63 Figure 9.

CLECs are generally required to benchmark rates to an ILEC and utilize its timeline for the transition. *Id.* at 272 ¶ 801. Traffic involving a wireless provider (called "CMRS") must transition to bill-and-keep either immediately or within six months, depending on whether the traffic was subject to an existing agreement on intercarrier compensation. *Id.* at 765 ¶ 996 (ordering an immediate transition); *id.* at 1145-46 ¶ 7 (extending the transition to six months for some CMRS-LEC traffic).

The FCC allows ILECs to recover some, but not all, of their lost intercarrier compensation revenues through a federal recovery mechanism. *See id.* at 683-84 ¶¶ 847-48. Through this mechanism, carriers can recover some of their lost revenue through an Access Recovery Charge on their end users. *See id.* at 715 ¶ 908. Carriers unable to recover all of their eligible recovery through the Access Recovery Charge are eligible for explicit support through the Connect America Fund. *See id.* at 721-22 ¶ 918.

D. The Types of Challenges

The Petitioners challenge four aspects of the reforms: (1) implementation of bill-and-keep for all traffic; (2) limitations on funding mechanisms during the transitional period; (3) irregularities in the rule-making process; and (4) application of the reforms to particular circumstances. We reject all of the challenges.

II. Challenges to the FCC's Authority to Implement a National Bill-and-Keep Framework for All Traffic

In the Order, the FCC concluded that 47 U.S.C. § 251(b)(5) applied to all telecommunications traffic exchanged with an LEC. Based on this conclusion, the FCC prescribed bill-and-keep as the default methodology for that traffic. The Petitioners challenge not only the FCC's authority to regulate the traffic, but also the way in which the FCC chose to exercise this authority. Thus, we must address both challenges: the FCC's authority and the content of the new regulations.

The FCC claims authority under 47 U.S.C. §§ 251(b)(5) and 201(b) to implement bill-and-keep as the default intercarrier compensation framework for all traffic exchanged with an LEC. *See id.* at 641 ¶ 760. For traffic between LECs and wireless providers, the FCC also invokes authority under 47 U.S.C. § 332. *Id.* at 641 ¶ 760 n.1350, 675-76 ¶¶ 834-36. And for interstate traffic, the FCC relies on 47 U.S.C. § 201. *Id.* at 646-47 ¶ 771, 675-76 ¶¶ 834-36.

Attacking this framework, the Petitioners raise three challenges.

First, they challenge the FCC's authority under § 251(b)(5). Joint Intercarrier Compensation Principal Br. of Pet'rs at 7-28 (July 17, 2013). This challenge encompasses three aspects of the traffic: (1) the FCC's authority to regulate access charges imposed by LECs on long-distance carriers; (2) the exclusive authority of states in regulating intrastate access charges; and (3) the FCC's authority over origination charges. *Id.*

Second, the Petitioners argue that bill-and-keep does not constitute a permissible methodology for at least some of the traffic. *Id.* at 28-45.

Third, the Petitioners argue that the FCC lacks authority to order state commissions to refuse exemptions to the bill-and-keep regime. *Id.* at 46-49.

A. Standard of Review

Congress has unambiguously authorized the FCC to administer the Communications Act through rulemaking and adjudication. *City of Arlington v. FCC*, __ U.S. __, 133 S. Ct. 1863, 1874 (2013). Thus, we apply *Chevron* deference to the FCC's interpretation of the statute and its own authority. *Id.* at 1874; *Sorenson Commc'ns, Inc. v. FCC*, 659 F.3d 1035, 1042 (10th Cir. 2011).

Chevron involves a two-step inquiry. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Sorenson*, 659 F.3d at 1042.

In the first step, we ask whether Congress has spoken on the issue. *Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1229-30 (10th Cir. 2005) (quoting *Chevron*, 467 U.S. at 842). When the statute is unambiguous, we look no further and "give effect to Congress's unambiguously expressed intent." *Qwest*, 398 F.3d at 1230 (citing *Chevron*, 467 U.S. at 842-43).

"[I]f the statute is silent or ambiguous with respect to the specific issue," we must decide "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843; *see City of Arlington*, 133 S. Ct. at 1874 ("Where

Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow.”). When we address this issue, the Petitioners must show that the FCC’s interpretation of the statute was impermissible. *Nat’l Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 333 (2002).

We review changes in the FCC’s interpretation of the Communications Act under the Administrative Procedure Act (“APA”). *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). But the APA does not subject the FCC’s change in position to heightened review. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009); *Qwest Corp. v. FCC*, 689 F.3d 1214, 1224 (10th Cir. 2012). The APA requires only that “‘the new policy [be] permissible under the statute, [and] that there are good reasons for it.’” *Qwest Corp.*, 689 F.3d at 1225 (quoting *Fox Television*, 556 U.S. at 515). This requirement is satisfied if the FCC acknowledges that it is changing position and provides a reasoned explanation for “disregarding facts and circumstances that underlay or were engendered by the prior policy.” *Fox Television*, 556 U.S. at 515.[2]

In applying *Chevron* and the APA, we confine our review to the grounds relied on by the agency. *Nat’l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 420

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[2] The Petitioners contended at oral argument that the FCC could not take an expansive approach to its statutory authority when the agency had earlier taken a contrary position. We reject this contention. An agency’s earlier interpretation of a statute does not restrict future exercises of authority under *Chevron*. *See Nat’l Cable & Telecomms. Ass’n*, 545 U.S. at 981.

(1992) (citing *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 88 (1943)); *S. Utah Wilderness Alliance v. Office of Surface Mining Reclamation & Enforcement*, 620 F.3d 1227, 1236 (10th Cir. 2010). But we can rely on "implicitly adopted rationales . . . as long as they represent the 'fair and considered judgment' of the agency, rather than a 'post hoc rationalization.'" *S. Utah Wilderness Alliance*, 620 F.3d at 1236 (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

B. The FCC's Authority Over Access Charges on All Traffic

The FCC interprets 47 U.S.C. § 201(b) and § 251(b)(5) to apply to all traffic, including access given to long-distance carriers, intrastate traffic, and origination. This interpretation is reasonable.

1. Traffic Between LECs and Long-Distance Carriers

In adopting the new regulations, the FCC concluded that it had jurisdiction over all traffic between LECs and long-distance carriers. 2 R. at 641 ¶ 760, 642 ¶¶ 761-62, 646-47 ¶¶ 771-72.

a. The FCC's Rationale

This interpretation flows in part from the language in § 251(b)(5). This section provides that each LEC must "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). The term "telecommunications" is defined in the statute and "encompasses communications traffic of any geographic scope . . . or regulatory classification." 47 U.S.C. § 153(50). Because

the term is untethered to geographic or regulatory limits, the FCC regards its authority under § 251(b)(5) to cover all traffic regardless of geography or regulatory classification. 2 R. at 642 ¶ 761.

In addition, the FCC relies on 47 U.S.C. § 201(b), which authorizes the adoption of regulations as necessary to carry out §§ 251 and 252. *Id.* at 641 ¶ 760; *see* 47 U.S.C. § 201(b); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999).

Based on the broad definition of "telecommunications" and the text of § 201, the FCC recently concluded that § 251(b)(5) covers all traffic between IXCs and LECs. 2 R. at 642 ¶ 761, 643-44 ¶ 765. In doing so, the FCC recognized that it had changed its interpretation of § 251(b)(5). *Id.* at 642 ¶ 761. But the FCC reasoned that its earlier reading of the law had been "inconsistent" with the text. *Id.*[3]

b. The Petitioners' Arguments

The Petitioners oppose this interpretation, contending that: (1) the statutory term "reciprocal compensation" does not include traffic between IXCs and LECs, and (2) other sections in the Communications Act preclude this reading of the FCC's statutory authority. These contentions fail under *Chevron*.

---

[3] The Petitioners contend that we should prefer an agency interpretation adopted "when the origins of both the statute and the finding were fresh in the minds of their administrators." Joint Intercarrier Compensation Principal Br. of Pet'rs at 12 n.9 (July 17, 2013) (quoting *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 7 (D.C. Cir. 2003)). Because the FCC's interpretation of the Communications Act is entitled to *Chevron* deference under settled law, its "freshness" is irrelevant. *See Brand X Internet Servs.*, 545 U.S. at 1001-02.

c. Traffic Between LECs and IXCs as "Reciprocal Compensation"

The FCC broadly interprets the phrase "reciprocal compensation" to encompass any intercarrier compensation agreements between carriers. *See id.* at 641-42 ¶¶ 761-62, 643-44 ¶ 765. The Petitioners raise two challenges to this conclusion under the first step of *Chevron*: (1) Congress used the term "reciprocal compensation" as a technical term of art to denote local traffic between two LECs; and (2) the plain meaning of "reciprocal compensation" cannot include traffic between IXCs and LECs because the payments go only one way (to the LECs). Joint Intercarrier Compensation Principal Br. of Pet'rs at 7-13 (July 17, 2013).

i. "Reciprocal Compensation" as a Term of Art

The Petitioners contend that Congress used the term "reciprocal compensation" as a term of art. *Id.* at 7-9. According to the Petitioners, the term "reciprocal compensation" was used in 1996 to refer to intercarrier compensation for local calls. *Id.* at 8-9. The Petitioners' evidence does not remove the ambiguity in the phrase "reciprocal compensation."

Under step one of *Chevron*, we start with the statutory text to determine whether the phrase "reciprocal compensation" is a term of art. *See Ass'n of Am. R.R.s v. Surface Transp. Bd.*, 161 F.3d 58, 64 (D.C. Cir. 1998). At this step, we give technical terms of art their established meaning absent a contrary indication in the statute. *McDermott Int'l Inc. v. Wilander*, 498 U.S. 337, 342 (1991); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355,

371-72 (1986). Thus, we must decide whether the Petitioners have shown that Congress referred to the term "reciprocal compensation" as a term of art limited to local traffic. We conclude that the Petitioners did not satisfy this burden.

The Petitioners rely on two pieces of evidence: (1) an FCC website description of the term "reciprocal compensation," which limited its application to local calls; and (2) accounts in the trade press, which discussed state-imposed reciprocal compensation requirements for local traffic. Joint Intercarrier Compensation Principal Br. of Pet'rs at 8 n.4, 9 n.5 (July 17, 2013). The two pieces of evidence do not eliminate ambiguity in the phrase.

The website simply described "reciprocal compensation" as the FCC did at the time. The FCC was then defining "reciprocal compensation" as limited to local traffic between two LECs. The FCC now embraces a contrary definition, and we have no reason to treat the prior interpretation as evidence of a term of art and disregard the current interpretation.

Accounts in the trade press also do little to eliminate ambiguity in the phrase "reciprocal compensation." Before enactment of the statute in 1996, the trade press included some references to reciprocal compensation on local calls. *See* 3 R. at 1471 n.19. But these accounts do not suggest that the term "reciprocal compensation" is inherently limited to local calls.

Accordingly, the Petitioners have not shown that the term "reciprocal compensation" embodied a term of art limited to local traffic.

ii. Plain Meaning of the Term "Reciprocal Compensation"

The Petitioners also argue that the FCC has distorted the plain meaning of the term "reciprocal compensation." Joint Intercarrier Compensation Principal Br. of Pet'rs at 25-26 (July 17, 2013). According to the Petitioners, traffic between an LEC and IXC is not "reciprocal" because the charges and traffic go only one way. *Id.* at 10, 25-26; Joint Intercarrier Compensation Reply Br. of Pet'rs at 9-10 (July 31, 2013). For this position, the Petitioners contend that for compensation to be "reciprocal," both carriers must pay each other. Joint Intercarrier Compensation Principal Br. of Pet'rs at 10 (July 17, 2013). Relying on this definition, the Petitioners argue that access charges "are never reciprocal" because the IXC pays the LECs on both ends to originate and terminate the traffic. *Id.* (emphasis omitted).

In effect, the Petitioners are arguing at step one of *Chevron* that § 251(b)(5) is unambiguous because access charges are always paid to the LEC and never to the IXC. But the nature of access charges does not remove ambiguities in the phrase "reciprocal compensation." *See Pac. Bell v. Cook Telecom, Inc.*, 197 F.3d 1236, 1242-44 (9th Cir. 1999) (concluding that § 251(b)(5) can plausibly be read to cover an agreement between an LEC and one-way paging provider even though the compensation flows only one way).

Section 251(b)(5) requires LECs to establish arrangements for "reciprocal compensation." 47 U.S.C. § 251(b)(5). Thus, we could adopt the Petitioners' interpretation only if the statute requires traffic and compensation to "actually flow to and from both carriers . . . to be a 'reciprocal compensation arrangement.'" *Pac. Bell*, 197 F.3d at 1244. This is a reasonable reading of the statute. But the statute can also be read to simply require the existence of reciprocal obligations. *See id.* (concluding that one-way paging providers were entitled to reciprocal compensation under the statute even through traffic and payment are never reciprocal). A carrier can have a reciprocal entitlement to compensation for transporting and terminating traffic even if it does not ultimately transport or terminate a call. *See Atlas Tel. Co. v. Okla. Corp. Comm'n*, 400 F.3d 1256, 1264 (10th Cir. 2005) (stating that under 47 U.S.C. § 251(b)(5), the term "reciprocal compensation" can cover traffic transported on an IXC's network).

The statutory term "reciprocal compensation" is ambiguous; thus, we reach the second step of *Chevron*. At step two, we conclude that the FCC reasonably interpreted the term "reciprocal compensation" for "telecommunications" to include the traffic between IXCs and LECs.

d. The Petitioners' Reliance on §§ 252(d)(2)(A) and 251(c)(2)(A)

The Petitioners argue that two other statutory sections (§§ 252(d)(2)(A) and 251(c)(2)(A)) would prevent application of § 251(b)(5) to access traffic. Joint Intercarrier Compensation Principal Br. of Pet'rs at 10-11 (July 17, 2013). We disagree.

i. Section 252(d)(2)(A)

The Petitioners invoke § 252(d)(2)(A), arguing that it precludes an expansive reading of § 251(b)(5) because traffic never originates on an IXC's network. *Id.* at 11-12; Joint Intercarrier Compensation Reply Br. of Pet'rs at 9 (July 31, 2013). This argument is invalid.

Section 252(d)(2)(A) applies to state commission arbitrations of interconnection agreements between an ILEC and another telecommunications carrier. *See* 47 U.S.C. § 252. Under this section, state commissions can consider reciprocal compensation terms just and reasonable only if they "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." *Id.* at § 252(d)(2)(A). Because IXCs do not originate calls, the Petitioners contend that reciprocal compensation arrangements cannot apply to traffic between LECs and IXCs. *See* Joint Intercarrier Compensation Principal Br. of Pet'rs at 11-12 (July 17, 2013).

The FCC rejected this argument, reasoning that § 252(d)(2)(A) does not limit § 251(b)(5). *See* 2 R. at 645-46 ¶ 768. In rejecting the argument, the FCC found that § 252(d)(2)(A) "'deals with the mechanics of who owes what to whom,'" but "'does not define the scope of traffic to which § 251(b)(5) applies.'" *Id.* (quoting *In re High-Cost Universal Serv. Support*, 24 FCC Rcd. 6475, 6481 ¶ 12 (2008)). With this finding, the FCC reiterated that Congress did not intend "'the pricing standards in section 252(d)(2) to

limit the otherwise broad scope of section 251(b)(5).'" 2 R. at 645-46 ¶ 768 (quoting *High-Cost Universal Serv. Support*, 24 FCC Rcd. 6475, 6480 ¶ 11 (2008)). Instead, the FCC concluded that § 252(d)(2)'s pricing rules do "not address what happens when carriers exchange traffic that originates or terminates on a third carrier's network." *In re High-Cost Universal Serv. Support*, 24 FCC Rcd. at 6481 ¶ 12.

The FCC's interpretation is reasonable. Section 251(b)(5) broadly refers to "the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). This section is incorporated into § 252(d)(2), but not the other way around. Consequently, there is nothing in § 252(d)(2) to suggest that it limits the scope of § 251(b)(5). In these circumstances, the FCC reasonably relied on the breadth of § 251(b)(5) to conclude that it is not narrowed by § 252(d)(2).

ii. Section 251(c)(2)(A)

The Petitioners also rely on § 251(c)(2)(A), which distinguishes between "exchange access" and "exchange service." This section requires ILECs to provide telecommunications carriers with interconnection to their networks "for the transmission and routing of telephone exchange service [local calls] and exchange access [long-distance calls]." 47 U.S.C. § 251(c)(2)(A). Because the section distinguishes between "exchange service" and "exchange access," the Petitioners argue that "reciprocal compensation" must refer to something other than "exchange access." Joint Intercarrier Compensation Principal Br. of Pet'rs at 11-12 (July 17, 2013). We reject this argument.

The Petitioners' argument does not render § 251(b)(5) unambiguous or vitiate the reasonableness of the FCC's interpretation. For this argument, the Petitioners incorrectly conflate "exchange service" and "reciprocal compensation." Section 251(c)(2)(A) refers to an ILEC's duty to allow others to interconnect for local- and long-distance calls. This duty is distinct from the duty in § 251(b)(5) to establish arrangements for reciprocal compensation. *See, e.g.*, *Verizon Cal., Inc. v. Peevey*, 462 F.3d 1142, 1146 (9th Cir. 2006). Thus, § 251(c)(2)(A) does not unambiguously shed light on how the FCC should interpret § 251(b)(5).

The Petitioners cite a House Conference report. Joint Intercarrier Compensation Principal Br. of Pet'rs at 11 n.8 (July 17, 2013); Joint Intercarrier Compensation Reply Br. of Pet'rs at 11 n.12 (July 31, 2013). But the report does not remove the ambiguity in § 251(b)(5). The House Report addressed only the need for the FCC to preserve its own authority under § 201 and the FCC's continued authority over access charges. "The obligations and procedures prescribed in [§ 251] do not apply to interconnection arrangements between local exchange carriers and telecommunications carriers under § 201 of the Communications Act for the purpose of providing interexchange service, and nothing in this section is intended to affect the Commission's access charge rules." H.R. Conf. Rep. 104-458, at 117. The House Report does not undermine the FCC's authority to enact a national reciprocal compensation framework under §§ 251(b)(5) and 201(b).

2. Preemption of State Regulatory Authority Over Intrastate Access Charges

The Petitioners argue that even if the FCC can regulate IXC-LEC traffic, this authority would include calls that were interstate, but not intrastate. Joint Intercarrier Compensation Principal Br. of Pet'rs at 14-25 (July 17, 2013). For this argument, the Petitioners rely on:

- 47 U.S.C. § 152(b),
- 47 U.S.C. § 601(c),
- § 601(c) of the Telecommunications Act of 1996,
- 47 U.S.C. § 253,
- 47 U.S.C. § 251(d)(3), and
- 47 U.S.C. § 251(g).

We disagree with the Petitioners in their interpretation of these sections.

a. Sections 152(b) and 601(c)

According to the Petitioners, 47 U.S.C. § 152(b) and § 601(c)(1) of the Telecommunications Act of 1996 insulate intrastate access charges from federal regulation under § 251(b)(5). Joint Intercarrier Compensation Principal Br. of Pet'rs at 14-15 (July 17, 2013).

Sections 152(b) and 601(c)(1) provide in part:

> **47 U.S.C. § 152(b):** [N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations

> for or in connection with intrastate communication service by wire or radio of any carrier.
>
> * * * *
>
> **<u>§ 601(c)(1) of the Telecommunications Act of 1996</u>:** No Implied Effect. This Act and the amendments made by this Act . . . shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.[4]

Because the FCC's earlier, valid interpretation did not require preemption of intrastate access charges, the Petitioners argue that § 251(b)(5) cannot be read more broadly to require preemption now. *Id.* at 15.

The Petitioners address the argument as if it arises at the first *Chevron* step. But the argument is insufficient at this step because Congress intended the 1996 Act to apply to intrastate communications and expressly allowed the FCC to preempt state law. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999); *MCI Telecomms. Corp. v. Pub. Serv. Comm'n of Utah*, 216 F.3d 929, 938 (10th Cir. 2000).

Nonetheless, the Petitioners argue that § 152(b) and § 601(c)(1) require the FCC to narrowly interpret § 251(b)(5) to avoid interference with state regulation of intrastate traffic. Joint Intercarrier Compensation Principal Br. of Pet'rs at 14-15, 19, 39 n.29 (July 17, 2013). We disagree. Otherwise, we would be interpreting §§ 152(b) and 601(c)(1) in a way that would upset the regulatory scheme envisioned in the 1996 Act. *See Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 870 (2000).

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[4] Section 601(c)(1) was codified at 47 U.S.C. § 152 in the Historical and Statutory Notes.

Section 152(b) simply limits the FCC's ancillary jurisdiction. *See AT&T Corp.*, 525 U.S. at 380-81 & n.7 (stating that § 152(b) serves only to limit the FCC's ancillary authority). And, § 601(c)(1) does not limit Congress's actual delegation of authority to the FCC. *See Qwest Corp. v. Minn. Pub. Utils. Comm'n*, 684 F.3d 721, 731 (8th Cir. 2012) (§ 601(c)(1) does not save state regulatory action conflicting with FCC regulations); *Farina v. Nokia, Inc.*, 625 F.3d 97, 131 (3d Cir. 2010) (declining to interpret § 601(c)(1) broadly "where a federal regulatory scheme reflects a careful balancing"). Because §§ 152(b) and 601(c)(1) do not unambiguously narrow the scope of § 251(b)(5), we proceed to *Chevron*'s second step. *See City of Arlington v. FCC*, __ U.S. __, 133 S. Ct. 1863, 1868 (2013).

At that step, we defer to the FCC's interpretation of a statutory ambiguity that concerns the scope of its regulatory authority. *See id.* at 1874. This deference applies to "statutes designed to curtail the scope of agency discretion." *Id.* at 1872.

Administrative deference is suitable here. Congress appears to grant plenary authority to the FCC through § 251, and §§ 152(b) and 601(c)(1) do not preclude the FCC from interpreting § 251(b)(5) to allow preemption of state regulation over intrastate access charges.

b. Section 253

The Petitioners also argue that the FCC has usurped state authority to promote broadband development through a system of intercarrier compensation. Joint Intercarrier

Compensation Principal Br. of Pet'rs at 16-18, 22 (July 17, 2013). For this argument, the Petitioners use Pennsylvania as an example. *Id.* According to the Petitioners, Pennsylvania uses access charges to promote broadband development and Pennsylvania's laws are not preempted under 47 U.S.C. § 253. *Id.* at 22 & n.20. Reliance on § 253 is misguided.

We have not been asked to decide the validity of the Pennsylvania law. Instead, the Petitioners ask us to decide if the FCC acted arbitrarily and capriciously in deciding to preempt intrastate access charges under § 251(b)(5). In deciding to preempt regimes for state access charges, the FCC did not act arbitrarily or capriciously.

The FCC's policy choice is not undermined by the alleged efforts in Pennsylvania. Though the Petitioners boast of efforts in Pennsylvania, they are silent regarding the steps to promote broadband in the 49 other states. Without evidence of a nationwide effort to promote broadband, the FCC concluded that a national approach would promote certainty and predictability. 2 R. at 656 ¶ 790. In reaching this conclusion, the FCC expressed concern regarding "variability and unpredictability" when broadband development is left to the states. *Id.* at 657-58 ¶ 794.

The lone example of Pennsylvania, as a leader in developing broadband networks, does little to undermine the FCC's concern with variability among the states. The FCC explained its preference for a national strategy to develop broadband, and the Petitioners' example of Pennsylvania does not render the FCC's strategy arbitrary or capricious.

c. Section 251(d)(3)

The Petitioners further rely on 47 U.S.C. § 251(d)(3) to rebut the FCC's interpretation that § 251(b)(5) includes intrastate traffic between IXCs and LECs. Joint Intercarrier Compensation Principal Br. of Pet'rs at 16-18 (July 17, 2013). Section 251(d)(3), entitled "Preservation of State access regulations," prevents the FCC from preempting state commissions' regulations, orders, or policies that: (1) establish LEC access and interconnection obligations, (2) are consistent with the requirements of § 251, and (3) do not substantially prevent implementation of the requirements of § 251 and the purposes of the Act. 47 U.S.C. § 251(d)(3). According to the Petitioners, § 251(d)(3) prevents the FCC from preempting state access charges. Joint Intercarrier Compensation Principal Br. of Pet'rs at 16-18 (July 17, 2013).

This argument is unpersuasive. The FCC reasonably concluded that § 251(d)(3) does not speak to the preemptive effect of § 251(b)(5) or limit the permissible interpretations of the statute or the FCC's rulemaking authority. 2 R. at 644 n.1374, 644-45 ¶ 767. The FCC has interpreted intrastate traffic as subject to § 251(b)(5); and, in exercising the grant of power under § 251(b)(5), the FCC is establishing a national bill-and-keep policy for all access traffic.

This is the context for our consideration of § 251(d)(3). As noted above, § 251(d)(3) preserves state regulations only if they would not substantially prevent implementation of § 251. And, in exercising its powers under § 251, the FCC views

intrastate access charges as an obstacle to reform. *Id.* at 644-45 ¶ 767. That finding is enough for the FCC to exercise its authority to preempt intrastate access charges under § 251(d)(3). *See Qwest Corp. v. Ariz. Corp. Comm'n*, 567 F.3d 1109, 1120 (9th Cir. 2009) (holding that state requirements were inconsistent with, and prevented implementation of, § 251 because the FCC had precluded the requirements); *Ill. Bell Tel. Co. v. Box*, 548 F.3d 607, 611 (7th Cir. 2008) (concluding that § 251(d)(3) did not save state regulations that were contrary to the FCC's determinations). As a result, § 251(d)(3) does not preclude the FCC's broad interpretation of its authority under § 251(b)(5).

d. Section 251(g)

Section 251(g) preserved existing obligations to provide access and interconnection, along with compensation, until they are explicitly superseded by FCC regulations. 47 U.S.C. § 251(g). This section does not undermine the FCC's interpretation of § 251(b)(5).

Both sides point to § 251(g) as support for their interpretations of § 251(b)(5). The Petitioners argue that § 251(g) involved only interstate traffic, reasoning that when this section took effect, no court or agency decision had purported to give the FCC jurisdiction over intrastate traffic. Joint Intercarrier Compensation Principal Br. of Pet'rs at 23-25 (July 17, 2013). The FCC argues the opposite: that § 251(g) shows that Congress contemplated FCC regulation over intrastate traffic. Federal Resp'ts' Final Resp. to the Joint Intercarrier Compensation Principal Br. of Pet'rs at 18 (July 29, 2013).

We need not choose between these conflicting interpretations of § 251(g) because the FCC did not rely on this section. *See* 2 R. at 644 n.1374 (noting that the FCC "need not resolve [the] issue, because all traffic terminated on an LEC [would], going forward, be governed by section 251(b)(5) regardless of whether section 251(g) previously covered the state intrastate access regime").

And the Petitioners' argument would not require us to narrow the scope of traffic governed by § 251(b)(5). At most, the Petitioners' argument would lead to a narrow reading of § 251(g), for it would address only the viability of agreements involving intrastate traffic until the FCC acted. This reading would leave § 251(g) silent on the continued viability of compensation arrangements for intrastate traffic.

Under the first step of *Chevron*, we are called upon to decide whether the FCC's interpretation of § 251(b)(5) is unambiguously foreclosed by § 251(g). For the sake of argument, we can assume that the Petitioners are correct in stating that § 251(g) did not address intrastate traffic. If that is true, however, § 251(g) could not act as an unambiguous expression of congressional intent on the extent of the FCC's authority over intrastate traffic.

The resulting issue is whether the FCC's broad reading of § 251(b)(5) is permissible notwithstanding § 251(g). We conclude that the FCC's interpretation is permissible. Section 251(g) provides only for the continuation of arrangements for access charges under any consent decree existing when the 1996 statute went into effect. *See* 47

U.S.C. § 251(g). But the statute also provides that these arrangements would end when the FCC acted. *See id.*

When Congress enacted the 1996 law, the D.C. District Court had required access charges for calls that were both interstate and intrastate. *United States v. AT&T*, 552 F. Supp. 131, 169 n.161 (D.D.C. 1982). Under § 251(g), these arrangements would end when they were superseded by the FCC. 47 U.S.C. § 251(g). In light of § 251(g), the FCC could reasonably conclude that it had the power to supersede the arrangements for access charges that were both interstate and intrastate because all had arisen out of the same consent decree. *See* 2 R. at 644 n.1374.

This interpretation was not the only one possible. For example, one could also view § 251(g) to reflect the widespread assumptions in 1996 that states (not the FCC) regulated intrastate access. But under the second step of *Chevron*, the FCC's contrary reading of § 251(g) was at least reasonable. As a result, we defer to the FCC's reading of § 251(g).

3. FCC Authority Over Intrastate Origination Charges

With this reading, we conclude that the FCC enjoys at least some regulatory authority over intrastate traffic between LECs and IXCs. But we must address the scope of this authority, for the Petitioners argue that it would not extend to origination charges. This argument is three-fold: (1) Originating access traffic is exempt from reciprocal compensation because § 251(b)(5) refers only to "transport and termination," not

"origination"; (2) the FCC failed to acknowledge that it had changed its definitions of "transport" and "termination"; and (3) the FCC's preemption of originating access charges is arbitrary and capricious because it does not allow originating LECs to recover their origination costs. Joint Intercarrier Compensation Principal Br. of Pet'rs at 25-28 (July 17, 2013). The first two challenges lack merit, and the third challenge is not ripe.

a. Section 251(b)(5) and Originating Access Traffic

In the Order, the FCC capped charges for originating access. 2 R. at 836-37 ¶ 1298, 661 ¶ 801, 661 Figure 9, 667 ¶ 22. The Petitioners deny regulatory authority over origination charges even under the FCC's interpretation of § 251(b)(5). According to the Petitioners, originating access charges are not subject to § 251(b)(5) because it refers to "transport and termination," but not "origination." Joint Intercarrier Compensation Principal Br. of Pet'rs at 26 (July 17, 2013) (citing 47 U.S.C. § 251(b)(5)). We reject the Petitioners' interpretation of § 251(b)(5).

This section authorizes arrangements for the reciprocal compensation of "transport and termination." Both sides point to the omission of origination charges.

For their part, the Petitioners suggest that the omission leaves the FCC powerless to reform origination charges. *Id.* The FCC argues the opposite: If § 251(b)(5) authorizes arrangements for reciprocal compensation involving transport and termination, the omission of origination charges must have meant that LECs are unable to charge access fees for origination. R. at 669 ¶ 817 (citing *In re Implementation of the Local*

Competition Provisions in the Telecomms. Act of 1996, 11 FCC Rcd. 15499, 16016 ¶ 1042 (1996)); Federal Resp'ts' Final Resp. to the Joint Intercarrier Compensation Principal Br. of Pet'rs at 21-22 (July 29, 2013).

This view is supported by "a venerable canon of statutory construction," "[t]he maxim '*expressio unius est exclusio alterius*'—which translates roughly as 'the expression of one thing is the exclusion of other things.'" *United States v. Hernandez-Ferrer*, 599 F.3d 63, 67-68 (1st Cir. 2010).

The FCC's interpretation reflects a reasonable approach. The Petitioners state that for toll calls, carriers must perform three types of functions: origination, transport, and termination. Joint Intercarrier Compensation Principal Br. of Pet'rs at 26 (July 17, 2013). Two of the three functions are included in § 251(b)(5). The single omission could suggest that Congress intended to exclude "origination" from the duty to provide compensation. Because the FCC's interpretation of § 251(b)(5) is reasonable, it is entitled to deference under *Chevron*. Thus, we reject the Petitioners' challenge to FCC regulation of origination charges.

b. The FCC's Interpretations of "Transport" and "Termination"

The Petitioners argue that the FCC has arbitrarily changed its definition of the statutory term "termination" without acknowledging the change. Joint Intercarrier Compensation Principal Br. of Pet'rs at 12-13 (July 17, 2013). According to the

Petitioners, the FCC previously defined the term "termination" in a way that excluded "origination." *Id.* at 13.

This argument is incorrect, for the FCC has not changed its definition of "termination." 2 R. at 642 ¶ 761. Instead, the FCC has changed its view regarding the traffic that is subject to § 251(b)(5). *Id.* With this change, the FCC provided an explanation. *Id.* at 642-43 ¶¶ 761-64.

In light of this explanation, we reject the Petitioners' challenge. It presupposes that the FCC has redefined the terms "transport" and "termination" without saying why. But these definitions have not changed. Instead, the FCC has refocused on the statutory term "telecommunications," concluding that it is this term—rather than "transport" or "termination"—that determines the scope of § 251(b)(5). *Id.* at 647 ¶ 761. By focusing on the term "telecommunications" and explaining this focus, the FCC stated why it was reassessing the scope of § 251(b)(5); accordingly, we reject the Petitioners' challenge.

c. The Purported Prohibition of Originating Access Charges

The Petitioners also argue that the prohibition on originating access charges is arbitrary and capricious because the FCC did not explain why the "prohibition on origination charges applies where the originating LEC receives no further compensation from its end-user." Joint Intercarrier Compensation Principal Br. of Pet'rs at 27-28 (July 17, 2013). This challenge is not ripe.

The FCC has announced that it will eventually abolish originating access charges and has capped originating access charges at current levels. *See* 2 R. at 650 ¶¶ 777-78. In the interim, the FCC has sought further comment "on other possible approaches to originating access reform, including implementation issues and our legal authority to adopt any such reforms." *Id.* at 839 ¶ 1305. Because the FCC has not yet abolished originating access charges, this challenge is unripe. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 386 (1999) ("When . . . there is no immediate effect on the plaintiff's primary conduct, federal courts normally do not entertain pre-enforcement challenges to agency rules and policy statements.").

C. Bill-and-Keep as a Default Methodology

The FCC not only extended its regulations to all access traffic, but also began a transition to bill-and-keep as the default standard for reciprocal compensation. 2 R. at 646 ¶ 769. According to the FCC's interpretation of its authority, § 201(b) allows the adoption of rules and regulations to implement § 251(b)(5). *Id.* at 646 ¶ 770. In implementing § 251(b)(5), the FCC considers bill-and-keep to be "just and reasonable" under § 201(b); thus, the FCC concluded it has statutory authority to implement bill-and-keep as the default reciprocal compensation standard for all traffic subject to § 251(b)(5). *Id.* at 646-47 ¶¶ 771-72.

In arriving at this conclusion, the FCC addressed opposition based on §§ 252(c) and 252(d)(2). *Id.* at 647-48 ¶ 773. Section 252 does two things: (1) It preserves state

rate-setting authority in state commission arbitrations involving ILECs and other carriers; and (2) it defines "just and reasonable" rates. 47 U.S.C. § 252.

For two reasons, the FCC concluded that these provisions did not prevent adoption of a bill-and-keep methodology. 2 R. at 647-48 ¶¶ 774-75. First, the FCC pointed to *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 384 (1999), which authorizes the FCC to establish a pricing methodology for state commissions to apply in these arbitrations. 2 R. at 648 ¶ 773. In choosing among pricing methodologies, the FCC found specific approval of bill-and-keep in 47 U.S.C. § 252(d)(2)(B). *Id.* at 648-49 ¶ 775. Second, the FCC found that bill-and-keep is just and reasonable under § 252(d)(2) because it allows carriers to recover their transport and termination costs from their end-users. *Id.* at 648-49 ¶¶ 775-76.

Both conclusions are criticized by the Petitioners. Joint Intercarrier Compensation Principal Br. of Pet'rs at 28-45 (July 17, 2013). They argue that: (1) bill-and-keep effectively sets a zero rate that infringes on state rate-setting authority under § 252(d), and (2) bill-and-keep does not lead to just and reasonable intercarrier compensation rates under §§ 252(d)(2)(A) and 201(b). *Id.* at 28-45.

We apply *Chevron* and defer to the FCC's interpretation of its authority to enact bill-and-keep as the default standard for reciprocal compensation.

1. Consideration Under § 252

The Petitioners contend that the FCC cannot establish bill-and-keep as a methodology because it intrudes on state rate-setting authority under § 252. *Id.* at 28-31. State authority is preserved in three parts of § 252: (b), (c), and (d).

In (b), Congress preserved the authority of states in arbitrating interconnection agreements between ILECs and other carriers. *See* 47 U.S.C. § 252(b).

In (c), § 252 required state commissions—not the FCC—to "establish any rates for interconnection, services, or network elements according to subsection (d) of this section." *Id.* at § 252(c)(2).

And in (d), Congress preserved state arbitration authority over "[c]harges for the transport and termination of traffic." *Id.* § 252(d)(2). Under this section, a state commission cannot consider reciprocal compensation terms and conditions just and reasonable unless:

> (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and
>
> (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

Id. at § 252(d)(2)(A). Though subsection (d) preserves state arbitration authority over charges, it also expressly allows approval of bill-and-keep arrangements, prohibiting a

construction that would "preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)." *Id.* at § 252(d)(2)(B)(i).

The FCC has focused on this language, pointing out that Congress specifically stated that bill-and-keep arrangements are considered "just and reasonable." 2 R. at 648-49 ¶ 775.

The Petitioners argue that the FCC has misinterpreted § 252(d)(2)(B)(i), stating that it simply requires carriers to voluntarily waive payments and submit to bill-and-keep arrangements. Joint Intercarrier Compensation Principal Br. of Pet'rs at 36-37 (July 17, 2013). This interpretation conflicts with the statute. Section 252(d)(2)'s pricing standards apply only to terms imposed through compulsory arbitration. *See* 47 U.S.C. § 252(c). Voluntarily negotiated terms can contradict the statutory requirements and are not subject to this pricing provision. *See id.* at § 252(a)(1). Thus, the FCC was entitled to reject the Petitioners' narrow interpretation of § 252(d)(2).

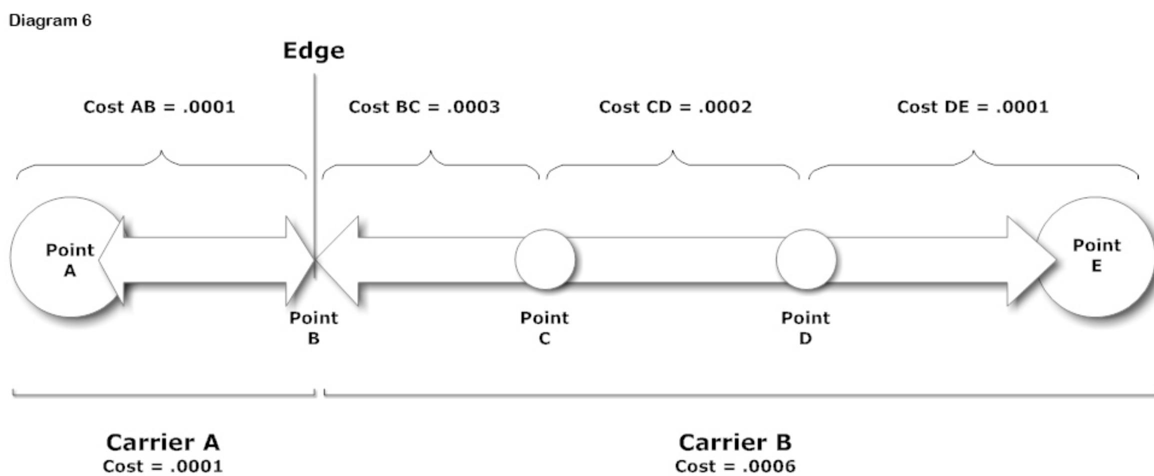
Because the statute expressly authorizes bill-and-keep arrangements along with state rate-setting authority, we believe the FCC's interpretation of § 252(d)(2) is reasonable and entitled to deference under *Chevron*. *See City of Arlington v. FCC*, __ U.S. __, 133 S. Ct. 1863, 1874 (2013).

Under Section 252(d)(2), states continue to enjoy authority to arbitrate "terms and conditions" in reciprocal compensation. *See* 47 U.S.C. § 252(d)(2). For example, even

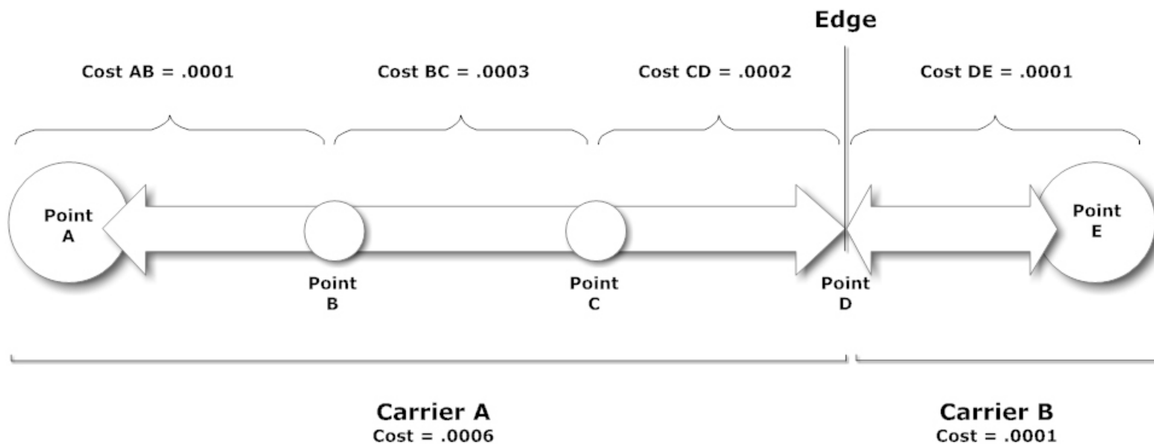
under bill-and-keep arrangements, states must arbitrate the "edge" of carrier's networks. 2 R. at 649-50 ¶ 776. This reservoir of state authority can be significant.

The "edge" of a carrier's network consists of the points "at which a carrier must deliver terminating traffic to avail itself of bill-and-keep." *Id.* The location of the "edge" of a carrier's network determines the transport and termination costs for the carrier.

The impact is illustrated in Diagram 6. In this scenario, Carrier A has low transport and termination costs because it needs only to transport the calls a short distance (between Points A and B).



A different delineation of the edge could significantly increase Carrier A's costs. This impact is illustrated in Diagram 7, which would reflect a state commission's decision to set the edge of Carrier A's network at Point D rather than Point A:



The FCC reasonably determined that by continuing to set the network "edge," states retain their role under § 252(d) in "determin[ing] the concrete result in particular circumstances." *Id.* at 649-50 ¶ 776 (quoting *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 384 (1999)).

The Petitioners disagree. In their view, *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), and *Iowa Utilities Board v. Federal Communications Commission*, 219 F.3d 744 (8th Cir. 2000), *rev'd in part by Verizon Commc'ns. Inc. v. FCC*, 535 U.S. 467 (2002), preserved the states' role in "establishing the actual reciprocal compensation *rate*, not finding points on a network at which a carrier must deliver traffic." Joint Intercarrier Compensation Principal Br. of Pet'rs at 29-31 (July 17, 2013). The Petitioners argue that bill-and-keep effectively sets the intercarrier compensation rate at zero and intrudes on

state rate-setting authority.[5] *Id.* at 29-30 (citing *Iowa Utils. Bd.*, 219 F.3d at 757, *rev'd in part, Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467 (2002)).

We reject the Petitioners' broad reading of *AT&T* and *Iowa Utilities Board*.

In *AT&T*, the Supreme Court upheld the FCC's rule-making authority over §§ 251 and 252. *AT&T*, 525 U.S. at 378. Interpreting § 252(c)(2)'s reservation of rate-setting authority to state commissions, the Court upheld the FCC's requirement that state commissions use a particular methodology for prices involving interconnection and

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[5] In their reply brief, the Petitioners also challenge the FCC's rate limitations during the transition to bill-and-keep. Joint Intercarrier Compensation Reply Br. of Pet'rs at 15 (July 31, 2013). This challenge is new. In their opening brief, the Petitioners did not challenge the FCC's decision to prescribe interim rates. Instead, the Petitioners challenged only the FCC's final prescription of bill-and-keep as a methodology for all traffic. Indeed, the term "interim rates" was mentioned just once in the Petitioners' opening brief. Joint Intercarrier Compensation Principal Br. of Pet'rs at 40 (July 17, 2013). And that reference came in a quotation that the Petitioners used for an unrelated argument, addressing the applicability of § 252(d)(2)(A) to interstate intercarrier compensation rates under § 201. *See id.* Because "[a]rguments inadequately briefed in the opening brief are waived," *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998), we would ordinarily decline to reach the Petitioners' new contention in their reply brief regarding the invalidity of the FCC's interim rates. *See* Joint Intercarrier Compensation Reply Br. of Pet'rs at 14-15 (July 31, 2013).

Though the Petitioners did not challenge interim rates in their opening brief, the LEC Intervenors did. *See* Incumbent Local Exchange Carrier Intervenors' Br. in Supp. of Pet'rs at 8 (July 15, 2013) ("Nonetheless, the *Order* end-runs the statutory directive by adopting a methodology that prescribes specific transition rates plus a specific ultimate rate of zero."). But intervenors generally cannot raise new issues. *Arapahoe Cnty. Pub. Airport Auth. v. FAA*, 242 F.3d 1213, 1217 n.4 (10th Cir. 2001). This prohibition is prudential and should be avoided only in "extraordinary" cases. *Id.* Because we are "hesitant to definitively opine on such [a] legally significant issue[] when [it has] received such cursory treatment," *United States v. Gordon*, 710 F.3d 1124, 1150 (10th Cir. 2013), we decline to disregard the general rule. As a result, we do not reach the Petitioners' arguments in their reply brief on the validity of the FCC's interim rates.

unbundled access. *See id.* at 384-85. In doing so, the Supreme Court concluded that the FCC has rulemaking authority to implement a pricing methodology for the states to implement, "determining the concrete result in particular circumstances. That is enough to constitute the establishment of rates." *Id.* at 384.

In *Iowa Utilities Board*, the Eighth Circuit Court of Appeals applied judicial estoppel to strike down the FCC's proxy prices for interconnection, network element charges, wholesale rates, and transport and termination rates. 219 F.3d at 756-57. The court did not distinguish between reciprocal compensation rates and interconnection, network element charges, and wholesale rates. *Id.* Instead, the court held that "[s]etting specific prices goes beyond the FCC's authority to design a pricing methodology and intrudes on the states' right to set the actual rates pursuant to § 252(c)(2)." *Id.* at 757.

Against the backdrop of *AT&T* and *Iowa Utilities Board*, the FCC reasonably concluded that bill-and-keep involves a permissible methodology notwithstanding the states' authority to set rates under § 252(c). The Petitioners assume that the state commissions have authority to require intercarrier compensation, for the states can set "rates" for interconnection under § 252(c)(2). This assumption is belied by § 252(d)(2), which governs state arbitrations over the "terms and conditions for reciprocal compensation." 47 U.S.C. § 252(d)(2).

The phrase "terms and conditions" does not necessarily require intercarrier compensation, for the statute expressly provides that § 252(d)(2)(A) should "not be

construed . . . to preclude . . . bill-and-keep arrangements." *Id.* at § 252(d)(2)(B)(i). If the states' rate-setting authority required carriers to pay one another, the statutory approval of bill-and-keep arrangements would not make sense. *See The Telecomms. Act of 1996: Law & Legislative History* 6 (eds. Robert E. Emeritz, Jeffrey Tobias, Kathryn S. Berthat, Kathleen C. Dolan, & Michael M. Eisenstadt 1996) (stating that under § 251(b), "each LEC must . . . enter into reciprocal compensation arrangements with interconnecting carriers, a requirement that can be met by 'bill-and-keep' arrangements"). Thus, the FCC reasonably interpreted the statute to allow the elimination of any intercarrier compensation through the adoption of bill-and-keep.

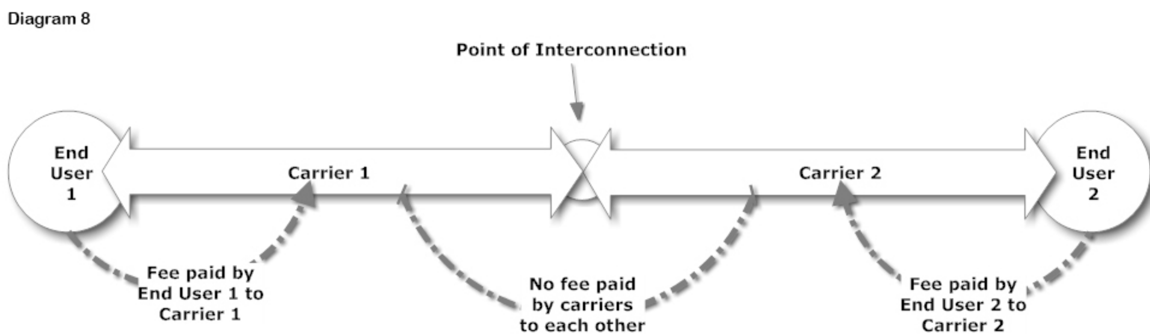
As the Petitioners argue, this methodology would eliminate the existence of any "rates" for intercarrier compensation. With elimination of these "rates," the state commissions would have less to arbitrate under § 252(c). But that is the product of the statutory approval of "bill-and-keep" rather than an invention of the FCC. Through bill-and-keep, state commissions will continue to define the edges of the networks; that role preserves state regulatory authority over the "terms and conditions" of reciprocal compensation. There is no violation of § 252(c).

2. The "Just and Reasonable" Rate Requirement in §§ 201(b) and 252(d)(2)

The Petitioners point to 47 U.S.C. §§ 201(b) and 252(d)(2), arguing that they require rates to be "just and reasonable." Joint Intercarrier Compensation Principal Br. of Pet'rs at 39-40 (July 17, 2013); *see* 47 U.S.C. §§ 201(b), 252(d)(2). Invoking these

sections, the Petitioners argue that the FCC's bill-and-keep methodology is not "just and reasonable." Joint Intercarrier Compensation Principal Br. of Pet'rs at 39-42 (July 17, 2013). This argument is invalid under *Chevron*.

According to the FCC, bill-and-keep allows for just and reasonable rates by providing for the "mutual and reciprocal recovery of costs through the offsetting of reciprocal obligations." Federal Resp'ts' Final Resp. to the Joint Intercarrier Compensation Principal Br. of Pet'rs at 33-34 (July 29, 2013). Under a bill-and-keep arrangement, each carrier obtains an "in kind" exchange. To illustrate:



In Diagram 8, Carrier 1 transports and terminates calls that originate on Carrier 2's network. In exchange, Carrier 2 transports and terminates calls that originate on Carrier 1's network. Both parties obtain reciprocal benefits, and both can recover their additional costs from their end-users. 2 R. at 648-49 ¶ 775 & n.1408, 649-50 ¶ 776.

The FCC reasoned that under this methodology, a carrier that terminates a call that originates with another carrier performs a service for its end-user, the call's recipient.

Because both end-users benefit from the call, the end-users should split the cost and pay their respective carriers for the call. Through this in-kind exchange of services, bill-and-keep allows carriers to obtain compensation for the call from their own customers. *Id.* at 640-41 ¶¶ 756-57, 648 n.1408, 649 n.1410.

The Petitioners contend that bill-and-keep leads to unreasonable rates for two reasons: (1) Carriers have a statutory right to payment from other carriers; and (2) reciprocal compensation arrangements do not allow for sufficient cost recovery. Joint Intercarrier Compensation Principal Br. of Pet'rs at 34-38, 41-43 (July 17, 2013).

a. Consideration of a Statutory Right to Payments from Other Carriers

The first contention involves a statutory right to payments from other carriers. *Id.* at 42. For this contention, however, the Petitioners do not point to any statutory language. Instead, they rely on *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 364-65 (1986), for the proposition that carriers are entitled to recover their reasonable expenses and a fair return on their investment through customer rates. *Id.* at 41. But *Louisiana Public Service Commission* requires only that carriers recover their reasonable expenses and a fair return on their investment from their customers and does not specify the source of this recovery. *La. Pub. Serv. Comm'n*, 476 U.S. at 364-65. Therefore, the FCC rationally concluded that §§ 201(b) and 252(d)(2) are satisfied by an in-kind exchange of services. *See id.* at 646-47 ¶ 771, 649-650 ¶ 776.

b. Sufficiency of Cost Recovery

Under Section 252(d)(2)(A)(ii), state commissions can consider terms and conditions just and reasonable only if they permit recovery by each carrier of costs based on a "reasonable approximation of the additional costs of terminating such calls." 47 U.S.C. § 252(d)(2)(A)(ii). Pointing to this provision, the Petitioners argue that: (1) the FCC was inconsistent by acknowledging that carriers incur costs for termination and generally cannot raise end-user rates because of competition, (2) the FCC failed to explain its departure from earlier reliance on termination costs, and (3) bill-and-keep is not "just and reasonable" because it does not allow sufficient recovery of costs. Joint Intercarrier Compensation Principal Br. of Pet'rs at 34-38 (July 17, 2013). These arguments are unpersuasive.

Bill-and-keep anticipates that carriers will recover their costs from their end-users. 2 R. at 648 ¶ 775 & n.1408, 649-50 ¶ 776. States are free to set end-user rates, and the Order does not prevent states from raising end-user rates to allow a fair recovery of termination costs. *See id.* at 649-50 ¶ 776.

The Petitioners' fall-back position is that the FCC failed to explain its change in position. Joint Intercarrier Compensation Principal Br. of Pet'rs at 37-38 (July 17, 2013). We disagree, for the FCC pointed to new analyses showing that both parties benefit from a call and that bill-and-keep allows for mutual recovery of costs. 2 R. at 640-41 ¶¶ 755-59.

Finally, the Petitioners contend that bill-and-keep violates § 252(d)(2) by failing to explicitly provide for cost recovery. Joint Intercarrier Compensation Principal Br. of Pet'rs at 37-38 (July 17, 2013). We reject this argument for two reasons. First, as discussed in Chief Judge Briscoe's separate opinion, the FCC reforms include funds for carriers that would otherwise lose revenues. 2 R. at 683-88 ¶¶ 847-53. Second, the FCC has found that carriers can offset lost revenue by increasing charges on end-users. *Id.* at 403 ¶ 34, 648-49 ¶ 775 n.1408. The FCC's rationale involves a reasonable predictive judgment, warranting our deference. *See Ace Tel. Ass'n v. Koppendrayer*, 432 F.3d 876, 880 (8th Cir. 2005) (holding that a reciprocal compensation rate of zero did not violate the "just and reasonable" requirement in 47 U.S.C. § 252(d)(2)); *MCI Telecomms. Corp. v. U.S. W. Commc'ns*, 204 F.3d 1262, 1271-72 (9th Cir. 2000) (upholding a determination that bill-and-keep was "just and reasonable" under 47 U.S.C. § 252(d)(2)(A)). As a result, we conclude that the FCC did not arbitrarily or capriciously fail to provide for cost recovery.

D. Authority for the States to Suspend or Modify the New Requirements

The Petitioners also argue that the FCC has assumed powers reserved to state commissions under 47 U.S.C. § 251(f)(2). This section empowers state commissions to suspend or modify requirements under § 251(b) for small LECs that would otherwise incur an undue burden. 47 U.S.C. § 251(f)(2).

The FCC addressed § 251(f)(2), cautioning "states that suspensions or modifications of the bill-and-keep methodology . . . would . . . re-introduce regulatory uncertainty . . . and undermine the efficiencies gained from adopting a uniform national framework." 2 R. at 671-72 ¶ 824. In light of this concern, the FCC discouraged grants of relief under § 251(f)(2), stating that any suspension or modification of bill-and-keep would likely undermine the public interest. *Id.* The FCC added that it would "monitor state action" and might "provide specific guidance" in the future. *Id.*

The Petitioners object to this admonition, contending that the FCC prejudged state commission decisions and effectively prohibited states from modifying the bill-and-keep regime. Joint Intercarrier Compensation Principal Br. of Pet'rs at 46-48 (July 17, 2013). This challenge is not ripe.

The FCC's cautionary statement does not constitute a binding rule; instead, it reflects only a prediction that applications for suspension or modification would fail under the statutory standard. *See* 2 R. at 671-72 ¶ 824. Because this prediction does not "impose an obligation, deny a right or fix some legal relationship," the Petitioners' challenge is premature. *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 112-13 (1948); *see Nat'l Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 425 (D.C. Cir. 2009) (holding that a challenge to the FCC's "prediction," which involved future waiver requests, was not ripe); *see also Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 582-83

(8th Cir. 2007) (holding that a state regulator's challenge to an FCC order was not ripe because it involved only a prediction of what the FCC would do in the future).

III. Challenges to Cost Recovery as Arbitrary and Capricious

The Petitioners have challenged not only the ultimate goal of the reforms, but also the way in which the FCC chose to transition toward a national bill-and-keep methodology.

A. The Transitional Plan

Perceiving that an immediate change would unduly disrupt the market, the FCC elected to gradually move toward a bill-and-keep methodology. 2 R. at 659-60 ¶ 798, 661-62 ¶ 801 & Figure 9. The FCC decided to transition terminating access charges to bill-and-keep over a six-year period for price cap carriers and over a nine-year period for rate-of-return carriers. *See id.* at 661-62 ¶ 801 & Figure 9. The FCC limited interstate originating access charges to existing levels, but has not yet decided how to transition these charges to bill-and-keep. *See id.* at 669 ¶¶ 817-18.

The FCC created a federal recovery mechanism to ease the transition to bill-and-keep for incumbent LECs. *See id.* at 683 ¶ 847. This recovery mechanism is not revenue neutral, for the FCC helps incumbent LECs recover only part of their lost revenues. *See id.* at 684-85 ¶ 851, 723-24 ¶ 924. The amount of the recovery will be based on existing trends that show declining revenues. *See id.* at 684-85 ¶ 851. For price-cap carriers, the recovery generally starts at 90% of 2011 revenues and declines 10% per year. *Id.* For

rate-of-return carriers, the recovery starts at 2011 revenues for switched access and net reciprocal compensation. *Id.* When the FCC acted, rate-of-return carriers were experiencing yearly drops in revenue of: (1) 3% for interstate switched access, and (2) 10% for intrastate intercarrier compensation. Choosing a benchmark between 3% and 10%, the FCC chose to reduce the eligible recovery for rate-of-return carriers by 5% each year. *Id.*

Under the FCC's recovery mechanism, carriers can recover part of their lost revenues through: (1) a federally tariffed Access Recovery Charge on end-users, and (2) supplemental support from the Connect America Fund. *Id.* at 685-88 ¶¶ 852-53. The Access Recovery Charge is limited to prevent individual end-users from paying excessive rates and is allocated at a carrier's holding-company level. *Id.* at 685-688 ¶ 852, 717 ¶ 910. To obtain supplemental support from the Connect America Fund, carriers must meet certain broadband obligations. *Id.* at 721-22 ¶ 918.

Although the FCC predicts this recovery mechanism will suffice for regulated services, carriers can request additional support and waiver of their broadband obligations through a "Total Cost and Earnings Review" process. *See id.* at 723-24 ¶ 924, 725 ¶ 926. This process allows a carrier to show that the standard recovery mechanism is "legally insufficient" and "threatens [the carrier's] financial integrity or otherwise impedes [its] ability to attract capital." *Id.* at 723-25 ¶¶ 924-25. The FCC regards this process as a

sufficient safety valve to prevent rates from becoming confiscatory. *See id.* at 724 ¶ 924 & n.1834.

The recovery mechanism will phase out over time. *See id.* at 684-85 ¶ 851. As it phases out, carriers will recover their network costs from end-users and the Universal Service Fund. *Id.* at 403 ¶ 34. But carriers will remain able to seek additional support through the FCC's Total Cost and Earnings Review process. *See id.* at 684-85 ¶ 851, 724 ¶ 924.

B. The Petitioners' Challenges

The Petitioners raise two types of APA challenges to the FCC's recovery mechanism and final bill-and-keep framework. First, the Petitioners argue that the FCC failed to apportion costs, as required in *Smith v. Illinois Telephone Co.*, 282 U.S. 133 (1930). Joint Intercarrier Compensation Principal Br. of Pet'rs at 50-51 (July 17, 2013). Second, the Petitioners challenge the sufficiency of the recovery mechanism for carriers losing revenue under the reforms. *Id.* at 53-54, 56.

C. Standard of Review

In challenging the interim measures and final bill-and-keep framework, the Petitioners focus on the reasonableness of the FCC's actions; thus, we review these challenges under the APA. *Id.*; *see* 5 U.S.C. § 706(2)(A). For this review, we consider whether the FCC acted arbitrarily, capriciously, with an abuse of discretion, or otherwise in violation of the law. *Sorenson Commc'ns, Inc. v. FCC*, 659 F.3d 1035, 1045 (10th Cir.

2011). The regulations are presumptively valid, and the Petitioners bear the burden of proof. *Id.* at 1046. We will uphold the regulations if the FCC has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Agency action is arbitrary and capricious only if the agency:

> has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43.

In reviewing the regulations, we can consider only the rationale articulated by the agency. *Licon v. Ledezma*, 638 F.3d 1303, 1308 (10th Cir. 2011). But "we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974); *Licon*, 638 F.3d at 1308.

Our review under the "'arbitrary and capricious' standard is particularly deferential in matters implicating predictive judgments and interim regulations." *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009); *see Sorenson Commc'ns, Inc.*, 659 F.3d 1035, 1046 (10th Cir. 2011) (substantial deference is appropriate for interim ratemaking); *accord Alenco Commc'n, Inc. v. FCC*, 201 F.3d 608, 616 (5th Cir. 2000)

(review of transitional regulations is "especially deferential"). When we review the FCC's predictive judgment on a matter within its expertise and discretion, "complete factual support in the record . . . is not possible or required." *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 814 (1978).

D. Consideration of the Apportionment Requirement in *Smith*

The Petitioners argue that the FCC failed to apportion the costs attributable to interstate and intrastate traffic. Joint Intercarrier Compensation Principal Br. of Pet'rs at 50-51, 54 (July 17, 2013); Joint Intercarrier Compensation Reply Br. of Pet'rs at 5 (July 31, 2013). This argument is rejected.

1. The Apportionment Requirement

The apportionment requirement originated in *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930). There, a state commission set intrastate rates; but the district court invalidated the rate schedule, reasoning that the rates were too low to allow the carriers to recover their costs. *Id.* at 142, 146. In determining the sufficiency of the rates, the state regulator and the district court assumed that the carriers used all of their property for intrastate service. *Id.* at 144-46. But the carriers also used their facilities for interstate service. *Id.* at 146-47. The Supreme Court viewed the district court's conclusion as flawed because it had failed to account for interstate service. *Id.* at 150-51. To determine whether the intrastate rates were high enough, the district court had to decide which of the

carrier's properties were used for intrastate service; otherwise, the court could not know how much the carrier had to recoup for the cost of that property. *Id.* at 150-51, 162.

Smith's protection is narrow: A regulator may not impose confiscatory rates, assuming that a regulator in another jurisdiction will exercise its unilateral independent authority to allow a fair recovery. *Id.* at 148-49.

2. Application of *Smith* to the FCC's Recovery Mechanism

The Petitioners contend that the FCC failed to apportion costs between the intrastate and interstate jurisdictions. Joint Intercarrier Compensation Principal Br. of Pet'rs at 50-51, 54 (July 17, 2013); Joint Intercarrier Compensation Reply Br. of Pet'rs at 5 (July 31, 2013). According to the Petitioners, the failure to apportion costs renders the FCC's recovery mechanism inadequate because it: (1) requires recovery of intrastate revenues through the interstate jurisdiction, and (2) does not provide sufficient recovery of costs. Joint Intercarrier Compensation Principal Br. of Pet'rs at 54 (July 17, 2013); *see* Joint Intercarrier Compensation Reply Br. of Pet'rs at 6 n.6 (July 31, 2013) (challenging the recovery of intrastate costs through interstate charges).

We disagree. *Smith* requires jurisdictional separation to ensure that the regulator sets rates based on costs of service in the regulator's jurisdiction. *Smith*, 28 U.S. at 148-49. The problem in *Smith* was that the state regulator had jurisdiction only for intrastate service, but was setting rates based on the cost of both intrastate and interstate service. *Id.* at 150-51, 162.

Our circumstances differ because the FCC enjoys authority to: (1) set interstate rates, and (2) regulate access traffic that is either interstate or intrastate. Because the FCC obtained regulatory authority over intrastate traffic, it can affect intrastate rates through regulation. The FCC's regulatory authority over intrastate traffic supports flexibility in our application of *Smith*. *See Lone Star Gas Co. v. Texas*, 304 U.S. 224, 241 (1938) (distinguishing *Smith* from the case of a federal agency acting within its authority); *MCI Telecomms. Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984) ("*Smith* appears to be based on the limits of state jurisdiction, rather than on constraints imposed on federal agencies by the due process clause.").

Smith does not require the apportionment to be exact, for it requires "only reasonable measures." *Smith*, 282 U.S. at 150. When the FCC acts on an interim basis to transition to a new regulatory structure, *Smith* is flexible in requiring "reasonable measures." *See Rural Tel. Coal. v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988) (holding that a cost allocation constituted a reasonable measure under *Smith* as "part of a transitional process, and '[i]nterim solutions may need to consider the past expectations of parties and the unfairness of abruptly shifting policies'"); *MCI Telecomms. Corp.*, 750 F.2d at 141 (rejecting MCI's challenge because *Smith* "was not considering the constitutionality of an interim ratemaking solution"). This flexibility is particularly appropriate when the FCC implements: "(a) an interim ratemaking solution (b) justified

by a substantial policy objective." *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 408 (D.C. Cir. 2002).

The FCC's transition plan appropriately allows recovery of lost intrastate revenues through a federal recovery mechanism. By funding shortfalls for intrastate services, the FCC did not leave LECs to obtain recovery from another jurisdiction. The situation in *Smith* was the opposite, and the FCC's recovery mechanism is valid under any reasonable interpretation of *Smith*. *See id.* at 409-10.

3. Waiver of the Challenge to the Access Recovery Charge

The National Association of State Utility Consumer Advocates challenges the Access Recovery Charge on two grounds: (1) The FCC did not analyze its authority to implement the charge; and (2) the FCC acted arbitrarily and capriciously by allowing carriers to pass along state-specific costs to customers in other states. National Association of State Utility Consumer Advocates Principal Br. at 5-6, 11-14 (July 12, 2013). But we cannot reach these issues because they were not properly raised before the FCC. *See* 47 U.S.C. § 405(a); *Sorenson Commc'ns, Inc. v. FCC*, 567 F.3d 1215, 1227-28 (10th Cir. 2009).

The National Association contends that these issues were raised in the petition for reconsideration filed by the Public Service Commission for the District of Columbia. National Association of State Utility Consumer Advocates Reply Br. at 1 (July 31, 2013) (citing 6 R. at 4046-53). It is true that the National Association's second challenge was

raised in the D.C. Commission's petition for reconsideration. 6 R. at 4049. But this petition had not been decided when the present action began. *See* National Association of State Utility Consumer Advocates Reply Br. at 2 (July 31, 2013).[6] Thus, the National Association cannot avoid waiver based on the D.C. Commission's presentation of a similar challenge. *See Petroleum Commc'ns, Inc. v. FCC*, 22 F.3d 1164, 1170-71 (D.C. Cir. 1994).

4. Recovery of Interstate Costs through End-User Rates and Universal Service Support

In their reply, the Petitioners challenge the FCC's ultimate bill-and-keep framework on grounds that it will require interstate cost recovery through local end-user rates once the federal recovery mechanism phases out. Joint Intercarrier Compensation Reply Br. of Pet'rs at 5-6 (July 31, 2013). According to the Petitioners, local end-user rates are subject to the intrastate jurisdiction and cannot be used for interstate cost recovery. *Id.*

This argument does not fit our facts. Bill-and-keep allows carriers to recover their interstate costs not only from end-users, but also from the Universal Service Fund. *See* 2

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[6] The parties have not advised us of an eventual decision on the D.C. Commission's petition for reconsideration. But even if the FCC has eventually decided the petition for reconsideration, the present challenge would have been premature. *See TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C. Cir. 1989) (per curiam) ("We hold . . . that when a petition for review is filed before the challenged action is final and thus ripe for review, subsequent action by the agency on a motion for reconsideration does not ripen the petition for review or secure appellate jurisdiction."); *see also Council Tree Commc'ns, Inc. v. FCC*, 503 F.3d 284, 287 (3d Cir. 2007) (stating that because a petition for reconsideration remained pending when the petition for review was filed, as well as the time of the court's eventual decision, the petition for review was "incurably premature").

R. at 403 ¶ 34, 648-49 ¶ 775 n.1408. The FCC concluded that these sources can provide carriers with a sufficient return without shifting the burden to another jurisdiction. *Id.* at 723-24 ¶ 924. This conclusion involved a reasonable predictive judgment.

Even if the prediction had been unwise, however, the FCC has not required carriers to recover federal costs based on rates outside of the FCC's jurisdiction. Thus, we reject the Petitioners' *Smith* challenge based on recovery of costs through local end-user rates.

E. Challenges Involving the Adequacy of the Recovery Mechanism

The Petitioners also contend that the FCC arbitrarily and capriciously failed to allow carriers to recover a fair return. Joint Intercarrier Compensation Principal Br. of Pet'rs at 53-54, 56-57 (July 17, 2013). According to the Petitioners, the eligible recovery declines precipitously at 5% per year, the recovery mechanism will not allow carriers to recover even this amount, and the recovery mechanism will eventually disappear. *Id.* With these limitations, the Petitioners argue that the FCC has capped other intercarrier compensation rates and limited financial support. *Id.* With less revenue and inadequate financial support, the Petitioners contend that future rates will be too low. *Id.* at 56. The Court rejects the Petitioners' argument as a facial challenge; as an as-applied challenge, the issue is not ripe.

The facial challenge fails because the FCC's Order will not necessarily lead to confiscatory rates. The FCC has concluded that the telecommunications industry is

transitioning to IP networks, the bill-and-keep regime will advance that transition, and the FCC's funding mechanism will phase out at a slower rate than the baseline. 2 R. at 631 ¶ 736, 707-08 ¶ 894. With these developments, the FCC could consider existing trends in the marketplace and alternative opportunities for carriers to generate revenue.

With landline revenues in steady decline, the FCC concluded that its recovery mechanism would fairly represent what carriers would have earned without the reforms. *Id.* at 724 ¶ 924.

The FCC considered not only the downward trends in the market, but also other opportunities for carriers to generate revenue. It is true that bill-and-keep will end intercarrier compensation for transport and termination of switched access. *Id.* at 640 ¶ 756. But the FCC reasoned that LECs can continue to collect compensation from other carriers and that the reforms would improve productivity and decrease costs. *Id.* at 725-26 ¶ 928. For example, incumbent LECs could continue to collect compensation for originating access and dedicated transport. *Id.* With continuation of these charges, the FCC projected gains in productivity and decreases in expenses. *Id.* at 726-27 ¶¶ 929-30. The FCC's reasoning does not suffer any facial flaws, and we reject the Petitioners' facial challenge.

We also decline to entertain the as-applied challenge because it is not ripe. When a carrier faces an insufficient return, it can seek greater support under the Total Cost and Earnings Review Process. *Id.* at 723-26 ¶¶ 924-28. Until this process is invoked, the as-

applied challenge is premature. If the FCC imposes confiscatory rates, carriers could then bring as-applied challenges. *See Verizon Commc'n, Inc. v. FCC*, 535 U.S. 467, 526-27, 528 n.39 (2002).

IV. Procedural Irregularities in the Rulemaking Process

The Petitioners also challenge the Order on due-process grounds.

A. The FCC Proceedings

The FCC issued the Order after four formal notices and a lengthy rulemaking process. *In re Universal Serv. Reform Mobility Fund*, 25 FCC Rcd. 14716 (2010); *In re Connect America Fund*, 26 FCC Rcd. 4554 (2011); *Further Inquiry into Tribal Issues Relating to Establishment of a Mobility Fund*, 26 FCC Rcd. 5997 (2011); *Further Inquiry Into Certain Issues in the Universal Serv.-Intercarrier Compensation Transformation Proceeding*, 26 FCC Rcd. 11112 (2011). Through that process, the FCC obtained hundreds of comments and thousands of *ex parte* submissions. *See* 2 R. at 398 ¶ 12, 1029-45.

In ultimately determining how to proceed, the FCC relied on a plan (called the "ABC Plan") proposed by six price-cap carriers in response to the FCC's 2011 notice. *See, e.g.*, *id.* at 445-46 ¶ 142. The FCC's final notice requested additional comment on the ABC Plan. 1 R. at 290. For this plan, the FCC provided a three-week notice and comment period, followed by a 13-day reply period. *See id.* at 290, 378.

The FCC rulemaking proceedings were "permit-but-disclose" proceedings. *Id.* at 26-27 ¶ 65; *see* 47 C.F.R. § 1.1200(a). In these proceedings, "*ex parte* presentations to Commission decision-making personnel are permissible but subject to certain disclosure requirements." 47 C.F.R. § 1.1200; *see EchoStar Satellite LLC v. FCC*, 457 F.3d 31, 39 (D.C. Cir. 2006). Thus, following *ex parte* presentations, the proponents must place copies of all written *ex parte* presentations in the record and file written summaries of all data and arguments presented in oral *ex parte* presentations. *See* 47 C.F.R. § 1.1206(b)(1)-(2). These rules also provide for submission of confidential information, FCC notice of *ex parte* presentations it has received, and a sunshine period starting immediately before the FCC votes (when only limited written responses to *ex partes* are permitted). *Id.*

In following its *ex parte* rules, the FCC obtained hundreds of *ex parte* submissions between the close of the final comment period and the "blackout" date. 6 R. at 3754-71. As allowed under the FCC's rules, many of these submissions were confidential and others had to sign confidentiality agreements to access unredacted versions. To promote transparency, the FCC placed three lists (referring to more than 110 publicly available sources) and a mobile service competition analysis into the rulemaking record after the close of the comment period. *See id.* at 3847-53, 3918-21, 3947-61.

In the Order, the FCC not only promulgated rules, but also addressed pending petitions. 2 R. at 757 ¶ 975.

B. The Petitioners' Arguments

The Petitioners raise seven constitutional challenges to the FCC's order. Six involve denial of due process from the FCC's procedure. These challenges involve: (1) the number and timing of the *ex parte* submissions, (2) the consideration of specific *ex partes*, (3) the FCC's placement of documents in the rulemaking record after close of the comment period, (4) the FCC's commingling of adjudicatory and rulemaking proceedings, (5) the inadequacy of the notice issued on August 3, 2011, and (6) the brevity of the final comment schedule. Joint Intercarrier Compensation Principal Br. of Pet'rs at 58-62 (July 17, 2013); Joint Intercarrier Compensation Reply Br. of Pet'rs at 27-33 (July 31, 2013). The Petitioners' seventh challenge is that the FCC improperly commandeered state commissions. Joint Intercarrier Compensation Principal Br. of Pet'rs at 62-63 (July 17, 2013).

1. The Waiver Issue

Before addressing the seven challenges, we must decide whether we can entertain some of the arguments raised in the Petitioners' reply. The FCC moves to strike some of these arguments, asserting that the Petitioners had omitted them in the opening brief. Mot. to Strike Args. in the Joint Intercarrier Compensation Reply Br. of Pet'rs (Sept. 30, 2013). The Petitioners contend that in their reply brief, they simply elaborated on the due-process arguments raised in their opening brief or responded to the FCC's arguments.

Joint Pet'r Resp. to FCC Mot. to Strike Args. from the Joint Intercarrier Compensation Reply Br. at 1 (Oct. 15, 2013).

Generally, "[a]rguments inadequately briefed in the opening brief are waived." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998). To enforce this requirement, we have granted motions to strike arguments that are raised for the first time in a reply brief. *E.g.*, *M.D. Mark, Inc. v. Kerr-McGee Corp.*, 565 F.3d 753, 768 n.7 (10th Cir. 2009).

Waiver is based on Federal Rule of Appellate Procedure 28(a)(8)(A), which requires a party to include its arguments and reasons, with supporting citations to the record.

In their reply, the Petitioners have referred to documents not mentioned in the opening brief and raised more specific objections to the FCC's rulemaking procedure. *Compare* Joint Intercarrier Compensation Principal Br. of Pet'rs at 58-62 (July 17, 2013), *with* Joint Intercarrier Compensation Reply Br. of Pet'rs at 27-33 (July 31, 2013). But the new references do not justify an order striking the reply.

2. The FCC's Motion to Strike

In their opening brief, the Petitioners mount a general challenge to the FCC's rulemaking procedure. Joint Intercarrier Compensation Principal Br. of Pet'rs at 61 (July 17, 2013). But the Petitioners' reply brief can be read in two ways: (1) The Petitioners continue to mount a general cumulative challenge to the FCC's rulemaking procedure and

have included more specific record citations as general examples to illustrate their broader argument; or (2) the Petitioners continue to mount a cumulative challenge, but also intend to rely on the citations identified for the first time in the reply brief. *See* Joint Intercarrier Compensation Reply Br. of Pet'rs at 27-33 (July 31, 2013). The first reading involves permissible elaboration on the opening brief. The second reading would involve a violation of Rule 28(a)(8)(A). Instead of striking the reply, we read it narrowly, with citation of the materials only to illustrate the general cumulative challenge advanced in the opening brief.

C. Our Review of the Constitutional Challenges

The Petitioners' procedural challenges stem from the constitutional right to due process, which requires notice and a fair opportunity to be heard. *See Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). The APA adds more specific requirements. For example, an agency must provide notice of the proposed rulemaking and allow interested persons "an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(b)-(c).

"'Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and methods of inquiry permitting them to discharge their multitudinous duties.'" *Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 559 (10th Cir. 1986) (quoting *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978)). "Congress

intended that the discretion of the agencies and not that of the courts be exercised in determining when extra procedural devices should be employed." *Wyoming v. Dep't of Agric.*, 661 F.3d 1209, 1239 (10th Cir. 2011). Therefore, the agencies enjoy discretion to establish the procedures they utilize to make substantive judgments. *See id.*

D. The Petitioners' Due Process Challenges

The Petitioners identify six types of errors that cumulatively resulted in a denial of due process. Joint Intercarrier Compensation Principal Br. of Pet'rs at 58-62 (July 17, 2013); Joint Intercarrier Compensation Reply Br. of Pet'rs at 27-33 (July 31, 2013).

1. General Challenges to the *Ex Partes*

The Petitioners initially focus on the hundreds of *ex partes* with the FCC. Joint Intercarrier Compensation Principal Br. of Pet'rs at 59-61 (July 17, 2013). According to the Petitioners, the *ex parte* filings multiplied just before the blackout date and the FCC frequently allowed access only upon the signing of a confidentiality agreement. *Id.* at 60. The Petitioners note that eight of the *ex partes* had been posted only three days before the FCC adopted the Order. Joint Intercarrier Compensation Reply Br. of Pet'rs at 30 (July 31, 2013). For these *ex partes*, the Petitioners contend that interested parties were unable to respond before the blackout period began. Joint Intercarrier Compensation Principal Br. of Pet'rs at 61 (July 17, 2013).

Ex parte contacts were proper, for they "are the bread and butter of the process of administration and are completely appropriate so long as they do not frustrate judicial

review or raise serious questions of fairness." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977) (per curiam).

The administrative proceedings involved continuous responses to the FCC's notices and to other responses. Ultimately, however, the proceedings had to end. When they did, many parties could legitimately contend that they needed more time to reply to others' responses. The only alternative, however, would have been to keep the comment period alive forever.

The APA ensures an opportunity to comment on the notice of proposed rulemaking, but not to reply to the rulemaking record. *See Am. Mining Cong. v. Marshall*, 671 F.2d 1251, 1262 (10th Cir. 1982) (stating that the APA provides a right to comment on proposed rulemaking, but not "the rulemaking record"). In light of this limitation under the APA, we cannot impose additional requirements under the guise of due process. *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524-25 (1979).

The Petitioners have not shown a failure to comply with the APA or even reliance on any of the disputed *ex partes*. *Am. Mining Cong.*, 671 F.2d at 1261; *see Sierra Club v. Costle*, 657 F.2d 298, 398-99 (D.C. Cir. 1981) ("The decisive point, however, is that EDF itself has failed to show us any *particular* document or documents to which it lacked an opportunity to respond, and which also were vital to EPA's support for the rule."). As a result, we reject the general challenges to the *ex partes*.

2. *Ex Parte* Challenges Based on Specific Documents

In their reply brief, the Petitioners point to four *ex partes* to support their due process challenge: (1) an October 20, 2011, Verizon *ex parte* filing that addresses Access Recovery Charges, (2) an October 18, 2011, Verizon *ex parte* concerning regulation of Voice-Over-the-Internet (“VoIP”), (3) an October 21, 2011, Verizon *ex parte* that addresses VoIP preemption, and (4) an October 19, 2011, AT&T *ex parte* that addresses VoIP jurisdiction. 6 R. at 3980-81, 3929, 3938-45, 4005; Joint Intercarrier Compensation Reply Br. of Pet’rs at 31-32 & nn.33-34 (July 31, 2013).[7]

In their opening brief, the Petitioners did not address the *ex partes* of October 18, October 19, or October 21; thus, the Petitioners have waived any argument based specifically on these documents. *See Harman v. Pollock*, 446 F.3d 1069, 1082 n.1 (10th Cir. 2006) (per curiam).[8] Because the Petitioners raised the October 20, 2011, Verizon *ex parte* in their opening brief, we will analyze it here. *See* Joint Intercarrier Compensation Principal Br. of Pet’rs at 60-61 (July 17, 2013).

In its *ex parte* on October 20, 2011, Verizon discussed the Access Recovery Charge on end-users. *See* 6 R. at 3980-81. And, in a meeting with the FCC’s general

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[7] In their opening brief, the Petitioners also referred to five AT&T contacts as examples of *ex partes*. Joint Intercarrier Compensation Principal Br. of Pet’rs at 60 (July 17, 2013). But the Petitioners did not specifically rely on these documents; thus, we have considered them in our general discussion and do not specifically address them here.

[8] We have considered these documents as general examples of *ex parte* contacts. We will also consider them as general examples of subjects covered in pending adjudicatory petitions discussed in these proceedings.

counsel, Verizon discussed the Access Recovery Charge and its implementation at the holding-company level. *See id.* at 3980. The Petitioners contend in their reply that: (1) the FCC did not sufficiently inform them in the notice about implementation at the holding company level, and (2) Verizon unfairly obtained knowledge about this matter prior to circulation of the Order. Joint Intercarrier Compensation Reply Br. of Pet'rs at 31 (July 31, 2013); *see* Joint Intercarrier Compensation Principal Br. of Pet'rs at 60-61 (July 17, 2013).

We reject these arguments. The ABC Plan involved application of the Access Recovery Charge at the holding-company level; and in the notice on August 3, 2011, the FCC specifically asked for comments on this provision. 5 R. at 3000-01; 1 R. at 302.

3. The FCC's Placement of Documents in the Rulemaking Record

The Petitioners also complain that the FCC placed over 110 documents into the rulemaking record after the close of the comment period. Joint Intercarrier Compensation Principal Br. of Pet'rs at 59-60 (July 17, 2013) (citing 6 R. at 3847-53, 3918-21, 3947-61). The FCC's handling of these documents did not result in a denial of due process.

Ordinarily, agencies should not add information to the rulemaking record after the close of the comment period. *See Small Refiner Lead Phase-Down Task Force v. U.S. EPA*, 705 F.2d 506, 540-41 (D.C. Cir. 1983). But the APA "does not require that every bit of background information used by an administrative agency be published for public comment." *Am. Mining Cong. v. Marshall*, 671 F.2d 1251, 1262 (10th Cir. 1982). And

agencies need not submit "additional fact gathering [that] merely supplements information in the rulemaking record by checking or confirming prior assessments without changing methodology, by confirming or corroborating data in the rulemaking record, or by internally generating information using a methodology disclosed in the rulemaking record" to further notice and comment. *Chamber of Commerce of U.S. v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006).

The Petitioners do not explain the significance of the additional documents or tie them to any of the disputed provisions in the Order; thus, we reject the Petitioners' procedural challenge based on late insertion of these documents into the record. *See Am. Mining Cong.*, 671 F.2d at 1261.

4. The FCC's Decision to Rule on Pending Petitions

The FCC found that its conclusions had "effectively address[ed], in whole or in part, certain pending petitions" and granted or denied several petitions. 2 R. at 757 ¶ 975. The Petitioners claim, without citation, that the FCC improperly commingled rulemaking and adjudicatory proceedings. Joint Intercarrier Compensation Principal Br. of Pet'rs at 59 (July 17, 2013). We reject the argument.

Commingling of functions is permitted when the proceeding involved rulemaking. *See AT&T v. FCC*, 449 F.2d 439, 454-55 (2d Cir. 1971). And the FCC's proceeding involved rulemaking even if the new rules had the effect of deciding others' petitions.

The incidental disposition of those petitions did not convert the rulemaking proceeding into an adjudication, and there was no violation of due process or the APA.

5. Adequacy of the August 3, 2011, Notice

In their reply, the Petitioners argue that the notice on August 3, 2011, was inadequate. Joint Intercarrier Compensation Reply Br. of Pet'rs at 28 (July 31, 2013). This argument was waived because it was omitted in the Petitioners' opening brief. *See Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998).

In the opening brief, the Petitioners made vague references to the sufficiency of the notice. *See* Joint Intercarrier Compensation Principal Br. of Pet'rs at 58 (July 17, 2013) ("Courts vacate APA rulemakings that fail to substantially comply with the requirement for public participation or which provide no meaningful opportunity for comment."); *id.* at 61 ("Courts have previously vacated FCC rulemakings where there was no realistic notice or opportunity to be heard."). But these references would not have alerted the FCC or the Court to a challenge based on the sufficiency of the August 3 notice. As a result, we decline to consider the Petitioners' new argument in their reply about the sufficiency of the August 3 notice.

6. Length of the Comment Period

In their reply brief, the Petitioners also challenge the length of the FCC's comment period. Joint Intercarrier Compensation Reply Br. of Pet'rs at 28-29 (July 31, 2013).

Because the Petitioners did not present this argument in their opening brief, the issue is waived. *See Adler*, 144 F.3d at 679.

7. Cumulative Challenge

The Petitioners have not shown that any part of the FCC's procedure was erroneous; thus, we reject the Petitioners' cumulative challenge. *See Sorenson Commc'ns v. FCC*, 659 F.3d 1035, 1046 (10th Cir. 2011) (applying a presumption of validity to the FCC's actions).

E. "Commandeering" of State Commissions

The Petitioners also contend that the FCC has commandeered state commissions by: (1) requiring them to regulate according to new federal standards under § 252, and (2) shifting cost recovery to the states. Joint Intercarrier Compensation Principal Br. of Pet'rs at 62-63 (July 17, 2013). We disagree.

Generally, the federal government unlawfully conscripts states when they must involuntarily enact or administer a federal regulatory program. *See Printz v. United States*, 521 U.S. 898, 932 (1997); *New York v. United States*, 505 U.S. 144, 176 (1992). The same may be true when the federal government provides a state with funding to implement a program and later "surpris[es] participating States with post-acceptance or 'retroactive conditions.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, __ U.S. __, 132 S. Ct. 2566, 2606 (2012). But "[w]here federal regulation of private activity is within the scope of the Commerce Clause, [the Court has] recognized the ability of Congress to offer

States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *New York*, 505 U.S. at 173-74.

That is the case here, for states are not required to regulate under § 252. Instead, the federal government has undertaken regulation of matters previously regulated by the states. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999). The federal government's creation of a federal regulatory scheme does not conscript the state commissions to do anything, and we reject the Petitioners' argument. *See Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 96-97 (2d Cir. 2000) (rejecting a similar challenge under 47 U.S.C. § 332(c)(7)(B)(iv)).

The Petitioners also contend that the FCC has assumed responsibility for cost recovery as a means of coercing state commissions. Joint Intercarrier Compensation Principal Br. of Pet'rs at 62-63 (July 17, 2013). For this contention, the Petitioners rely on *National Federation of Independent Business v. Sebelius*, __ U.S. __, 132 S. Ct. 2566 (2012). That case involved federal funding to the states so they could implement a federal program. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2605-06. Here, the federal government has assumed responsibility for financial support to third parties—not states—so the FCC can implement a federal program. *National Federation of Independent Business* is inapplicable, and the FCC has not coerced state commissions.

V. Individual Challenges to the Order

In addition to the broad challenges to the FCC's regulation of access traffic, adoption of a bill-and-keep regime, and procedural fairness, individual parties and groups challenge specific aspects of the reforms. We reject these challenges.

A. Rural Independent Competitive Alliance's Challenge to the FCC's Limitation on Funding Support for Rural Competitive LECs

The FCC authorized financial support to incumbent LECs (but not competitive LECs), through the Universal Service Fund. 2 R. at 688 ¶ 853, 691-93 ¶¶ 862, 864. This difference is challenged by the Rural Independent Competitive Alliance. Additional Intercarrier Compensation Issues Principal Br. (Pet'rs) at 10-19 (July 11, 2013). We reject the challenge.

The arbitrary-and-capricious standard requires an agency to "provide an adequate explanation to justify treating similarly situated parties differently." *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008). The FCC justified the disparity on two grounds: (1) CLECS, unlike ILECs, can freely raise rates on end-users without regulatory constraints; and (2) CLECs, unlike ILECs, "typically can elect whether to enter a service area and/or to serve particular classes of customers (such as residential customers) depending upon whether it is profitable to do so without subsidy." 2 R. at 691-92 ¶ 864. Because these justifications show that ILECs have a greater need than CLECs for additional financial support, the FCC would seem to have "articulate[d] a satisfactory explanation for its action [that] includ[es] a rational connection between the

facts found and the choice made." *Sorenson Commc'ns, Inc. v. FCC*, 659 F.3d 1035, 1045 (10th Cir. 2011) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

The Rural Independent Competitive Alliance disagrees, contending that the FCC's explanations are implausible and false. Additional Intercarrier Compensation Issues Principal Br. (Pet'rs) at 10-19 (July 11, 2013).

The FCC relies primarily on its second rationale: Competitive LECs have greater freedom to choose where and how to provide service; thus, they have less need for financial support than incumbent LECs. Federal Resp'ts' Final Resp. to Pet'rs' Additional Intercarrier Compensation Issues Principal Br. at 16-20 (July 29, 2013) (citing 2 R. at 693 ¶ 864 & n.1675). This explanation was rational. Because most incumbent LECs are carriers of last resort, they must ordinarily serve their assigned areas even when it is no longer profitable. *See* Stuart Buck, Telric v. Universal Service*: A Takings Violation*, 56 Fed. Comms. L.J. 1, 46 (2003) ("[M]any (if not all) ILECs are designated as 'carriers of last resort' under various state laws, which means that they are generally not allowed to (1) refuse local phone service to any customer in any area in which they operate, or (2) discontinue service in an area where there is no other carrier."). The FCC reasonably regarded competitive LECs as more flexible. 2 R. at 692-93 ¶ 864. Without status as carriers-of-last-resort, many competitive LECs can choose which customers to serve and freely leave the region.

The Alliance points to a previous FCC order, where it stated that CLECs lack lower-cost urban operations that urban ILECs can use to subsidize rural service. Additional Intercarrier Compensation Issues Principal Br. (Pet'rs) at 15-16 (July 11, 2013) (citing *In re Access Charge Reform*, 16 FCC Rcd. 9923, 9950 ¶ 65 (2001)). According to the Petitioners, this statement shows that rural CLECs cannot "pick and choose to retain their most profitable customers." *Id.* In the prior order, however, the FCC did not question the CLECs' greater opportunity to select customers or restrict service. *See In re Access Charge Reform*, 16 FCC Rcd. at 9950 ¶¶ 65-66.

It is true, as the Alliance argues, that some competitive LECs have committed to serve entire regions. Additional Intercarrier Compensation Issues Principal Br. (Pet'rs) at 15 (July 11, 2013). Notwithstanding these commitments, the FCC could reasonably rely on the flexibility available to competitive LECs and the relative lack of flexibility for incumbents. *See* 2 R. at 692-93 ¶ 864. Unlike ILECs, CLECs made a rational economic decision to enter the market and serve specific customers and areas. *Id.* at 692-93 ¶ 864-65.

The Alliance argues that once CLECs built their networks, they developed reliance interests that could not be ignored by the FCC. Additional Intercarrier Compensation Issues Principal Br. (Pet'rs) at 17-18 (July 11, 2013). It surely would have been arbitrary and capricious if the FCC had disregarded the CLECs' reliance interests. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). But the FCC did no such thing.

Instead, the FCC set out to balance the need for a recovery mechanism against the need to avoid undue burdens on those carriers contributing to the Universal Service Fund. *See* 2 R. at 690 ¶ 859. In balancing these needs, the FCC made an empirical judgment that "competitive LECs . . . [had] not built out their networks subject to [carrier-of-last-resort] obligations requiring the provision of service when no other provider [would] do so." *Id.* at 692-93 ¶ 864.

This empirical judgment may be debatable. But we must defer to the FCC in its empirical judgment on an issue involving its institutional expertise. *See Metro Broad., Inc. v. FCC*, 497 U.S. 547, 570 (1990) (deferring to the FCC in its determination of an empirical nexus). When the FCC drew on this empirical judgment, it did not ignore the CLECs' reliance interests; instead, the FCC concluded that these interests did not trump other competing considerations. *See Qwest Corp. v. FCC*, 689 F.3d 1214, 1227-31 (10th Cir. 2012) (upholding the FCC's denial of a forbearance petition, based on a change in approval that involved "moving of the goalpost," because the change was adequately explained).

The Alliance contends that this deference will undermine the FCC's own objective of broadening the array of services in rural areas. Additional Intercarrier Compensation Issues Principal Br. (Pet'rs) at 18-19 (July 11, 2013). According to the Alliance, CLECs deserve support because they are more likely than ILECs to deploy advanced telecommunications services in rural areas. *Id.* (citing *In re Access Charge Reform*, 16

FCC Rcd. 9923, 9950 ¶ 65 (2001)). But the FCC has broad discretion to balance competing policy goals, including the control of transition costs. *See Sorenson v. Commc'ns v. FCC*, 659 F.3d 1035, 1045 (10th Cir. 2011); *see also Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1108 (D.C. Cir. 2009) (the FCC "has broad discretion" to balance the objectives in funding universal service). The FCC acted reasonably in balancing the need to carefully oversee the Universal Service Fund with the goal of extending service in rural areas.

B. The Challenge by National Telecommunications Cooperative Association, U.S. TelePacific Corporation, and North County Communications Corporation to the Transition of CMRS-LEC Traffic to Bill-and-Keep

The FCC decided to immediately implement bill-and-keep as the default reciprocal compensation methodology for CMRS-LEC (cellphone-landline) traffic. 2 R. at 761-62 ¶ 988. On reconsideration, the FCC extended the transition for six months for local CMRS-LEC traffic subject to an interconnection agreement. *Id.* at 1145-46 ¶ 7.

National Telecommunications Cooperative Association, U.S. TelePacific Corporation, and North County Communications Corporation challenge these decisions as arbitrary and capricious. Additional Intercarrier Compensation Issues Principal Br. (Pet'rs) at 20-21 (July 11, 2013). According to these petitioners, the FCC applied different standards to similar situations, implementing a flash-cut for CMRS-LEC traffic while professing to avoid flash cuts. *Id.* at 20-21 (quoting 2 R. at 663 ¶ 802). We conclude that the FCC's time-table satisfies the APA.

The FCC decided to immediately institute bill-and-keep for CMRS-LEC traffic, giving two reasons: (1) Evidence showed that arbitrage schemes were more problematic for CMRS-LEC traffic than local LEC-LEC traffic; and (2) an immediate shift for CMRS-LEC traffic would be less disruptive than it would have been for other types of traffic. 2 R. at 764-65 ¶¶ 995-96 & n.2099.

The FCC downplayed concerns about disruption for three reasons.

First, CMRS providers and CLECs had only recently developed arrangements for reciprocal compensation. *Id.* at 765 ¶ 996. Without a longer history of these arrangements, CLECs "had no basis for reliance on such a methodology in their business models." *Id.*

Second, without an interconnection agreement, ILECs do not receive reciprocal compensation. *Id.* at 765-66 ¶ 997. And, the FCC found that most large ILECs with such an agreement had "already adopted $0.0007 or less as their reciprocal compensation rate." *Id.* at 766 ¶ 997.

Third, the FCC found that ILECs with interconnection agreements might have more time to adjust to bill-and-keep because the FCC was not abrogating existing agreements. *Id.* at 767 ¶ 1000.

For these reasons, the FCC concluded that an immediate transition to bill-and-keep for CMRS-LEC traffic would not be too disruptive or "overburden[] the universal service

fund." *Id.* The FCC's rationale was internally consistent, facially reasonable, and supported by the evidence. As a result, the FCC's explanation sufficed under the APA.

C. Core Communications, Inc. and North County Communications Corporation's Challenge to the FCC's New Regulations on Access Stimulation

In the Order, the FCC addressed an interim arbitrage scheme known as "access stimulation." *Id.* at 601-17 ¶¶ 656-701. Access stimulation occurs when an LEC with high access charges enters into an arrangement with a provider of high call-volume operations, such as chat lines, adult-entertainment calls, or free conference calls. *Id.* at 601 ¶ 656. The arrangement "inflates or stimulates the access minutes terminated to the LEC, and the LEC then shares a portion of the increased access revenues . . . with the 'free' service provider." *Id.* Because an IXC cannot pass along these higher access costs to the customers making these more expensive calls, the IXC must recover these extra costs from all of its customers. *Id.* at 602 ¶ 663.

This scheme works because LECs entering "traffic-inflating revenue-sharing agreements" need not reduce their access rates "to reflect their increased volume of minutes." *Id.* at 601 ¶ 657. According to the FCC, these LECs experience a "jump in revenues and thus inflated profits that almost uniformly make the LEC's interstate switched access rates unjust and unreasonable under section 201(b) of the Act." *Id.*

The FCC defined "access stimulation" in the Order. *Id.* at 604 ¶ 667. "Access stimulation" occurs when an "LEC has entered into an access revenue sharing agreement"

and “the LEC either has had a three-to-one interstate terminating-to-originating traffic ratio in a calendar month, or has had a greater than 100 percent increase in interstate originating and/or terminating switched access MOU in a month compared to the same month in the preceding year.” *Id.* at 604 ¶ 677.

Petitioners Core Communications, Inc. and North County Communications Corporation challenge two aspects of the rules: (1) The FCC allowed access-stimulating ILECs, but not access-stimulating CLECs, to utilize procedures allowing retariffs of charges for terminating access; and (2) the FCC required access-stimulating CLECs to benchmark to the price-cap LEC with the lowest terminating access rates in the state. Additional Intercarrier Compensation Issues Principal Br. (Pet’rs) at 31-36 (July 11, 2013). The Petitioners challenge both provisions as arbitrary and capricious under the APA. *Id.* These challenges are rejected.

1. The FCC’s Refusal to Allow CLECs to Use ILEC Ratemaking Procedures

The Petitioners challenge the refusal to allow access-stimulating CLECs to set rates above the FCC’s chosen benchmark. *Id.* at 31. According to the Petitioners, the FCC did not explain its refusal to allow “CLECs to have the same option as ILECs to rely upon the § 61.38 rules to demonstrate actual costs and demand in the rate-of-return territories in which they provide switched access.” *Id.* We disagree.

The issue involves a regulation in place before the recent reforms: 47 C.F.R. § 61.38. This regulation called for incumbent LECs to file tariffs supported by cost-of-

service data. *See Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1234 (D.C. Cir. 1980). Because these tariffs have supplied benchmarks for CLECs,[9] they have not ordinarily had to submit cost data.

Core and North County contend that for access stimulation, the remedy is harsher for CLECs than ILECs. ILECs can obtain relief from rate adjustments by submitting cost studies under 47 C.F.R. § 61.38; CLECs cannot. Additional Intercarrier Compensation Issues Principal Br. (Pet'rs) at 31-32 (July 11, 2013). According to Core and North County, the FCC failed to explain the disparity. *Id.* We disagree.

The FCC explained its rationale in the Order: Determining the reasonableness of CLEC pricing has proven impractical. 2 R. at 614-15 ¶ 694. Thus, the FCC "has specifically disclaimed reliance on cost to set competitive LEC access rates." *In re Access Charge Reform: PrairieWave Telecomms., Inc.*, 23 FCC Rcd. 2556, 2560 ¶ 13 (2008).

This rationale is neither arbitrary nor capricious. The FCC previously noted the advantages of setting CLEC rates through benchmarking rather than the submission of cost data:

> [A] benchmark provides a bright line rule that permits a simple determination of whether a CLEC's access rates are just and reasonable. Such a bright line approach is particularly desirable given the current legal and practical difficulties involved with comparing CLEC rates to any objective standard of "reasonableness."

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9 *See In re Access Charge Reform*, 16 FCC Red. 9923, 9943-45 (2001).

In re Access Charge Reform, 16 FCC Rcd. 9923, 9939 ¶ 41 (2001).

Core and North County do not address the historical differences between the pricing of ILECs and CLECs. Instead, Core and North County argue that CLECs should have the opportunity to support relief through cost data under 47 C.F.R. § 61.38. The FCC feared that this option would create difficulty in assessing the reasonableness of CLEC rates. 3 R. at 1933 (cited at 2 R. at 614 n.1172).

The FCC addressed a similar issue six years ago when confronted with a waiver petition by a CLEC (PrairieWave Telecommunications, Inc.), which submitted extensive cost data and requested an opportunity to charge based on its own costs rather than a benchmark tied to ILEC rates. *See In re Access Charge Reform: PrairieWave Telecomms., Inc.*, 23 FCC Rcd. 2556, 2556 ¶ 1 (2008). Like Core and North County, PrairieWave discounted the burden because it had been the only CLEC to seek a waiver. *See id.* at 2560-61 ¶ 13. The FCC explained that if it were to accept PrairieWave's cost data, "every competitive LEC" would request a waiver. *Id.* And with this flood of data, the FCC would need to alter CLEC rates from a "straightforward comparison" to an "administratively difficult cost study analysis." *Id.* at 2561 ¶ 14; *see also In re Access Charge Reform*, 16 FCC Rcd. 9923, 9939 ¶ 41 (2001) (stating that a benchmarking approach provides a simple way to determine the reasonableness of a CLEC's access rates and avoids the "legal and practical difficulties involved with comparing CLEC rates to any objective standard of 'reasonableness'").

The FCC's explanation here was similar. For example, the FCC cited comments from one LEC that had acknowledged the "legal and practical difficulties involved with comparing CLEC rates to any objective standard of reasonableness." 2 R. at 614 n.1172 (citing 3 R. at 1933).

Core and North County downplay the burden in preparing the cost data, but do not address the FCC's concern about how the data would be utilized. The FCC rationally concluded that the cost data would prove useful only if the agency were to abandon its benchmarking approach for CLEC rates and face the legal and practical difficulties of setting CLEC rates based on an objective standard of reasonableness. Core and North County do not present any reason for the FCC to reverse course in this manner, and we are left without any reason to question the FCC's decision. Thus, its refusal to open the § 61.38 procedures, allowing submission of cost data for rate-setting, is neither arbitrary nor capricious.

2. The FCC's Requirement for Access-Stimulating CLECs to Benchmark to the Price-Cap LEC with the State's Lowest Access Rates

The FCC not only declined to allow CLECs to use the § 61.38 procedures, but also required access-stimulating CLECs to benchmark their switched-access rates to the state's price-cap LEC with the lowest access charges. *Id.* at 612-13 ¶ 689. According to the Petitioners, this benchmark was arbitrary and capricious because: (1) it applies to CLECs

statewide, and (2) the FCC lacked evidentiary support for its decision. Additional Intercarrier Compensation Issues Principal Br. (Pet'rs) at 32-36 (July 11, 2013).

Core and North County initially argue that it was irrational to tie the benchmark to a price-cap LEC's statewide rates when the CLEC was stimulating access in only a small part of the state. *Id.* at 32-33. The FCC took a different view. It reasoned that when a CLEC artificially increases traffic, its volumes resemble those of the price-cap LEC in the state. 2 R. at 612-13 ¶ 689. Thus, the FCC concluded that for CLECs improperly stimulating traffic, rates should be tied to the state's price-cap LEC. *Id.*

Core and North County regard this explanation as "irrational" because the CLEC may not even be operating in territories served by rate-of-return LECs. Additional Intercarrier Compensation Issues Principal Br. (Pet'rs) at 33 (July 11, 2013). This argument ignores the FCC's view that the pertinent comparator is the state's price-cap LEC, not the smaller rate-of-return carriers. The FCC's view may be debatable, but it is neither arbitrary nor capricious.

Core and North County also question the evidentiary basis for the FCC to use price-cap LECs, rather than rate-of-return LECs. *Id.* at 34-35. The Petitioners contend that the FCC grounded its benchmarking decision on a finding that the "access stimulating LEC's traffic volumes are more like those of the price cap LEC in the state, and it is therefore appropriate and reasonable for the access stimulating LEC to benchmark to the price cap LEC." *Id.* at 34 (citing 2 R. at 612-13 ¶ 689).

The FCC's conclusion has some evidentiary support. *See* 3 R. at 1536 (AT&T's evidentiary submission, showing that rural traffic-stimulating CLECs are terminating three to five times as many minutes as the largest ILECs in Iowa, Minnesota, and South Dakota). This evidence suggests that traffic-stimulating CLECs do not operationally resemble the ILECs they benchmark. *See id.* at 1538 (AT&T's submission, showing that traffic-stimulating CLECs "clearly are not in the same business as NECA Band 8 ICOs").

Based on this evidence, the FCC's decision was reasonable. The FCC chose to require benchmarks of access-stimulating CLECs to price-cap LECs based on evidence that their volumes were comparable. This decision was reasonable, and we reject the APA challenge by Core and North County.

D. AT&T, Inc.'s Challenge to the FCC's Decision to Allow VoIP-LEC Partnerships to Collect Intercarrier Compensation Charges for Services Performed by the VoIP Partner

AT&T challenges one aspect of the new rules: the opportunity for VoIP-LEC partnerships to charge intercarrier compensation during the transition to bill-and-keep. AT&T Principal Br. at 16-23 (July 16, 2013). This challenge is rejected.

LECs have partnered with VoIP providers and wireless carriers (like AT&T). Eventually, when bill-and-keep is fully implemented, LECs in these partnerships will be unable to impose any access charges. But during the transition period, LECs can impose access charges, though they will be phased downward. AT&T's challenge focuses on differences between the rules pertaining to LEC-VoIP partnerships and LEC-wireless

partnerships. During the transition period, LECs can impose access charges for functions performed by VoIP partners. *See* 2 R. at 753-54 ¶ 970. But LECs that partner with wireless providers (like AT&T) cannot charge for functions performed by the wireless partner. *Id.* at 753 n.2024.[10]

AT&T argues that it was arbitrary and capricious to deny the same opportunities to LECs that partner with wireless providers. AT&T Principal Br. at 18-23 (July 16, 2013). According to AT&T, the FCC failed to: (1) adequately explain its decision to give VoIP providers an advantage over wireless providers, and (2) address the concern over competitive equality. *Id.* at 16. We disagree, concluding that the FCC adequately responded to AT&T's objection. This explanation was two-fold: (1) The ability of VoIP providers to charge for access would promote development of IP networks; and (2) VoIP providers partnered with LECs to interconnect, and wireless providers voluntarily partnered with LECs to avoid FCC regulation. 2 R. at 752 ¶ 968, 753 n.2024.

As discussed in Chief Judge Briscoe's separate opinion, Congress set out in the 1996 Act to promote the development of IP networks. *See, e.g.*, *In re LAN Tamers, Inc.*, 329 F.3d 204, 206 (1st Cir. 2003) (explaining that universal service includes high-speed

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[10] AT&T is inconsistent in its argument. It sometimes focuses on the CLEC's ability to *tariff* for work done by VoIP providers; other times, AT&T addresses the ability to *receive* intercarrier compensation for this work. This distinction matters because the ability to obtain intercarrier compensation is separate from the ability to use a tariff to do so. *In re Sprint PCS*, 17 FCC Rcd. 13192, 13196 (2002). The rule preventing CLECs from tariffing for work done by their CMRS partners is based on the absence of an independent right to intercarrier compensation. *See In re Access Charge Reform*, 19 FCC Rcd. 9108, 9116 (2004).

internet access). Unlike conventional wireless service, VoIP service depends on IP facilities. *See, e.g.*, *In re Universal Serv. Contribution Methodology*, 21 FCC Rcd. 7518, 7526 ¶ 15 (2006). To promote development of IP networks, the FCC attempted to support VoIP providers because they were developing these networks. *See* 2 R. at 752 ¶ 968.

This strategy was at least reasonable. Any decision would have created an asymmetry between VoIP providers and either wireless providers or LECs. The FCC could reasonably have concluded that a contrary decision would have slowed IP deployment and undercut the FCC's stated goal of encouraging the deployment of IP networks.

The FCC relied not only on the goal of promoting IP deployment, but also on the need for wireless providers to partner with LECs. *Id.* at 753 n.2024. As the FCC explained, VoIPs frequently partner with LECs to interconnect with the network, while wireless providers frequently partner with LECs to avoid FCC regulations. *Id.* at 753-54 ¶ 970, 753 n.2024. Until the FCC issued the Order, it had not determined the intercarrier compensation obligations for VoIP traffic. Federal Resp'ts' Final Resp. to the AT&T Principal Br. at 14 (July 29, 2013) (quoting Notice of Proposed Rulemaking ¶ 610, Supp. R. at 192). In contrast, the FCC had long prohibited wireless carriers from collecting access charges through CLEC partners. 2 R. at 753 ¶ 970 n.2024. These differences between LEC-VoIP partnerships and wireless-LEC partnerships provided a reasonable

foundation for the FCC's distinction in the interim rules. *See id.* The FCC did not act arbitrarily or capriciously when it allowed access charges for functions provided by VoIP providers in partnership with LECs, but not for functions performed by wireless providers in partnership with LECs.

AT&T argues that the FCC's explanation did not address the complaint about a "market-distorting competitive bias" in favor of VoIP providers. AT&T Principal Br. at 18 (July 16, 2013). Prior to entry of the Order, however, AT&T had complained only that it would be arbitrary to treat wireless providers differently than VoIP providers. 6 R. at 3987 (AT&T's argument that the FCC's proposed rule would "arbitrarily tilt the regulatory playing field"); *id.* at 3989-90 (AT&T's argument that there "could be no rationale for such an arbitrary distinction, which would represent nothing more than a flagrant instance of competition-distorting regulatory favoritism"). Because the FCC presented sound regulatory reasons for treating VoIP providers differently than wireless carriers, it adequately responded to AT&T's allegation that it was arbitrarily favoring VoIP providers.

E. Voice on the Net Coalition, Inc.'s Challenges to the FCC's No-Blocking Obligation

To avoid high access charges, some long-distance carriers began to block long-distance calls that terminated with certain LECs. *Establishing Just & Reasonable Rates for Local Exchange Carriers*, 22 FCC Rcd. 11629, 11629 ¶ 1 (2007). The FCC attempted to stop this practice, reiterating its general prohibition on "call blocking." *Id.* In the

Order, the FCC also extended this prohibition to interconnected VoIP or one-way VoIP service providers obtaining intercarrier compensation. 2 R. at 756 ¶ 974. The FCC feared that VoIP providers, like the long-distance companies, could have incentives to block calls to avoid high access charges. *See id.*

Voice on the Net challenges this prohibition on three grounds: (1) The FCC gave inadequate notice that it was considering a "no-blocking" obligation; (2) the FCC failed to adequately explain its decision; and (3) the FCC lacked statutory authority to impose the no-blocking obligation on information services. Voice on the Net Coalition, Inc. Principal Br. at 9-19 (July 15, 2013). The first challenge is invalid because the FCC's notice was sufficient. The other two challenges were waived.

1. The Waiver Test

We would ordinarily decline to entertain any of the present arguments because they were not raised in the FCC's rulemaking proceedings or in a petition for rehearing. "The filing of a reconsideration petition to the Commission is 'a condition precedent to judicial review . . . where the party seeking such review . . . relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass.'" *Sorenson Commc'ns, Inc. v. FCC*, 659 F.3d 1035, 1044 (10th Cir. 2011) (quoting 47 U.S.C. § 405(a)).

Voice on the Net has not drawn our attention to a petition for reconsideration; thus, "we must determine whether the FCC was otherwise given an opportunity to pass on

[these] issue[s]." *Id.* This opportunity existed only if one of the commenters had developed the issue in the administrative proceedings. *See Sorenson Commc'ns, Inc. v. FCC*, 567 F.3d 1215, 1227-28 (10th Cir. 2009) (holding that the issue was waived because the petitioner failed to raise in the FCC proceedings the "basis" for the present legal challenge).

The D.C. Circuit Court of Appeals has adopted a straightforward test for waiver under § 405. "The pith of the test is this: 'the argument made to the Commission' must 'necessarily implicate[]' the argument made to us." *Sprint Nextel Corp. v. FCC*, 524 F.3d 253, 257 (D.C. Cir. 2008) (quoting *Time Warner Entm't Co. v. FCC*, 144 F.3d 75, 80 (D.C. Cir. 1998)). This test reflects a practical method of applying § 405, and we adopt the test for our circuit. Like the D.C. Circuit, we apply the test by distinguishing between procedural and substantive challenges. *See Time Warner Entm't Co.*, 144 F.3d at 80. When the challenge involves only a "technical or procedural mistake," the party must have raised the same claim to the FCC. *Id.* at 81. But if a petitioner makes a substantive challenge, such as one involving FCC policy, we determine whether the FCC would necessarily have viewed the question as part of the case. *See New England Pub. Commc'ns Council, Inc. v. FCC*, 334 F.3d 69, 79 (D.C. Cir. 2003).

We apply this test to each of Voice on the Net's arguments to determine if the argument was preserved in the FCC proceeding.

2. Challenge to the Notice

According to Voice on the Net, the FCC failed to provide adequate notice and an opportunity to comment on the no-blocking obligation on one-way VoIP providers. Voice on the Net Coalition, Inc. Principal Br. at 9-13 (July 15, 2013). Because this challenge is procedural, rather than substantive, we address whether Voice on the Net raised the same challenge in the FCC proceeding. *See Time Warner Entm't Co.*, 144 F.3d at 81.

Voice on the Net contends that the issue was preserved in a VoIP White Paper presented to the FCC. Voice on the Net Coalition, Inc. Reply Br. at 1 (July 31, 2013). We disagree except for the narrow contention that the FCC failed to define "'one-way' VoIP services." *See id.* at 10.

The VoIP White Paper discussed potential FCC rate regulation on one-way VoIP, but not the challenged no-blocking obligation on one-way VoIP providers:

> The FCC . . . has not undertaken the pre-requisites under the [APA] necessary to impose rate regulation on "one-way" VoIP. The term "one-way interconnected VoIP" is not defined by the Act or in the Commission's rules. Neither has the FCC provided a proposed definition of the term, or provided notice, explanation or justification of the proposed regulation.

6 R. at 3830. The White Paper also stated in a footnote, without mentioning a no-blocking obligation, that "[n]otice must be 'sufficient to fairly apprise interested parties of all significant subjects and issues involved.'" *Id.* at 3830 n.32 (quoting *Am. Iron & Steel Inst. v. EPA*, 568 F.2d 284, 291 (3d Cir. 1977)).

Voice on the Net acknowledges that rate regulation is not the same as a no-blocking obligation. Voice on the Net Coalition, Inc. Reply Br. at 2 (July 31, 2013). But Voice on the Net points to the FCC's assertion of a close connection between intercarrier compensation and a no-blocking obligation. *Id.* Because the two issues are closely related, Voice on the Net contends that the challenge to rate regulation on one-way VoIP service necessarily implicated the present challenge. *Id.*

This contention fails. In opposing rate regulation on one-way VoIP, Voice on the Net did not provide the FCC with a fair opportunity to pass on a separate, narrower no-blocking obligation. For example, if parties were to allege that the FCC failed to notice the transition to bill-and-keep, they would not preserve a much narrower claim that the FCC failed to adequately notice the Access Recovery Charge. Though the two are related, a general challenge does not necessarily implicate a more specific one. *See Sprint Nextel Corp. v. FCC*, 524 F.3d 253, 257 (D.C. Cir. 2007).

The VoIP White Paper did preserve a potential challenge to the FCC's use of the term "one-way interconnected VoIP." *See* 6 R. at 3830. But the FCC explained in its notice that one-way interconnected VoIP constituted VoIP service that "allow[s] users to terminate calls to the [Public Switched Telephone Network], but not receive calls from the PSTN, or vice versa." 1 R. at 365 n.57. Because the FCC defined "one-way interconnected VoIP" in the notice, we reject the challenge.

3. Challenge to the Adequacy of the Explanation

Voice on the Net also invokes the APA in challenging the sufficiency of the FCC's explanation for no-blocking rules. Voice on the Net Coalition, Inc. Principal Br. at 13-15 (July 15, 2013). Because this challenge is procedural, rather than substantive, we examine whether the same issue was raised in the administrative proceeding. *See Time Warner Entm't Co.*, 144 F.3d at 81.

According to Voice on the Net, its argument on the no-blocking rules was preserved in the VoIP White Paper. Voice on the Net Coalition, Inc. Reply Br. at 2 (July 31, 2013). But the VoIP White Paper did not address the sufficiency of the explanation for the no-blocking rules on one-way VoIP providers; thus, this challenge has been waived.

4. Challenge to the FCC's Ancillary Jurisdiction

Voice on the Net also challenges the FCC's ancillary jurisdiction. Voice on the Net Coalition, Inc. Principal Br. at 15-19 (July 15, 2013). This challenge involves FCC's policy; thus, "we ask whether a reasonable Commission *necessarily* would have seen the question raised before us as part of the case presented to it." *Time Warner Entm't Co.*, 144 F.3d at 81. The question would have constituted part of the case as long as it had been presented by one of the parties. *See EchoStar Satellite, LLC v. FCC*, 704 F.3d 992, 996 (D.C. Cir. 2013).

According to Voice on the Net, the FCC's ancillary jurisdiction was challenged in the VoIP White Paper and a letter on October 18, 2011. Voice on the Net Coalition, Inc. Reply Br. at 1 (July 31, 2013). These documents contain arguments that: (1) VoIP services were "likely to be information services and may even [have been] software applications or online offerings wholly outside of the Commission's jurisdiction," (2) the FCC could not "avoid obvious limitations in its ability to regulate services outside of its primary jurisdiction, including information services and other online services and applications," and (3) VoIP did not involve "Title II telecommunications services," but were "information services, outside of the scope of Section 201 Title II rate regulation." 6 R. at 3830, 3935-36. These arguments did not cover the FCC's ancillary authority.

Voice on the Net also urges a futility exception. Voice on the Net Coalition, Inc. Reply Br. at 3-4 (July 31, 2013). No such exception exists, and the Supreme Court stated in *Booth v. Churner* that it would not "read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001). Because § 405(a) involves a statutory exhaustion requirement, we are not free to recognize a futility exception. *See Fones4All Corp. v. FCC*, 550 F.3d 811, 818 (9th Cir. 2008) (holding that futility does not excuse exhaustion because it is specifically required in § 405). In the absence of a futility exception, we conclude that Voice on the Net has waived its substantive challenges.

F. Transcom Enhanced Services, Inc.'s Challenges to the FCC's Intra-MTA Rule, Provisions on Call-Identification, and Blocking of Calls

Petitioner Transcom calls itself "an enhanced service provider." 6 R. at 3855. As an enhanced service provider, Transcom regards itself as an end-user rather than a telecommunications carrier. *Id.* at 3965. Because Transcom views itself as an end-user rather than a telecommunications carrier, it argues that it can never be in the middle of a telecommunication for intercarrier compensation purposes and cannot be regulated as a common carrier. Transcom Principal Br. at 21-22 (July 12, 2013).

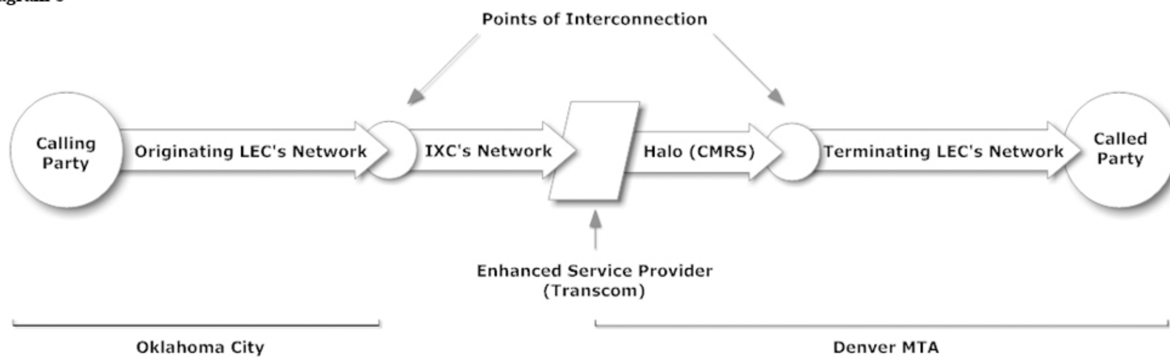
Based on this characterization, Transcom challenges three aspects of the FCC's Order: (1) the FCC's interpretation of its intraMTA rule governing reciprocal compensation between wireless providers and LECs; (2) the FCC's ancillary jurisdiction to impose call-identifying rules on non-carriers who do not originate or terminate traffic; and (3) the validity of the FCC's no-blocking rules on VoIP providers. *Id.* at 39-40, 45-48. We reject each argument. Transcom is not the called party, and Transcom has not preserved its second and third challenges.

1. Transcom's Challenge to the FCC's IntraMTA Rule

Transcom initially challenges the FCC's clarification of its "IntraMTA rule." This rule addresses calls between an LEC and a wireless provider that originate and terminate in the same "Major Trading Area." These calls are characterized as local and are subject to reciprocal compensation. 2 R. at 768 ¶ 1003; 47 C.F.R. 51.701(b)(2).

This characterization was addressed in the FCC proceedings by a wireless carrier, Halo Wireless. *See* 2 R. at 768-69 ¶ 1005; 6 R. at 3926-28. Halo asserted that it had provided "'Common Carrier Wireless Exchange Service to [Enhanced Service Providers] and Enterprise Customers.'" *Id.* at 3975. According to Halo, its traffic originated at the base station where its customers (enhanced service providers like Transcom) connected wirelessly. *See* 2 R. at 768 ¶ 1005. Halo would then deliver its traffic to the terminating LEC and characterize its traffic as local (or "intraMTA"). *See id.*

Multiple parties presented evidence that Halo's traffic did not originate on a local wireless line. *See id.* These parties stated that Halo's traffic originated as access traffic and progressed to Halo's enhanced service providers, who then handed off the call to Halo to deliver to the terminating LEC. *Id.* This process is illustrated in Diagram 9, which shows a typical long-distance call from Oklahoma City to Denver:



Halo's "customer" (the enhanced service provider) is not the party who was calling or being called. Nonetheless, Halo argued that its traffic was not subject to access charges because the enhanced service provider terminated each long-distance call and originated a new local wireless call. *See id.* at 769 ¶ 1006. In response, the FCC clarified that for purposes of the intraMTA rule, the "re-origination of a call over a wireless link in the middle of a call path [did] not convert a wireline-originated call into a [wireless]-originated call for reciprocal compensation." *Id.* For the intraMTA rule, the FCC ignores the presence of an enhanced service provider, such as Transcom, in the middle of a call; instead, the FCC looks to the calling party's location in relation to the called party. *See id.*

This conclusion requires Halo (as a common carrier) to pay access charges; however, the FCC has not addressed Transcom's status as an end-user or common carrier. Though its status was not addressed, Transcom argues that it can no longer enjoy the benefits of being an "end user." Transcom Principal Br. at 11, 26-30 (July 12, 2013).

According to Transcom, calls terminate and originate with enhanced service providers. *Id.* at 21. Under this view, even when the enhanced service provider is in the middle of a communication, the call terminates; when the call leaves the enhanced service provider, a new call has begun. *See id.*

For this characterization, Transcom misreads two cases and overlooks the FCC's prior determination that a call "terminates" only when the call reaches the called party. *Id.* at 33-34; Transcom Reply Br. at 12-13 (July 30, 2013).

Transcom relies on *Atlantic Bell Telephone Companies v. Federal Communications Commission*, 206 F.3d 1 (D.C. Cir. 2000), and *Worldcom, Inc. v. Federal Communications Commission*, 288 F.3d 429 (D.C. Cir. 2002), two cases involving dial-up internet *Id.* at 44.

In *Atlantic Bell Telephone Companies*, the D.C. Circuit Court of Appeals vacated an FCC order that excluded internet service providers from the reach of 47 U.S.C. § 251(b)(5). *Atl. Bell Tel. Cos.*, 206 F.3d at 5, 8. The FCC had found that calls to internet service providers were not considered "local" because they usually involved further communications with out-of-state websites. *See id* at 5. The court rejected this "end-to-end" analysis because it ignored the FCC regulation defining "termination" as "the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises." *See id.* at 6. Applying this regulation, the court concluded that calls terminated when they reached the internet service providers; thus, the internet service providers were "clearly the 'called part[ies].'" *Id.*

Transcom has not explained how it meets the FCC's regulatory definition of "termination," rendering *Atlantic Bell Telephone Companies* inapplicable. In addition to

this lack of explanation, Transcom has not pointed to any authority making its purported position as an enhanced service provider or an end-user relevant to the FCC's interpretation of the intraMTA rule.

Atlantic Bell Telephone Companies presented a different situation because Transcom is not the called party. Dial-up providers are treated differently because they are the parties being called. *See In re Core Commc'ns, Inc.*, 455 F.3d 267, 271 (D.C. Cir. 2006) ("Under the dial-up method, a consumer uses a line provided by a local exchange carrier . . . to dial the local telephone number of an Internet service provider."). Because Transcom is not the called party, calls do not terminate with it; and the FCC reasonably interpreted its intraMTA rule.

2. Transcom's Challenge to the Call-Identifying Rules

Transcom also challenges the FCC's caller-identification rules. In the Order, the FCC prohibited "intermediate providers" from altering "path signaling information identifying the telephone number, or billing number, if different, of the calling party that is received with a call." 47 C.F.R. § 64.1601(a)(2); *see* 2 R. at 624-25 ¶¶ 719-20. The FCC defined an "intermediate provider" as "any entity that carries or processes traffic that traverses or will traverse the PSTN at any point insofar as that entity neither originates nor terminates that traffic." 47 C.F.R. § 64.1600(f); 2 R. at 624 ¶ 720. Because this regulation regulates non-carriers, the FCC concedes it lacks Title II authority. Federal Resp'ts' Final Resp. to the Transcom Principal Br. at 21 (July 24,

2013). Transcom contends that this regulation also exceeds the FCC's ancillary jurisdiction. Transcom Principal Br. at 46-47 (July 12, 2013).

We do not reach the jurisdictional challenge because Transcom failed to preserve it in the administrative proceeding. *See* 47 U.S.C. § 405(a). In its response brief, the FCC contended that Transcom had waived its jurisdictional argument. Federal Resp'ts' Final Resp. to the Transcom Principal Br. at 21 (July 24, 2013). Transcom responded, without explanation, by citing over 100 pages in the record. Transcom Reply Br. at 23 (July 30, 2013). These citations are not helpful.

Of the cited material, only two footnotes and four pages are potentially relevant. *See* 3 R. at 1220, 1222 n.30, 1325-26, 1478-79 n.5, 1834. Two of the pages state only that information services are outside the FCC's Title II authority. *Id.* at 1220, 1834. The other pages discuss policy reasons weighing against regulation of information services under Title I. *Id.* at 1325-26. And one footnote states generally that "the FCC lacks 'blanket' Title I authority to regulate non-telecommunications industries." *Id.* at 1478-79 n.5.

The other footnote broadly challenges ancillary jurisdiction for a much broader rule: one requiring information service providers to transmit call identification data "even if the communications never touch the PSTN and even if the 'phone number' is not used for that communication." *Id.* at 1222 n.30. The FCC rule applies only to calls that

traverse the PSTN; as a result, we have no reason to address the FCC's ancillary authority over calls that do not traverse the PSTN. *See* 2 R. at 755-56 ¶¶ 973-74.

Transcom has failed to identify a single place, amid the 100+ pages cited, in which it alerted the FCC to its jurisdictional attack on the call-identifying rules. Accordingly, this challenge has been waived.

3. Transcom's Challenge to the FCC's No-Blocking Rules

Like Voice on the Net, Transcom challenges the FCC's no-blocking rules for VoIP providers. Transcom Principal Br. at 48-49 (July 12, 2013). In addressing Voice on the Net's argument, we held that this challenge is waived because this challenge was not presented in the administrative proceeding. For the same reason, we conclude that Transcom has waived this challenge. *See* 47 U.S.C. § 405(a).

G. Windstream Corporation and Windstream Communications, Inc.'s Challenges to Origination Charges

Windstream Corporation and Windstream Communications, Inc., which operate a price-cap LEC, challenge the FCC's treatment of originating access charges for VoIP traffic. Windstream Principal Br. at 20-32 (July 17, 2013). This challenge is rejected.

In the Order, the FCC immediately set the default access rates for interstate and intrastate toll VoIP traffic "equal to [the] interstate rates applicable to non-VoIP traffic." 2 R. at 735 ¶ 944. Thus, charges for VoIP traffic would be capped at interstate rates for origination and termination. *Id.* at 746-47 ¶ 961. The FCC added that it would allow VoIP originating access charges at interstate rates on a transitional basis, "subject to the

phase-down and elimination of those charges pursuant to a transition to be specified." *Id.* at 746 n.1976. The caps allegedly hurt Windstream because access charges are generally higher for intrastate calls than for interstate calls. *See id.* at 656-57 ¶ 791, 663 n.1508.

Because the Order largely focused on charges for terminating access, Windstream asked the FCC to "clarify 'that the Order [did] not apply to, and [was] not intended to displace, intrastate originating access rates for PSTN-originated calls that [were] terminated over VoIP facilities.'" Windstream Principal Br. at 13 (July 17, 2013) (quoting 6 R. at 4076).

In response, the FCC modified its VoIP rules in a second reconsideration order. 2 R. at 1162 ¶ 30. There the FCC acknowledged that Windstream had presented evidence undermining the initial assumption that all VoIP intercarrier compensation, including originating access charges for TDM format originated traffic, had been "widely subject to dispute and varied outcomes." *Id.* at 1163-65 ¶¶ 32-34. Based on the new evidence, the FCC allowed LECs to resume charging intrastate originating access rates for VoIP calls for two years. *Id.* at 1165-66 ¶ 35. Although originating VoIP intrastate access charges would be capped at interstate levels after two years, the FCC did not allow use of its recovery mechanism to recoup lost revenue. *See id.* at 1165 ¶ 35 n.97.

Windstream invokes the APA to challenge this treatment of intrastate VoIP originating access charges on four grounds: (1) The FCC failed in the initial order to provide a reasoned explanation for reducing origination charges for VoIP traffic; (2) the

FCC acted irrationally in treating VoIP originating access differently than originating access for traditional landline service; (3) the FCC failed to provide funding support; and (4) the FCC acted arbitrarily and capriciously in failing to grant relief for the initial six-month period preceding the Second Reconsideration Order. Windstream Principal Br. at 20-32 (July 17, 2013); Windstream Reply Br. at 15 (July 31, 2013). We reject these arguments.

1. Windstream's Challenge to the FCC's Explanation in the Original Order

Windstream contends that in the original order, the FCC failed to explain the decision to "flash-cut[] intrastate VoIP originating access rates to much-lower interstate rates." Windstream Principal Br. at 20 (July 17, 2013). According to Windstream, the FCC did not clearly reduce VoIP originating access charges because the discussion involved only terminating access. *Id.* at 21-22.

We reject Windstream's characterization of the original order. There the FCC stated that it would reduce intrastate VoIP originating access charges to the same level as interstate rates. In the Order, the FCC: (1) defined "VoIP-PSTN traffic" to cover "traffic exchanged over PSTN facilities that originates and/or terminates in IP format," and (2) stated that "VoIP-PSTN traffic" would be "subject to charges not more than originating and terminating interstate access rates." 2 R. at 732-33 ¶ 940, 746-47 ¶ 961.[11] This

[11] Windstream argues that footnote 1976 undermines this reading of the Order. Windstream Principal Br. at 21 (July 17, 2013). We disagree. Though footnote 1976 appears in the VoIP section of the Order, it generally discusses originating access charges under 47 U.S.C. § 251(b)(5) and the anticipated reforms involving originating access.

language is clear even though the FCC elsewhere focused on terminating access charges. The FCC's VoIP framework applied to the origination of access VoIP traffic.

The FCC also explained its decision to cap VoIP intrastate originating access charges at interstate rates. In the Order, the FCC established (for the first time) an entitlement to originating and terminating access charges for VoIP traffic during the transition to bill-and-keep. *Id.* at 729 ¶ 933.

When the FCC issued its initial order, it had little reason to believe that billing disputes were more prevalent for termination than for origination. Thus, termination and origination were subjected to the same rules. *See id.* at 730-32 ¶¶ 937-39. After the Order was issued, Windstream presented evidence that disputes were less frequent for origination than for termination. *Id.* at 1164 ¶ 33. This evidence prompted the FCC to modify its order, and we must now review the FCC's explanation for the new version. *Id.* at 1164-66 ¶¶ 34-35.

2. Windstream's Challenge to the FCC's Explanation for the New Rule

Windstream contends that the FCC failed to explain its decision to treat originating access VoIP traffic differently than traditional originating access traffic. Windstream Principal Br. at 22-24 (July 17, 2013). In the Second Reconsideration Order, the FCC determined that "there were fewer disputes and instances of non-payment or under-payment of origination charges billed at intrastate originating access rates for intrastate

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See 2 R. at 746 n.1976.

toll VoIP traffic than was the case for terminating charges for such traffic." 2 R. at 1164 ¶ 33. Arguing that this acknowledgment applies equally to originating access charges for traditional service, Windstream contends that the FCC failed to explain why it was treating intrastate originating access differently in VoIP and traditional service. Windstream Principal Br. at 24 (July 17, 2013). We reject this contention.

The FCC explained that in the overarching transition to bill-and-keep for all traffic, originating access charges need not be treated the same for traditional service and VoIP service. 2 R. at 1162-63 ¶ 31. In the initial order, the FCC pointed out that it was adopting "a distinct prospective intercarrier compensation framework for VoIP traffic based on its findings specific to that traffic." *Id.* But before entry of the original order, the FCC had not extended access charges to VoIP traffic; thus, carriers had less reason to rely on continuing revenue for VoIP intercarrier compensation. *See id.* at 1162 ¶ 31 & n.84. Without this reliance interest, the FCC thought LECs should have to justify extension of the intercarrier compensation regime for VoIP traffic during the transition. *See id.*

In the Second Reconsideration Order, the FCC credited evidence that carriers were actually receiving originating access charges for VoIP traffic. *Id.* at 1164 ¶ 33. Whether entitled to the access charges or not, carriers were collecting these charges on VoIP traffic; and with this reality, the FCC gave carriers two years to charge the higher origination rates for intrastate access on VoIP traffic. *See id.* at 1165-66 ¶ 35.

In doing so, the FCC was careful to address originating VoIP access traffic in the context of its transitional VoIP intercarrier compensation regime. *See id.* In the context of the FCC's transition to bill-and-keep for all traffic, this decision was not arbitrary and capricious. *See Sorenson Commc'ns, Inc. v. FCC*, 659 F.3d 1035, 1046 (10th Cir. 2011) (stating that special deference is given to transitional measures).

3. Windstream's Challenge to the FCC's Failure to Provide Funding Support

Windstream also challenges the FCC's refusal to provide funding support for reductions in intrastate originating VoIP access charges, calling the refusal arbitrary and capricious. Windstream Principal Br. at 25-29 (July 17, 2013). This challenge is rejected.

In other parts of the Order, the FCC: (1) emphasized its "commitment to a gradual transition" to bill-and-keep and rejection of flash-cuts, and (2) adopted a funding mechanism for traditional terminating access charges because "[p]redictable recovery during the intercarrier compensation reform transition [was] particularly important to ensure that carriers '[could] maintain/enhance their networks while still offering service to end-users at reasonable rates.'" 2 R. at 695 ¶ 870, 689-90 ¶ 858, 704 ¶ 890. And, the FCC decided not to reduce traditional originating access charges until it could "further evaluate the timing, transition, and possible need for a recovery mechanism." *Id.* at 632 ¶ 739. With these statements, Windstream argues that the FCC failed to explain its

refusal to adopt a recovery mechanism for the reduction in intrastate originating VoIP access charges. Windstream Principal Br. at 25-29 (July 17, 2013). We disagree.

The FCC provided carriers with a two-year transition period before lowering intrastate VoIP originating access charges to interstate levels. 2 R. at 1165-66 ¶ 35. With this step, the FCC explained that reduction in intrastate originating VoIP access charges would not require replacement revenue in the context of "the Commission's overall VoIP intercarrier compensation framework." *Id.* The FCC predicted that under its VoIP intercarrier compensation framework, "most providers [would] receive, either via negotiated agreements or via tariffed charges, additional revenues for previously disputed terminating VoIP calls and [would] also realize savings associated with reduced litigation and disputes." *Id.* In light of these benefits, the FCC found that "indefinitely permitting origination charges at the level of intrastate access for prospective intrastate toll VoIP traffic [was] not necessary to ensure a measured transition." *Id.* Thus, in capping VoIP intrastate originating access charges without a separate recovery mechanism, the FCC reasoned that carriers would obtain sufficient revenue. *Id.*

This explanation sufficed under the APA. In transitioning the industry to bill-and-keep for all traffic, the FCC could reasonably conclude that the interim measures would ease many of the burdens on LECs. As recognized above, we give substantial deference to interim regulations and transitional measures. *See Sorenson Commc'ns, Inc.*, 659 F.3d at 1046. And we are "particularly deferential when [we] review[] an agency's predictive

judgments, especially those within the agency's field of discretion and expertise." *Franklin Sav. Ass'n v. Dir., Office of Thrift Supervision*, 934 F.2d 1127, 1146 (10th Cir. 1991).

We apply these principles in reviewing the FCC's prediction that carriers would obtain sufficient revenue for terminating access to offset losses in revenue for originating VoIP access. Windstream criticizes this prediction on four grounds: (1) The FCC did not address the absence of a recovery mechanism for intrastate VoIP originating access charges; (2) the FCC failed to support its assertion that carriers would receive sufficient revenue in the overall context of the VoIP intercarrier compensation framework; (3) a flash cut would occur at the end of the two-year transition period; and (4) the FCC was inconsistent in establishing a recovery mechanism for the loss of access charges for terminating VoIP, but not originating VoIP access. Windstream Reply Br. at 10-15 (July 31, 2013). We reject each argument.

The FCC found that a recovery mechanism was unnecessary for intrastate VoIP originating access charges. *See* 2 R. at 1165-66 ¶ 35. The FCC explained its approach to "the transition of origination charges for intrastate toll VoIP traffic in the context of the Commission's overall VoIP intercarrier compensation framework." *Id.* The FCC predicted that most providers would receive "additional revenues for previously disputed terminating VoIP calls" and save in litigation costs. *Id.* These predictions led the FCC to

conclude that a recovery mechanism was not necessary to prevent undue disruption from reduced charges for the origination of intrastate calls. *See id.*

We also reject Windstream's argument (presented in its reply brief)[12] that intercarrier compensation would be inadequate. This argument was omitted in Windstream's opening brief; thus, the argument has been waived. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998).

Windstream characterizes the two-year transition period as an unwarranted "flash cut." Windstream Principal Br. at 19-24 (July 17, 2013). But the FCC applied its institutional expertise in concluding that carriers could adjust their business models before dropping rates. We again have little reason to question the FCC's predictive judgment based on Windstream's characterization of the two-year period as a "flash cut."

In addition, Windstream argues that the FCC acted inconsistently by creating a recovery mechanism for reductions in access charges for termination, but not origination. Windstream Reply Br. at 14-15 (July 31, 2013). The FCC acknowledged the difference, but explained it. *See* 2 R. at 1165-66 ¶ 35. This explanation was based on the disputed nature of termination charges for VoIP providers. *See id.* By resolving these disputes in favor of VoIP providers, the FCC reasoned that access charges for termination access could be used to offset reduction in revenue for origination access. *Id.* With greater overall termination charges for VoIP carriers, the FCC could reasonably decline to offer a recovery mechanism for losses in origination charges.

[12] Windstream Reply Br. at 11-12 (July 31, 2013).

As Windstream points out, the FCC provided different treatment for origination- and termination-charges; but the FCC explained the difference. This explanation might have been debatable, but it was neither arbitrary nor capricious. As a result, we defer to the FCC in applying its institutional expertise when it declined to provide a separate recovery mechanism for lost revenue in originating access.

4. Windstream's Challenge to the Initial Period of Six Months

Windstream argues that the FCC should have ordered carriers to pay higher originating access rates retroactively for the six-month period between the initial order and the second reconsideration order. Windstream Principal Br. at 29-32 (July 17, 2013). Even if the FCC could require retroactive payment of higher rates, the FCC could have chosen to make the higher rates prospective (rather than retroactive). *See Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512, 520 (D.C. Cir. 1999). And Windstream did not ask the FCC to exercise this discretion in the petition for rehearing. 6 R. at 4076-84. Because the FCC would have had no obligation to consider the issue *sua sponte*, we decline to disturb the Order on this ground.

VI. Conclusion

We deny all of the petitions for review involving the FCC's regulations regarding intercarrier compensation. In addition, we deny the FCC's Motion to Strike New Arguments in the Joint Intercarrier Compensation Reply Brief of Petitioners.

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FILED
United States Court of Appeals
Tenth Circuit

May 23, 2014

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

IN RE: FCC 11-161

No. 11-9900

DIRECT COMMUNICATIONS CEDAR VALLEY, LLC, a Utah limited liability company; TOTAH COMMUNICATIONS, INC., an Oklahoma corporation; H & B COMMUNICATIONS, INC., a Kansas Corporation; MOUNDRIDGE TELEPHONE COMPANY, a Kansas corporation; PIONEER TELEPHONE ASSOCIATION, INC., a Kansas corporation; TWIN VALLEY TELEPHONE, INC., a Kansas corporation; PINE TELEPHONE COMPANY, INC., an Oklahoma corporation; PENNSYLVANIA PUBLIC UTILITY COMMISSION; CHOCTAW TELEPHONE COMPANY; CORE COMMUNICATIONS, INC.; NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES; NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION d/b/a NTCA-THE RURAL BROADBAND ASSOCIATION; CELLULAR SOUTH, INC.; AT&T INC.; HALO WIRELESS, INC.; THE VOICE ON THE NET COALITION, INC.; PUBLIC UTILITIES COMMISSION OF OHIO; TW TELECOM INC.; VERMONT PUBLIC SERVICE BOARD; TRANSCOM ENHANCED SERVICES, INC.; THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS; CENTURYLINK, INC.; GILA RIVER INDIAN COMMUNITY; GILA RIVER TELECOMMUNICATIONS, INC.;

Consolidated Case Nos.:
11-9581, 11-9585, 11-9586, 11-9587, 11-9588, 11-9589, 11-9590, 11-9591, 11-9592, 11-9594, 11-9595, 11-9596, 11-9597, 12-9500, 12-9510, 12-9511, 12-9513, 12-9514, 12-9517, 12-9520, 12-9521, 12-9522, 12-9523, 12-9524, 12-9528, 12-9530, 12-9531, 12-9532, 12-9533, 12-9534, 12-9575

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ALLBAND COMMUNICATIONS COOPERATIVE; NORTH COUNTY COMMUNICATIONS CORPORATION; UNITED STATES CELLULAR CORPORATION; PR WIRELESS, INC.; DOCOMO PACIFIC, INC.; NEX-TECH WIRELESS, LLC; CELLULAR NETWORK PARTNERSHIP, A LIMITED PARTNERSHIP; U.S. TELEPACIFIC CORP.; CONSOLIDATED COMMUNICATIONS HOLDINGS, INC.; NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS; RURAL TELEPHONE SERVICE COMPANY, INC.; ADAK EAGLE ENTERPRISES LLC; ADAMS TELEPHONE COOPERATIVE; ALENCO COMMUNICATIONS, INC.; ARLINGTON TELEPHONE COMPANY; BAY SPRINGS TELEPHONE COMPANY, INC.; BIG BEND TELEPHONE COMPANY, INC.; THE BLAIR TELEPHONE COMPANY; BLOUNTSVILLE TELEPHONE LLC; BLUE VALLEY TELE-COMMUNICATIONS, INC.; BLUFFTON TELEPHONE COMPANY, INC.; BPM, INC., d/b/a Noxapater Telephone Company; BRANTLEY TELEPHONE COMPANY, INC.; BRAZORIA TELEPHONE COMPANY; BRINDLEE MOUNTAIN TELEPHONE LLC; BRUCE TELEPHONE COMPANY, INC.; BUGGS ISLAND TELEPHONE COOPERATIVE; CAMERON TELEPHONE COMPANY, LLC; CHARITON VALLEY TELEPHONE CORPORATION; CHEQUAMEGON COMMUNICATIONS COOPERATIVE, INC.; CHICKAMAUGA TELEPHONE CORPORATION;

CHICKASAW TELEPHONE COMPANY; CHIPPEWA COUNTY TELEPHONE COMPANY; CITIZENS TELEPHONE COMPANY; CLEAR LAKE INDEPENDENT TELEPHONE COMPANY; COMSOUTH TELECOMMUNICATIONS, INC.; COPPER VALLEY TELEPHONE COOPERATIVE; CORDOVA TELEPHONE COOPERATIVE; CROCKETT TELEPHONE COMPANY, INC.; DARIEN TELEPHONE COMPANY; DEERFIELD FARMERS' TELEPHONE COMPANY; DELTA TELEPHONE COMPANY, INC.; EAST ASCENSION TELEPHONE COMPANY, LLC; EASTERN NEBRASKA TELEPHONE COMPANY; EASTEX TELEPHONE COOP., INC.; EGYPTIAN TELEPHONE COOPERATIVE ASSOCIATION; ELIZABETH TELEPHONE COMPANY, LLC; ELLIJAY TELEPHONE COMPANY; FARMERS TELEPHONE COOPERATIVE, INC.; FLATROCK TELEPHONE COOP., INC.; FRANKLIN TELEPHONE COMPANY, INC.; FULTON TELEPHONE COMPANY, INC.; GLENWOOD TELEPHONE COMPANY; GRANBY TELEPHONE LLC; HART TELEPHONE COMPANY; HIAWATHA TELEPHONE COMPANY; HOLWAY TELEPHONE COMPANY; HOME TELEPHONE COMPANY (ST. JACOB, ILL.); HOME TELEPHONE COMPANY (MONCKS CORNER, SC); HOPPER TELECOMMUNICATIONS LLC; HORRY TELEPHONE COOPERATIVE, INC.; INTERIOR TELEPHONE COMPANY; KAPLAN TELEPHONE COMPANY, INC.; KLM

TELEPHONE COMPANY; CITY OF KETCHIKAN, ALASKA, d/b/a KPU Telecommunications; LACKAWAXEN TELECOMMUNICATIONS SERVICES, INC.; LAFOURCHE TELEPHONE COMPANY, LLC; LA HARPE TELEPHONE COMPANY, INC.; LAKESIDE TELEPHONE COMPANY; LINCOLNVILLE TELEPHONE COMPANY; LORETTO TELEPHONE COMPANY, INC.; MADISON TELEPHONE COMPANY; MATANUSKA TELEPHONE ASSOCIATION, INC.; MCDONOUGH TELEPHONE COOPERATIVE; MGW TELEPHONE COMPANY, INC.; MID CENTURY COOPERATIVE.; MIDWAY TELEPHONE COMPANY; MID-MAINE TELECOM LLC; MOUND BAYOU TELEPHONE & COMMUNICATIONS, INC.; MOUNDVILLE TELEPHONE COMPANY, INC.; MUKLUK TELEPHONE COMPANY, INC.; NATIONAL TELEPHONE OF ALABAMA, INC.; ONTONAGON COUNTY TELEPHONE COMPANY; OTELCO MID-MISSOURI LLC; OTELCO TELEPHONE LLC; PANHANDLE TELEPHONE COOPERATIVE, INC.; PEMBROKE TELEPHONE COMPANY, INC.; PEOPLES TELEPHONE CO.; PEOPLES TELEPHONE COMPANY; PIEDMONT RURAL TELEPHONE COOPERATIVE, INC.; PINE BELT TELEPHONE COMPANY, INC.; PINE TREE TELEPHONE LLC; PIONEER TELEPHONE COOPERATIVE, INC.; POKA LAMBRO TELEPHONE COOPERATIVE, INC.; PUBLIC SERVICE TELEPHONE COMPANY;

RINGGOLD TELEPHONE COMPANY; ROANOKE TELEPHONE COMPANY, INC.; ROCK COUNTY TELEPHONE COMPANY; SACO RIVER TELEPHONE LLC; SANDHILL TELEPHONE COOPERATIVE, INC.; SHOREHAM TELEPHONE LLC; THE SISKIYOU TELEPHONE COMPANY; SLEDGE TELEPHONE COMPANY; SOUTH CANAAN TELEPHONE COMPANY; SOUTH CENTRAL TELEPHONE ASSOCIATION; STAR TELEPHONE COMPANY, INC.; STAYTON COOPERATIVE TELEPHONE COMPANY; THE NORTH-EASTERN PENNSYLVANIA TELEPHONE COMPANY; TIDEWATER TELECOM, INC.; TOHONO O'ODHAM UTILITY AUTHORITY; UNITEL, INC.; WAR TELEPHONE LLC; WEST CAROLINA RURAL TELEPHONE COOPERATIVE, INC.; WEST TENNESSEE TELEPHONE COMPANY, INC.; WEST WISCONSIN TELCOM COOPERATIVE, INC.; WIGGINS TELEPHONE ASSOCIATION; WINNEBAGO COOPERATIVE TELECOM ASSOCIATION; YUKON TELEPHONE CO., INC.; ARIZONA CORPORATION COMMISSION; WINDSTREAM CORPORATION; WINDSTREAM COMMUNICATIONS, INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,

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Respondents,

and

SPRINT NEXTEL CORPORATION; LEVEL 3 COMMUNICATIONS, LLC; CENTURYLINK, INC.; CONNECTICUT PUBLIC UTILITIES REGULATORY AUTHORITY; INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE; WESTERN TELECOMMUNICATIONS ALLIANCE; NATIONAL EXCHANGE CARRIER ASSOCIATION, INC.; ARLINGTON TELEPHONE COMPANY; THE BLAIR TELEPHONE COMPANY; CAMBRIDGE TELEPHONE COMPANY; CLARKS TELECOMMUNICATIONS CO.; CONSOLIDATED TELEPHONE COMPANY; CONSOLIDATED TELCO, INC.; CONSOLIDATED TELECOM, INC.; THE CURTIS TELEPHONE COMPANY; EASTERN NEBRASKA TELEPHONE COMPANY; GREAT PLAINS COMMUNICATIONS, INC.; K. & M. TELEPHONE COMPANY, INC.; NEBRASKA CENTRAL TELEPHONE COMPANY; NORTHEAST NEBRASKA TELEPHONE COMPANY; ROCK COUNTY TELEPHONE COMPANY; THREE RIVER TELCO; RCA - The Competitive Carriers Association; RURAL TELECOMMUNICATIONS GROUP, INC.; T-MOBILE USA, INC., CENTRAL TEXAS TELEPHONE COOPERATIVE, INC.; VENTURE COMMUNICATIONS COOPERATIVE, INC.; ALPINE COMMUNICATIONS, LC; EMERY TELCOM; PEÑASCO VALLEY TELEPHONE COOPERATIVE, INC.; SMART CITY TELECOM; SMITHVILLE

COMMUNICATIONS, INC.; SOUTH
SLOPE COOPERATIVE TELEPHONE
CO., INC.; SPRING GROVE
COMMUNICATIONS; STAR
TELEPHONE COMPANY; 3 RIVERS
TELEPHONE COOPERATIVE, INC.;
WALNUT TELEPHONE COMPANY,
INC.; WEST RIVER COOPERATIVE
TELEPHONE COMPANY, INC.; RONAN
TELEPHONE COMPANY; HOT
SPRINGS TELEPHONE COMPANY;
HYPERCUBE TELECOM, LLC;
VIRGINIA STATE CORPORATION
COMMISSION OF THE STATE OF
KANSAS; MONTANA PUBLIC
SERVICE COMMISSION; VERIZON
WIRELESS; VERIZON; AT&T INC.;
COX COMMUNICATIONS, INC.;
NATIONAL TELECOMMUNICATIONS
COOPERATIVE ASSOCIATION d/b/a
NTCA-THE RURAL BROADBAND
ASSOCIATION; INDEPENDENT
TELEPHONE &
TELECOMMUNICATIONS ALLIANCE;
NATIONAL EXCHANGE CARRIER
ASSOCIATION, INC. (NECA),
COMCAST CORPORATION; VONAGE
HOLDINGS CORPORATION; RURAL
TELECOMMUNICATIONS GROUP,
INC.; NATIONAL CABLE &
TELECOMMUNICATIONS
ASSOCIATION; CENTRAL TEXAS
TELEPHONE COOPERATIVE, INC.;
VENTURE COMMUNICATIONS
COOPERATIVE, INC.; ALPINE
COMMUNICATIONS, LC; EMERY
TELCOM; PEÑASCO VALLEY
TELEPHONE COOPERATIVE, INC.;
SMART CITY TELECOM; SMITHVILLE
COMMUNICATIONS, INC.; SOUTH
SLOPE COOPERATIVE TELEPHONE

CO., INC.; SPRING GROVE COMMUNICATIONS; STAR TELEPHONE COMPANY; 3 RIVERS TELEPHONE COOPERATIVE, INC.; WALNUT TELEPHONE COMPANY, INC.; WEST RIVER COOPERATIVE TELEPHONE COMPANY, INC.; RONAN TELEPHONE COMPANY; HOT SPRINGS TELEPHONE COMPANY; HYPERCUBE TELECOM, LLC,

Intervenors.

STATE MEMBERS OF THE FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE,

Amicus Curiae.

JUDGMENT

Before **BRISCOE**, Chief Circuit Judge, **HOLMES**, Circuit Judge, and **BACHARACH**, Circuit Judge.

It is the judgment of this court that the petitions for review filed in these consolidated proceedings involving rulemaking by the Federal Communications Commission are denied. The court has addressed the thirty-one consolidated petitions for review in two separately authored opinions being issued together.

With regard to the issues raised in the opinion authored by Chief Judge Briscoe, Judge Holmes joins and Judge Bacharach dissents in part but otherwise joins.

With regard to the issues raised in the opinion authored by Judge Bacharach, Chief Judge Briscoe and Judge Holmes join.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk