BRIEF FOR RESPONDENTS

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

NO. 10-1184

VERMONT PUBLIC SERVICE BOARD AND MAINE PUBLIC UTILITIES COMMISSION

PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA

RESPONDENTS.

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

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties

Petitioners are the Vermont Public Service Board and the Maine Public Utilities Commission (collectively "petitioners"). Respondents are the Federal Communications Commission and the United States. Verizon and the National Association of State Utility Consumer Advocates ("NASUCA") have intervened in support of Respondents. Qwest intervened in this case and elected not to file a brief. Respondents are unaware of any amicus curiae.

B. Ruling Under Review

High-Cost Universal Service Support, 25 FCC Rcd 4072 (2010), 75 Fed. Reg. 26,137 (May 11, 2010) (JA).

C. Related Cases

The Order on review, which responds to a remand from the Tenth Circuit Court of Appeals, *see Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222 (10th Cir. 2005), has not been reviewed by this Court or any other court. Counsel are not aware of any related cases that are pending before this Court or any other court.

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GLOSSARY

ETCs	Eligible Telecommunications Carriers
FCC	Federal Communications Commission
FNPRM	Further Notice of Proposed Rulemaking
LEC	Local Exchange Carrier
NASUCA	National Association of State Consumer Advocates
NOI	Notice of Inquiry
NPRM	Notice of Proposed Rulemaking
Petitioners	Maine Public Utilities Commission and Vermont Public Service Board
VoIP	Voice over Internet Protocol Services

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STATEMENT OF JURISDICTION

The *Order* on review was released on April 16, 2010, and was published in the *Federal Register* on May 11, 2010. *High-Cost Universal Service Support,* 25 FCC Rcd 4072 (2010), 75 Fed. Reg. 26,137 (May 11, 2010) ("*Order*") (JA). The Court has jurisdiction to review final Federal Communications Commission rulemaking orders pursuant to 47 U.S.C. §402(a) and 28 U.S.C. §2342(1).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are appended to this brief.

STATEMENT OF ISSUES

This case concerns the Federal Communications Commission's (the "FCC" or "Commission") high-cost universal service support program for non-rural carriers – one of the FCC's programs designed to promote universal consumer access to "an evolving level of telecommunications services," 47 U.S.C. §254(c)(1). Under section 254 of the Communications Act of 1934, 47 U.S.C. §254, the Commission's "universal service" policies are guided by several "principles." As relevant here, these principles include: (1) that there should be "specific, predictable, and sufficient" federal and state universal service mechanisms (47 U.S.C. §254(b)(5)); (2) that quality services should be available at just, reasonable, and affordable rates (47 U.S.C. §254(b)(1)); and (3) that consumers in all regions of the nation should have access to telecommunications and information services that are "reasonably comparable" in rates and quality to those provided in urban areas (47 U.S.C. §254(b)(3)).

In the *Order* on review, the FCC responded to a decision by the United States Court of Appeals for the Tenth Circuit, which remanded an earlier FCC order regarding non-rural high-cost universal service support. *Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222 (10th Cir. 2005) ("*Qwest II*"). In response to the Tenth Circuit's directives, the FCC: (1) explained its interpretation of the undefined terms "reasonably comparable" and "sufficient" in sections 254(b)(3) and 254(b)(5) and (e) of the Act, 47 U.S.C. §254(b)(3), (b)(5) and (e); (2) determined that the current level of federal non-rural high-cost support is "sufficient" within the meaning of sections 254(b)(5) and (e); and (3) concluded

that its current mechanism for allocating those federal funds comports with section 254's universal service objectives. In so doing, the FCC rejected petitioners' primary proposal to modify the high-cost support system in a way that would have resulted in a $2.725 billion annual increase in universal service funding, a burden that consumers ultimately would have shouldered by paying higher charges for telecommunications.

The issue before this Court is whether the *Order* is consistent with the Communications Act and the *Qwest II* decision, and reasonably based on the FCC's expert assessment of the record.

COUNTERSTATEMENT

I. Statutory Background

The availability of reasonably priced telecommunications services in all parts of the nation is a longstanding goal of regulation under the Communications Act. The FCC has a mandate to regulate interstate communications "so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges. . . ." 47 U.S.C. §151. The FCC has interpreted this statute to authorize universal service policies to promote affordable access to telephone service in areas where costs otherwise might be prohibitive.[1]

When local telephone markets were protected monopolies, states and, to a lesser extent, the FCC relied largely on implicit subsidies to further universal

[1] The cost of providing telephone service is typically relatively high in rural areas due to low population density, terrain, and other factors.

service. *See Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 406 (5th Cir. 1999) ("*TOPUC*") ("Implicit subsidies . . . involve the manipulation of rates for some customers to subsidize more affordable rates for others."). Under this system, regulators might, for example, "require the carrier to charge 'above-cost' rates to low-cost, profitable urban customers to offer the 'below-cost' rates to expensive, unprofitable rural customers." *Id.*

The system of implicit subsidies became unsustainable when Congress opened the local telephone market to competition in the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56, which amended the Communications Act. 47 U.S.C. § 251, 252. As the court explained in *TOPUC*, "implicit subsidies can work well only under regulated conditions. In a competitive environment, a carrier that tries to subsidize below-cost rates to rural customers with above-cost rates to urban customers is vulnerable to a competitor that offers at-cost rates to urban customers." 183 F.3d at 406.

In the 1996 amendments to the Communications Act, Congress therefore specified that any federal universal service mechanisms should be "explicit" and "sufficient to achieve the purposes" of section 254. 47 U.S.C. §254(e). At the same time, Congress reaffirmed the FCC's longstanding commitment to universal service principles, and preserved the Commission's existing policy of providing support for low-income consumers and for carriers serving high-cost areas. 47 U.S.C. §254(b)(3), (e), (j).

In section 254, Congress required the FCC to convene a Federal-State Joint Board to recommend universal service reforms, and delegated authority to the FCC

to adopt rules to implement the new universal service provisions in the Act. 47 U.S.C. §254(a). It also established a non-exclusive list of principles on which the FCC and the Joint Board must base universal service policies. 47 U.S.C. §254(b)(1)-(7). Of particular relevance here, Congress directed that: (1) there should be "specific, predictable and sufficient" federal and state universal service mechanisms (47 U.S.C. §254(b)(5)); (2) "[q]uality services should be available at just, reasonable, and affordable rates" (47 U.S.C. §254(b)(1)); and (3) "[c]onsumers in all regions of the Nation" should have access to telecommunications and information services that are "reasonably comparable" in rates and quality to those provided in urban areas (47 U.S.C. §254(b)(3)).

II. The FCC's High-Cost Universal Service Support Mechanism for Non-Rural Carriers

In 1997, after receiving the Joint Board's recommendations, the FCC adopted rules to implement the new universal service provisions of the Act. *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 (1997) ("*First Report and Order*"). The *First Report and Order* defined a set of "core" services eligible for universal service support, established a fund (known as the federal universal service fund) to support those services, and set a timetable for implementation.

The federal universal service fund is financed primarily by assessments paid by providers of interstate telecommunications services. *See* 47 C.F.R. §54.706. Such contributions are to be made on "an equitable and nondiscriminatory basis" to support "the specific, predictable, and sufficient mechanisms established by the

Commission to preserve and advance universal service." 47 U.S.C. §254(d). Fund assessments are determined by applying a quarterly "contribution factor" to the contributors' reported interstate and international revenues. *Order* ¶21 n.72 (JA). "Fund contributors are permitted to, and almost always do, pass [these] assessments through to their end-user customers," *id*. (JA), typically in the form of line items on their customers' bills.

The universal service fund consists of four separate and complementary FCC programs: (1) the schools and libraries program; (2) the low-income support program; (3) the rural health care program; and (4) the high-cost support program. *Order* ¶26 (JA). The non-rural high-cost support mechanism – the program at issue in this case – is one component of the larger federal high-cost support program.[2] Other high-cost support mechanisms also provide universal service support to rural, insular and other high-cost areas. *Id*. ¶27 n.92 (JA). As of 2010, the non-rural mechanism disbursed $357 million annually – or about 8 percent of the $4.75 billion in high-cost support distributed that year.[3]

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[2] Under the Act, the "rural" or "non-rural" designation depends not only on the nature of the area served by a local exchange carrier ("LEC"), but also the LEC's size. *See* 47 U.S.C. § 153(44). "In short, a rural carrier is one that serves rural, sparsely populated areas or that is small in size." *Qwest Corp. v. FCC*, 258 F.3d 1191, 1204 (10th Cir. 2001) ("*Qwest I*") (discussing 47 U.S.C. § 153(37), which was subsequently reordered as 47 U.S.C. § 153(44)). "Non-rural carriers," on the other hand, "are larger and serve at least some urban areas." *Id.* at 1196.

[3] 2010 Universal Service Monitoring Report (data through October 2010), Table 3.1 at 3-15 (Dec. 2010), *available at http://www.fcc.gov/wcb/iatd/monitor.html*

A. The *Ninth Report and Order* and the *Tenth Report and Order*

The FCC established a high-cost support mechanism for non-rural LECs in the *Ninth Report and Order*. *Federal-State Joint Board on Universal Service*, 14 FCC Rcd 20432, 20434 (¶2) (1999) ("*Ninth Report and Order*"). The mechanism made funding available in states where the average cost of service exceeded a benchmark of 135 percent of the national average cost per telephone line. *Ninth Report and Order*, 14 FCC Rcd at 20457-58, 20463-20465 (¶¶45-46, 54-56). Providing federal support to non-rural LECs in states with average costs substantially in excess of the national average, the FCC found, would enable those states to achieve reasonably comparable urban and rural rates. *Id*. at 20458 (¶46).

In separate orders, the FCC developed a computer model to estimate the forward-looking cost of providing service in rural areas served by non-rural LECs, *Federal-State Joint Board on Universal Service, Forward-Looking Mechanism for High-Cost Support for Non-Rural LECs*, 13 FCC Rcd 21323 (1998), and subsequently selected the input values to use in the model. *Federal-State Joint Board on Universal Service, Forward-Looking Mechanism for High Cost Support for Non-Rural LECs*, 14 FCC Rcd 20156 (1999) ("*Tenth Report and Order*").

B. *Qwest I*

On review, the Tenth Circuit remanded the *Ninth Report and Order* to the FCC. *Qwest I*, 258 F.3d 1191. The court held that, in adopting its support mechanism for non-rural LECs, the FCC had failed adequately to define the statutory terms "reasonably comparable" and "sufficient" when applying sections 254(b)(3) and (e), but instead had "substitute[d] different standards" in its

definitions of those terms. *Id.* at 1195, 1201-02. The court further concluded that the agency had "failed to explain how its 135% [cost] benchmark will help achieve the goal of reasonable comparability or sufficiency," but noted that "we likely would uphold the mechanism" if it "actually produced urban and rural rates that were reasonably comparable, however those terms are defined." *Id.* (footnote omitted).

The court also found that the agency had failed to (1) adequately induce the states to adopt their own mechanisms to support universal service in a manner consistent with section 254, and (2) explain how federal support for non-rural carriers relates to other federal support mechanisms. *Id.* at 1195. In clarifying the narrow scope of its holding, the court explained: "We do not decide the underlying issue of whether the funding is in fact sufficient; rather, we conclude that the FCC has not supported why the funding is sufficient." *Id.* The court "acknowledge[d] that the agency is entitled to deference in its line-drawing when it makes a reasoned decision." *Id.* at 1202.

Separately, the court affirmed the forward-looking cost model finalized in the *Tenth Report and Order*, noting that the challenged "technical aspects" of the model "fall squarely within the FCC's discretion as an expert agency." *Qwest I*, 258 F.3d at 1195, 1205-07.

C. The *2003 Remand Order*

The FCC responded to the Tenth Circuit's directives in the *2003 Remand Order*. *Federal-State Joint Board on Universal Service*, 18 FCC Rcd 22559 (2003) ("*2003 Remand Order*").

Revised Definitions of Key Statutory Terms. On remand, the FCC defined "reasonably comparable," as used in section 254(b)(3), to require that rates in rural areas fall within the nationwide range of rates for urban areas. *2003 Remand Order*, 18 FCC Rcd at 22583-84 (¶¶39-40). To identify that range, the FCC established a rate benchmark based on data from an annual survey of local telephone rates in 95 cities. *Id.* at 22580, 22582, 22607-09 (¶¶35, 38, 80-81). Applying a standard deviation analysis (rather than a percentage or dollar amount) to measure rate comparability, the agency set the benchmark at two standard deviations above the average urban rate.[4]

The FCC interpreted "sufficient," as used in sections 254(b)(5) and (e), as enough support to maintain reasonably comparable rural and urban rates. *2003 Remand Order*, 18 FCC Rcd at 22581 (¶36). Based on the record, the FCC concluded that the federal non-rural support mechanism provides sufficient support to enable states to achieve reasonably comparable rural and urban rates, and that the record did not support distributing substantially higher federal support for intrastate service. *Id.*; *see id.* at 22593 (¶55).

State Inducements. To induce state action to help maintain urban and rural rate comparability, the FCC required every state to certify annually whether its

[4] Standard deviation analysis, a commonly used method of statistical analysis, measures the difference between input values in a range and the mean or average. In a normal distribution, data points within two standard deviations of the mean will comprise approximately 95 percent of all data points. *Order* n.144 (JA). The FCC's standard deviation analysis resulted in a rate benchmark of $32.28. *2003 Remand Order*, 18 FCC Rcd at 22584-85 (¶41).

rural rates are reasonably comparable to urban rates nationwide, and to explain the basis for its conclusion. *Id.* at 22605, 22613-14 (¶¶76, 89-92). States may use the rate benchmark as a "safe harbor" to establish reasonable comparability. *Id.* at 22607-09, 22613-14 (¶¶80-82, 90). A state must certify that its rates are reasonably comparable, or establish a plan to attain rate comparability, as a condition for its receipt of federal universal service support for non-rural carriers. *Id.* at 22614 (¶92).

The FCC also allowed each state to request further federal action by demonstrating that, despite the state's best efforts, federal support and state action together have not achieved rate comparability. *Id*. at 22615-16 (¶¶93-96). Further federal action could include, but is not limited to, additional targeted support. *Id.* at 22614-15 (¶93).

Methodology for Determining Support and Cost Benchmark Level. The FCC also established criteria for deciding how federal universal service funds should be allocated among the states under the non-rural high-cost support mechanism. The FCC found that cost differences are the best measure of whether a particular state needs federal assistance to achieve intrastate rate comparability between urban and rural customers. The FCC explained that this approach permits federal funding to be determined on an equitable basis across states without regard to state policy choices that affect intrastate rates for particular customers. *Id.* at 22572-73 (¶23); *see also Order* ¶¶61-63 (JA).

The FCC established a benchmark of two standard deviations above the national average cost. *2003 Remand Order,* 18 FCC Rcd at 22599 (¶66). Non-

rural carriers may receive high-cost support in a state if the statewide average cost, as estimated by the FCC's forward-looking cost model, exceeds this cost benchmark.[5]

D. *Qwest II*

On review, the Tenth Circuit remanded the *2003 Remand Order* in part. *Qwest II*, 398 F.3d 1222. The Tenth Circuit identified three problems with the *2003 Remand Order*.

First, the Tenth Circuit found that the FCC erred in defining "sufficient" as "enough federal support to enable states to achieve reasonable comparability of rural and urban rates in high-cost areas served by non-rural carriers." *Qwest II*, 398 F.3d at 1233-34. As the court explained, "reasonable comparability" is just one of several principles that Congress directed the FCC to consider when crafting policies to preserve and advance universal service. *Id.* at 1234 (citing 47 U.S.C.

[5] Three different types of cost and rate comparisons are thus associated with the non-rural high-cost support mechanism. First, the FCC compares the statewide average cost per line to the national average cost per line (both estimated by the forward-looking cost-model) to determine high-cost support amounts. Only states with average per-line costs that exceed two standard deviations of the national average cost are eligible for non-rural high-cost support. *See* Section IV, below, pp. 39-44. Second, to induce states to meet their universal service obligations, the FCC requires states to certify that rural rates within their borders are reasonably comparable to urban rates, as required by section 254(b)(3). There is a rebuttable presumption that rural rates falling below the rate benchmark (currently set at two standard deviations of the average urban rate) are reasonably comparable. *See* Section III, below, pp. 33-39. Finally, in the *Order* on review, the FCC compared rural and urban rates both within and among states to respond to the Tenth Circuit's concern that rates in rural, insular, and high-cost areas may not be reasonably comparable to urban rates nationwide for purposes of section 254(b)(3) of the Act. *See* Section II, below, pp. 25-33.

§254(b)). The court understood the agency's definition as "suggesti[ng] that other principles, including affordability, do not underlie federal non-rural support mechanisms." *Id.* "On remand," the court directed, "the FCC must articulate a definition of 'sufficient' that appropriately considers the range of principles identified in the text of the statute." *Id.*

Second, the court held that the FCC's definition of "reasonably comparable" did not take into account the statutory principle of advancing (rather than just preserving) universal service. *See id.* at 1235-36; 47 U.S.C. §254(b). The Tenth Circuit directed the FCC on remand to "define the term 'reasonably comparable' in a manner that comports with its concurrent duties to preserve and advance universal service." *Qwest II*, 398 F.3d at 1237.

Finally, the Tenth Circuit deemed the non-rural high-cost support mechanism invalid because it rested on the application of the definition of "reasonably comparable" rates invalidated by the court. *Id.* at 1237. While the court acknowledged that it "would be inclined to affirm the FCC's cost-based funding mechanism if it indeed resulted in reasonably comparable rates," it found that the Commission had failed to provide "empirical findings supporting this conclusion." *Id.* "On remand," the court directed the FCC to "utilize its unique expertise to craft a support mechanism taking into account all the factors that Congress identified in drafting the Act and its statutory obligation to preserve *and* advance universal service." *Id.* (emphasis in original).

The Court separately affirmed the rate certification process used by the FCC to induce states to achieve rate comparability. *Id.* at 1238.

III. The Order on Review

On remand, the FCC issued a "narrow" order that specifically focused on the problems with the existing non-rural mechanism that the Tenth Circuit identified in *Qwest II*. *Order* ¶1 (JA).

The FCC explained at the outset that the evolution of universal service over recent years "inform[ed] [its] analysis of whether the non-rural mechanism, as currently structured, comports with section 254 of the Act." *Id.* ¶22 (JA). In particular, "[t]he communications marketplace has undergone significant changes since the Commission originally adopted the non-rural high-cost support mechanism in 1999." *Id.* ¶12 (JA). At that time, most customers received local telephone service from an incumbent LEC. *Id.* ¶12 (JA). But, the FCC noted, by 2010 "consumers are migrating away from traditional wireline telephone service." *Id.* (JA). Evidence in the record showed that "the vast majority of subscribers have a wireless phone in addition to a wireline phone," *id.* (JA), and "most of the population – including the rural population – now has access to wireless service offered by one or more different providers." *Id.* ¶15 (JA).

In response to the Tenth Circuit's concerns about the affordability of telephone coverage in certain areas of the country, the FCC analyzed telephone subscribership rates and consumer expenditure data. The FCC's data showed that the national telephone penetration rate (*i.e.*, the percentage of consumers across the nation with telephone service) had remained at consistently high levels since passage of the 1996 Act, and had increased to 95.7 percent – an all-time high – at the time of *Order*. *Id.* ¶18 (JA). The FCC further found that average consumer

expenditures on telephone service have remained relatively stable over time, even though consumers now receive additional services such as wireless as well as traditional wired telephone service. *Id.* ¶19 (JA). In addition, the real price of telephone service had declined, in real terms, between 1996 and 2006. *Id.*

Finally, the FCC analyzed the dramatic increase in overall universal service fund disbursements, which grew from $5.35 billion in 2001 to $7.26 billion in 2009. *Id.* ¶20 (JA). The FCC acknowledged that "[h]igh-cost support disbursements represent the majority of universal service expenditures, and are the primary driver of growth in overall universal service disbursements." *Id.* (JA). It also acknowledged that, as the universal service fund has grown larger, "so has the quarterly universal service contribution factor, which results in higher universal service contribution assessments [on carriers] and higher telephone bills for end-user customers." *Id.* (JA). Indeed, by early 2010, the contribution factor had risen to 15.3 percent of interstate and international revenues – "an all-time high" – forcing "many consumers [to] pay[] a surcharge of over 15 percent on the interstate portion of their monthly bill." *Id.* (JA).

Taking into account these important developments, the FCC then addressed the three specific issues that the *Qwest II* court directed the agency to address.

"Sufficient." On remand, the FCC "define[d] 'sufficient,'" as that undefined term is used in 47 U.S.C. §254(b)(5), "as an affordable and sustainable amount of support that is adequate, but no greater than necessary, to achieve the goals of the universal service program." *Id.* ¶30 (JA).

Addressing the Tenth Circuit's directive that it must consider all of the principles set forth in section 254(b), the FCC noted that it had developed four universal service programs (*i.e.*, high-cost, low-income, rural health care, and schools and libraries) to implement all the statutory requirements set forth in section 254 of the Act. *Id.* ¶26 (JA). Thus, the agency explained, "a fair assessment of . . . whether support is 'sufficient' for purposes of section 254(e)[] must . . . encompass the entirety of [the] universal service support programs." *Id.* ¶27 (JA).

The FCC further observed that "[t]he various objectives of section 254 impose practical limits on the fund." *Id.* ¶28 (JA). "If the universal service fund grows too large" as a result of efforts to satisfy one of the section 254(b) principles, "it will jeopardize other statutory mandates, such as ensuring affordable rates in all parts of the country." *Id.* (JA). Accordingly, the FCC concluded that it must "balance the principles [in] section 254(b) to ensure that support is sufficient but does not impose an excessive burden on *all* ratepayers." *Id.* (JA).

"In light of all these considerations," the FCC found that its new definition of "sufficient" satisfies the Tenth Circuit's directive. Unlike the prior definition, it is tied explicitly to all of the principles in section 254(b). *Id.* ¶30 (JA). It also expressly incorporates the principle of affordability by ensuring that universal service is sufficient without growing the universal service fund so large as to render unaffordable the rates for telecommunications services. *Id.* (JA).

Applying this definition, the FCC concluded that "the non-rural high-cost support mechanism, acting in conjunction with the Commission's other universal

service programs, provides sufficient support to achieve the universal service principles set forth in section 254(b) of the Act." *Id.* ¶31 (JA). The FCC explained that its universal service programs "have produced almost ubiquitous access to telecommunications services and very high telephone subscribership rates." *Id.* ¶31 (JA).

While some parties asserted the non-rural high-cost support mechanism provides insufficient universal service funding, the FCC noted that no party had demonstrated that customers in rural areas would lack access to affordable and reasonably comparable rates and services absent an increase in support. *Id.* ¶¶34-37 (JA). The agency thus rejected several proposals to "reform" the non-rural mechanism, including a proposal by petitioners that would have resulted in a $2.725 billion annual increase in the universal service fund (and a nine-fold increase in non-rural high-cost support). *Id.* ¶38 (JA). The FCC found no reason "to add to the already heavy universal service contribution burden placed on consumers" given its finding that universal service support is, in fact, sufficient. *Id.* (JA).

"Reasonably Comparable." Turning to section 254(b)(3)'s use of the undefined term "reasonably comparable," the agency further held that rural rates are "reasonably comparable" to urban rates if they fall within a reasonable range of the national average urban rate. *Id.* ¶53 (JA).

The FCC also considered whether the non-rural mechanism has actually produced reasonably comparable rates under its articulated standard. The agency concluded that rates for traditional wireline telephone service are reasonably

comparable across rural and urban areas and within states. *Id.* ¶¶43-49; Appendix C (JA). Uncontested data submitted by Verizon and the National Association of State Utility Consumer Advocates ("NASUCA") showed that "average rates are similar between urban and rural areas, and . . . the standard deviation of the rates is similar in rural and urban areas." *Id.* ¶43 (JA). In fact, as the FCC explained, "urban and rural rates often are the same" and "[t]o the extent there are differences, . . . the data show that urban rates within most states tend to be higher." *Id.* (JA).

The FCC acknowledged that one state – Wyoming – had demonstrated that its rural rates are not reasonably comparable to urban rates. *Id.* ¶50 (JA). Rather than adjusting the non-rural high-cost support mechanism to address Wyoming's needs, the FCC found that "unique situations like Wyoming's can be best addressed on an individualized, case-by-case basis." *Id.* ¶51 (JA). Indeed, in a separate Memorandum Opinion and Order, the FCC provided more than $2 million of annual supplemental high-cost support for the rural residential customers of Qwest in Wyoming. *Id.* ¶¶84-92 (JA).

The FCC next found that the non-rural support mechanism, as currently configured, has preserved *and* advanced universal service consistent with section 254. Steady increases in telephone subscribership, the agency explained, obviated the Tenth Circuit's concern that the variance between urban and rural areas could render rural rates unaffordable. *Order* ¶54 (JA). Furthermore, the FCC recognized that "consumer expenditures on telephone service have remained stable, and, as a result of increased broadband and wireless deployment, consumers can now choose among multiple universal service providers, not just traditional

wireline telephone companies." *Id.* ¶56 (JA). "[T]hese marketplace developments," the agency concluded, "demonstrate that the non-rural mechanism results in reasonably comparable rates that have advanced universal service." *Id.* (JA).

The Non-Rural High-Cost Support Mechanism. The FCC next held that the non-rural high-cost support mechanism comports with section 254. The agency explained that "[u]nrefuted empirical evidence in the record shows that wireline telephone rates are reasonably comparable in urban and rural areas, and where there is a discrepancy, rural rates tend to be *lower*." *Order* ¶59 (JA) (emphasis added). The FCC also noted that the affordability of rates was shown by the increase in telephone penetration rates, even while "average consumer expenditures on telephone service have remained stable." *Id.*

Collectively, this evidence "confirm[ed] that the non-rural high-cost support mechanism, working in conjunction with the Commission's other universal service programs, provides sufficient support." *Id.* Finally, the agency noted, the record showed that "the non-rural mechanism has both preserved *and* advanced the universal service objectives in section 254(b) of the Act, as demonstrated by increasing subscription rates and increasing access to different types of services." *Id.* (emphasis in original). In light of these findings, the FCC concluded that "no further action" was "required . . . to comply with the Tenth Circuit's *Qwest II* decision." *Id.* ¶60 (JA).

Comprehensive Reform and the National Broadband Plan. Finally, the FCC found that the congressionally mandated National Broadband Plan[6] "provides a separate and independent ground for keeping the existing non-rural high-cost support mechanism in place" at this time. *Id.* ¶83 (JA). The National Broadband Plan "recommends a comprehensive reform program" that would "shift" all high-cost universal service support away from "primarily supporting voice communications to supporting broadband platforms that enable many applications, including voice." *Id.* ¶79 (JA).

Accordingly, the FCC found that its efforts to "revise and improve high-cost support will be advanced" through the broader universal service proceedings that address recommendations of the National Broadband Plan, as opposed to the narrow proceeding in this case, which only concerned one component (*i.e.*, non-rural high-cost support) of the universal service program.[7] *Id.* ¶80 (JA). The FCC reasoned that providing non-rural carriers additional high-cost support for traditional voice service, even on an interim basis, would make it more difficult to

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[6] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009), charged the FCC with developing a national plan for broadband deployment. The FCC delivered a National Broadband Plan to Congress on March 16, 2010. The Plan is available at: http://www.broadband.gov/plan.

[7] The Commission initiated that proceeding shortly after it finalized the National Broadband Plan. *See Connect America Fund*, Notice of Inquiry and Notice of Proposed Rulemaking, 25 FCC Rcd 6657 (Apr. 21, 2010) ("*CAF NOI/ NPRM*"), 75 Fed. Reg. 26,906-02 (May 13, 2010). *See also Connect America Fund*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 2011 WL 466775 (Feb. 9, 2011) ("*USF/ICC Transformation NPRM*").

eventually phase out support for voice service and transition it to broadband, as recommended by the National Broadband Plan. *Id.* ¶82 (JA).

SUMMARY OF ARGUMENT

In the *Order* on review, the FCC responded to specific directives from the Tenth Circuit in *Qwest II*. In doing so, the agency explained its reasonable understanding of the relevant statutory terms ("reasonably comparable" rates and "sufficient" universal service support), and found that its current rules for providing high-cost universal service support to non-rural carriers satisfy section 254 of the Act. Rather than challenge the FCC's construction of the statute, petitioners instead attack the agency's underlying universal service policies, alleging that the FCC violated the Administrative Procedure Act ("APA"), 5 U.S.C. §§553 *et seq.*, when it found that those policies comport with the requirements of section 254 and, thus, should remain in effect pending comprehensive universal service reform. Under the APA, this Court must respect the FCC's policy choices unless they constitute an abuse of discretion. Petitioners have failed to make that showing.

Petitioners contend that the FCC erred in finding that rural and urban rates are reasonably comparable, as required by section 254(b)(3), because it failed to compare rural rates in each state to a national average urban rate. That argument is barred by section 405(a) of the Act because petitioners never presented it to the agency. Regardless, neither the statute nor FCC precedent bind the agency to this method of comparison, which the Tenth Circuit found deficient in *Qwest II*. On remand from that decision, the FCC justifiably took a different approach that

examined the variance in rural and urban rates both within and among states to find that rates are, in fact, reasonably comparable nationwide. It also reasonably relied on telephone penetration data – which showed steady increases in telephone subscribership – to demonstrate that rural rates are not too high to ensure universal access to basic telephone service. That analysis responded directly to concerns expressed by the court in *Qwest II*. In addressing the Tenth Circuit's concerns, the agency did not abuse its discretion.

Nor was the FCC required to lower the rate benchmark that is used to determine whether rural rates in a particular state satisfy section 254(b)(3). Petitioners emphasize that the Tenth Circuit invalidated that benchmark in *Qwest II*. But the Tenth Circuit did so only insofar as the benchmark rested on an "impermissible" reading of "reasonably comparable" in section 254(b)(3) – a reading that the agency subsequently revised in the *Order* at issue in this case. On remand, the Commission reinterpreted section 254(b)(3) to take into account the advancement of universal service, as the Tenth Circuit instructed. Thus, the rate benchmark the FCC employed – which the Tenth Circuit never rejected as inherently unreasonable – does not rest on the superseded statutory construction that the court rejected in *Qwest II*.

When the FCC has reasonably interpreted the relevant statutory terms, as it did in the *Order*, setting the rate benchmark is a line-drawing exercise that falls within the agency's unique expertise. The line the FCC drew in this case falls within a zone of reasonableness, as demonstrated by high telephone subscribership rates and the overall advancement of universal service while that rate benchmark

has been in effect. In any event, if a state can show that rates and services are not reasonably comparable, the FCC can provide that state supplemental high-cost support – as was done for Wyoming. Petitioners have never attempted to make such a showing for their states.

Petitioners complain that the FCC failed to consider proposals to lower the cost benchmark that determines high-cost support amounts for non-rural carriers. Petitioners make no attempt to defend their proposal to lower the benchmark to 125 percent of average urban cost – a proposal that would have resulted in a $2.725 billion annual increase in universal service funding. Instead, they contend that lowering the cost benchmark is mandatory if it costs ratepayers something less than that amount. The FCC, however, concluded that *any* increase in universal service support was unnecessary given empirical evidence showing that the current support level fulfills the requirements of section 254 of the Act. Consistent with this Court's decision in *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1102 (D.C. Cir. 2009), the FCC found that lowering the cost benchmark would have been contrary to the interests of consumers in net contributor states because it would have required them to contribute more than is necessary to ensure that rates are affordable and reasonably comparable in states like Maine and Vermont. Having rationally explained its line-drawing decision in determining the appropriate cost benchmark, the agency was not required to separately address – and repetitively reject – numerous alternative proposals that would have drawn the line in a different place. Nor was the agency required to consider specific proposals that

would reduce or eliminate funding for other universal service programs to offset the consumer impact of increased non-rural high-cost support.

Petitioners' challenge to the Commission's use of the forward-looking cost-model that the court upheld in *Qwest I* likewise fails. The FCC reasonably decided to use the existing model on an interim basis pending the development of a more advanced model that will estimate the cost of providing broadband.

Finally, the Commission acted reasonably in rejecting – as insufficiently supported by the record evidence – petitioners' claim that services in rural New England are not reasonably comparable to services in urban areas. Furthermore, because most states have established mechanisms to ensure service quality within their jurisdictions, the Commission reasonably declined petitioners' request to develop new federal reporting mechanisms to collect massive quantities of service-quality data to support compliance with section 254(b)(3). Indeed, in the 1997 *First Report and Order*, the FCC found no need to adopt new federal service quality reporting mechanisms solely for universal service purposes because such mechanisms would be redundant and inconsistent with the pro-competitive, de-regulatory national policy framework in the 1996 Act.

ARGUMENT

I. STANDARDS OF REVIEW

Judicial review of the Commission's interpretation of the Communications Act is governed by *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, if the intent of Congress is clear, then "the court, as well as the agency, must give effect to [that] unambiguously expressed

intent." *Id.* at 842-43. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. "*Chevron* requires a federal court to accept the agency's [reasonable] construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

Under the APA, the FCC's decision must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). This "very deferential" standard "focuses on the reasonableness of the agency's decisionmaking processes." *Rural Cellular Ass'n*, 588 F.3d at 1105. "[T]he ultimate standard of review is a narrow one," and the "court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The FCC need only articulate a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). Judicial deference to the FCC's "expert policy judgment" is especially appropriate when, as in this case, the "subject matter . . . is technical, complex, and dynamic." *Brand X*, 545 U.S. at 1003 (quoting *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002)).

II. THE FCC'S URBAN-TO-RURAL RATE ANALYSIS WAS RATIONAL AND CONSISTENT WITH SECTION 254(b)(3)

In response to the Tenth Circuit's remand in *Qwest II*, the FCC held that rural rates are "reasonably comparable" to urban rates within the meaning of section 254(b)(3) of the Act if they fall within a reasonable range of the national average urban rate. *Order* ¶53 (JA). Relying on the only comprehensive national rate data in the record, the FCC also examined the variance in rural and urban rates both within and among states to find that rates are, in fact, reasonably comparable nationwide. *Id.* ¶¶43-48 (JA). Specifically, the FCC compared: (1) the nationwide averages (or means) of urban rates and rural rates; (2) the standard deviations of urban rates and rural rates nationwide; and (3) urban rates and rural rates within the same state. *Order*, ¶¶43-48 (JA __).

Petitioners contend that the FCC acted arbitrarily and capriciously when it failed to compare rural rates on a state-by-state basis with a national average urban rate, which petitioners claim is the only permissible method of analysis. Br. 21-25. This claim should be dismissed because it is not properly before the Court. In any event, petitioners are wrong.

A. Petitioners Have Waived Their Challenge to the FCC's Urban-to-Rural Rate Analysis.

Petitioners' attack on the FCC's urban-to-rural rate comparison is not properly before the Court because it was not raised before the agency. Section 405(a) of the Act provides that the filing of a petition for reconsideration with the agency is a "condition precedent to judicial review" of any "questions of fact or

law upon which the Commission . . . has been afforded no opportunity to pass." 47 U.S.C. §405(a). "[E]ven when a petitioner has no reason to raise an argument until the FCC issues an order that makes the issue relevant, the petitioner must file 'a petition for reconsideration' with the Commission before it may seek judicial review." *In re Core Commc'ns, Inc.*, 455 F.3d 267, 276-77 (D.C. Cir. 2006) (quoting 47 U.S.C. §405(a)). Under section 405(a), this Court "generally lack[s] jurisdiction to review arguments that have not first been presented to the Commission." *Qwest Corp. v. FCC,* 482 F.3d 471, 474 (D.C. Cir. 2007).

That principle controls here. No party to this administrative proceeding presented petitioners' current claim that the FCC improperly relied on intrastate rate comparisons, and national average rural and urban rates, to find that local telephone service rates in rural and urban areas are reasonably comparable. Nor did petitioners seek reconsideration before the FCC. Their claim therefore is barred by section 405(a), and the Court should dismiss it.

B. The FCC's Finding that Urban and Rural Rates Are Reasonably Comparable Is Consistent with the Statute, FCC Precedent, and *Qwest I* and *II*.

Even if petitioners' claim were properly presented, it fails on the merits. The Commission was not required to compare rural rates in each state to a national average urban rate to demonstrate that urban and rural rates are reasonably comparable. As explained below, petitioners' proposed method of rate comparison is compelled by neither the statute nor the FCC's orders. It was, moreover, rejected by the Tenth Circuit in *Qwest I*.

Section 254(b)(3) of the of the Act provides:

> Consumers in *all regions of the Nation*, including low-income consumers and those in *rural, insular, and high cost areas*, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in *urban areas* and that are available at rates that are reasonably comparable to rates charged for similar services in *urban areas*.

47 U.S.C. §254(b)(3) (emphasis added). The statute requires reasonable comparability in all *regions* of the nation, and between urban *areas* and rural, insular, and high-cost *areas*. *See Qwest I*, 258 F.3d at 1204. It does not mention "states." Accordingly, on remand from the Tenth Circuit, the FCC reasonably interpreted section 254(b)(3) to require a comparison of rates in urban and rural *areas*, without regard to state borders. That interpretation is entitled to judicial deference. *See Brand X*, 545 U.S. at 980.

To bolster their statutory argument, petitioners assert that the FCC *sub silentio* departed from its own precedent when it made intrastate rate comparisons in the *Order* on review. Br. 15-16; *see also id.* 22-25. Petitioners' only support for this contention is the *Seventh Report and Order*, in which the FCC adopted the Joint Board's recommendation to define "reasonably comparable" as "a fair range of urban/rural rates both within a state's borders, and among states nationwide." Br. 22; *see also id.* at 23. But petitioners fail to acknowledge that the Tenth Circuit expressly rejected that definition of "reasonably comparable" in *Qwest I* based, in

part, on its finding that the FCC had failed to assume responsibility for helping to achieve intrastate rate comparability. 258 F.3d at 1201, 1204.

The Tenth Circuit's criticisms of the FCC's earlier attempts to define "reasonably comparable" confirm the reasonableness of the Commission's method of rate comparison in the *Order* and underscore the shortcomings of petitioners' alternative. In *Qwest I*, the Tenth Circuit held that the FCC's "fundamental error [was] in concerning itself only with 'enabl[ing] reasonable comparability among states,'" when "[section] 254 requires a comparison of rural and urban *areas, not states*." 258 F.3d at 1204 (emphasis added). The court's point was that FCC was responsible for achieving "reasonable comparability" both within and among states, not just "among" states, as petitioners' argue. *Id.* Thus, the FCC's intrastate rate comparisons on remand were entirely consistent with the Tenth Circuit's opinion.

Furthermore, the *Qwest I* court expressed concern about the total variance in rural and urban rates *nationwide*, not the variance between rural rates in a particular state and a national average. 298 F.3d at 1201 (noting that "some rural rates will be 70-80% higher than urban rates [elsewhere in the United States] under the FCC's funding mechanism."). On remand from *Qwest I*, the FCC responded with the method of comparison petitioners demand here: using rate data from the U.S. Government Accountability Office, the FCC compared state-specific rural rates to a national average urban rate. *2003 Remand Order*, 18 FCC Rcd at 22594 (¶57). Yet the Tenth Circuit, in *Qwest II*, again found that the FCC had failed to demonstrate that rates were "reasonably comparable" under section 254(b)(3)

because the variance between the lowest urban rates and highest rural rates – irrespective of state boundaries – was too great. *Qwest II*, 398 F.3d at 1237 (noting that "rural rates falling just below the comparability benchmark may exceed the lowest urban rates by over 100%."). On remand, the court directed the FCC to provide "empirical findings supporting [its] conclusion" that rates in rural and urban areas are reasonably comparable. *Id.*

The FCC did precisely that in the *Order*. Pointing to uncontested evidence in the record, the agency found that in 18 states and the District of Columbia, the largest non-rural LEC charges the same rate in both the rural and urban areas it serves. *Order* at ¶48 (JA). And in those states where the non-rural LEC charges different rates, urban rates tend to be higher rather than lower. *Id.* (JA). In so finding, the FCC demonstrated, on the basis of empirical data, that it had "undertake[n its] responsibility to ensure that the states act" to achieve reasonably comparable rates within their borders, as the Tenth Circuit directed in *Qwest I*, 258 F.3d at 1204.

The FCC further found that the average or mean rate is similar between rural and urban areas nationwide, as is the standard deviation of rates.[8] *Order* ¶¶45-46 (JA). Indeed, data in the administrative record showed that the range of rates does not vary greatly as a function of urbanization. *Id.* (JA). As the FCC

[8] Because standard deviation analysis measures the dispersion of data points from the mean (*see* above note 4,), this analysis of urban and rural rates allowed the FCC to determine whether rural rates fall within a "reasonable range of the national average urban rate," as required by the definition of "reasonably comparable" that the agency adopted on remand. *Order* ¶53 (JA).

explained, "these descriptive statistics and the distribution of rates" show that "differences among urban rates are similar to differences among urban and rural rates." *Id.* ¶46 (JA).[9] In undertaking this comparison, the FCC directly responded to the Tenth Circuit's concern about the variance between the lowest urban rate and the highest rural rate. The agency compared the ranges of rates in two populations: urban rates nationwide and rural rates nationwide. It concluded that, for both populations, the spread between the highest and lowest rates is similar. Thus, the variance between the lowest urban rate and the highest rural rate is roughly the same as the spread between the lowest urban rate and the highest urban rate. Generally speaking, rural customers do not pay higher rates than urban customers.

By contrast, petitioners' preferred method of analysis would only evaluate reasonable comparability among states by measuring rural rates in a particular state against a national average urban rate.[10] As noted above, the FCC unsuccessfully

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[9] Petitioners contend that the only factor causing variation in local telephone rates is cost. *See, e.g*, Br. 23-24, 30. As the FCC explained in the *Order*, however, a variety of non-cost-based policy decisions affect state ratemaking. *Order* ¶63 (JA).

[10] Petitioners seem to argue (Br. 26-27) that the FCC's method of rate comparison must follow its rate certification process, which allows states to presume that their rural residential rates are reasonably comparable to urban rates if they fall below the rate benchmark (*i.e.*, two standard deviations of the average urban rate). *See Order* ¶85 (JA); 47 C.F.R. §54.316(b). However, the certification process was designed "to induce states to achieve reasonably comparable rates" within their borders, *2003 Remand Order*, 18 FCC Rcd at 22601 (¶70), as required by *Qwest I*, 258 F.3d at 1203-1204; it was not designed to achieve reasonably comparable rates nationwide, as required by section 254(b)(3).

used petitioners' approach in the *2003 Remand Order*, but the Tenth Circuit faulted that method of comparison for ignoring the variance between the highest rural rates and the lowest urban rates nationwide. *Qwest II*, 398 F.3d at 1237.[11] The express purpose of the *2010 Remand Order* was to "respond[] to the Tenth Circuit's remand" (*Order* at ¶1 (JA)), and it therefore made sense for the FCC to take a different approach to measuring rate comparability that addressed the court's concerns. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) ("it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better.").

Finally, the *Qwest* cases undermine – rather than support – petitioners' argument that the FCC improperly relied on a national average rural rate figure. Br. 25-27. In *Qwest I*, the Tenth Circuit rejected the notion "that the use of statewide and national averages is necessarily inconsistent with [section] 254." 258 F.3d at 1202 n.9. Thus, the FCC's use of such data in the *Order* on review was entirely permissible. In any event, the FCC's finding that the nationwide average rural rate ($21.00) is barely higher than the nationwide average urban rate ($19.57) was only one of many points of comparison that supported the agency's conclusion that rates are reasonably comparable. *Order* ¶44 (JA). The bulk of

[11] The FCC's prior approach (which petitioners advocate in this case) would tolerate significant variance in urban rates so long as rural rates are no higher than (or very close to) the average urban rate. But under this approach, the FCC could deem rates "reasonably comparable" for purposes of section 254(b)(3) even where urban rates both among and within particular states are far higher than rural rates. The revised approach that the FCC adopted in the *Order* on review avoids this problem.

the FCC's analysis compared individual rates in rural and urban areas to find that rates are reasonably comparable nationwide, as required by section 254(b)(3). *Id.* ¶¶45-46, 48 (JA).

C. The FCC Reasonably Relied on Telephone Penetration Rates to Find that Urban and Rural Rates Comply with Section 254(b)(3).

Petitioners further complain that the FCC erroneously relied on the increasing telephone penetration rate to find that rural rates are reasonably comparable to urban rates. Br. 28-30. Petitioners contend that "[a]t most, the high [telephone] penetration rate suggests that phone service in rural areas may be 'affordable,'" and that "[b]y equating reasonable comparability … with affordability, the FCC read the separate reasonable comparability of rates provision out of the statute." Br. 28-29. To the contrary, as shown above, the FCC explained in detail the basis for its finding that rates are "reasonably comparable" because they "fall within a reasonable range of the national average urban rate." *Order* ¶¶43-48, 53; *see also* pp. 26-32. In discussing the undisputed data showing a steady increase in telephone subscribership, the agency was simply responding to the Tenth Circuit's concerns in *Qwest II* that, unless the Commission took action to reduce the existing variance in rural and urban rates, rural rates would be too high to ensure universal access to basic service. *Order* ¶54 (JA).

In discussing this data, the FCC also was recognizing the interplay between the principle of affordability (under section 254(b)(1)) and the principle of reasonable comparability (under section 254(b)(3)), which the Tenth Circuit itself recognized. "Rates cannot be divorced from a consideration of universal service,"

the court explained in *Qwest II*, "nor can the variance between rates paid in rural and urban areas. If rates are too high [*i.e.*, unaffordable], the essential telecommunications services encompassed by universal service may indeed prove unavailable." 398 F.3d at 1236.

Responding to the court's concerns on remand, the FCC explained that "the fact that telephone subscribership penetration rates have increased . . . demonstrates that rates are not too high [*i.e.*, unaffordable] under the Commission's universal service program; indeed, the essential telecommunications services encompassed by universal service have become more available than ever before." *Order* ¶54 (JA).

The FCC's analysis of telephone penetration rates was responsive to the Tenth Circuit's concerns. Addressing the court's concerns on remand was a rational – rather than irrational – agency action.

III. THE FCC REASONABLY DECLINED TO ADJUST THE RATE BENCHMARK USED IN THE RATE CERTIFICATION PROCESS

Contrary to petitioners' claims, the FCC was not obligated to lower the rate benchmark (currently set at two standard deviations of the average urban rate) that it used to determine whether rural and urban rates are reasonably comparable.

A. *Qwest II* Did Not Foreclose Use of the Rate Benchmark Under a Revised Statutory Interpretation.

Petitioners contend that the FCC was prohibited from retaining its rate benchmark because the Tenth Circuit invalidated it in *Qwest II*. Br. 38-40. According to petitioners, "[t]he Court held that the rate benchmark 'ensured that

significant variance between rural and urban rates will continue unabated' and 'does not deserve deference and is manifestly contrary to the statute.'" *Id.* at 38 (quoting *Qwest II*, 398 F.3d at 1235-37).

Petitioners have misread (and misquoted) the Tenth Circuit's opinion. The first quotation (concerning "significant variance") is accurate as far as it goes; but the "significant variance" that troubled the court was the variance between the highest rural rates and the lowest urban rates. *See Qwest II*, 398 F.3d at 1237. Not even the petitioners maintain that the *lowest* urban rates are the proper baseline for rate comparability. They (like the FCC) use a national average urban rate as the relevant point of comparison. *Compare* Br. 38-40, *with Order* ¶¶49, 70 (JA). As the FCC explained, "states exercise considerable discretion in setting rural and urban rates" so "there is considerable variation [in rates] among states." *Order* ¶28 (JA). Thus, "[a] comparison of rural rates to the lowest urban rate would be heavily influenced by a particular state's rate policies," and not the cost of providing the services eligible for universal service support. *Id.*

In any event, the FCC addressed the Tenth Circuit's concern about the variance between the highest rural rates and the lowest urban rates by demonstrating that the ranges of rural and urban rates nationwide are in fact similar, so that generally speaking, rural consumers do not pay higher rates than urban consumers. *Id.* ¶¶43-47 (JA). In making this showing, the FCC satisfied the Tenth Circuit's directive to provide "empirical findings supporting [its] conclusion" that urban and rural rates are reasonably comparable. *Qwest II*, 398 F.3d 1237. By contrast, petitioners' proposal that the FCC lower the rate

benchmark to 125 percent of the average urban rate "would simply increase non-rural high-cost support without guaranteeing any change in the rates paid by consumers in rural areas." *Order* ¶72 (JA). Indeed, the Tenth Circuit already rejected petitioners' approach, holding that section 254(b)(3) "calls for reasonable comparability between rural and urban rates," which cannot be satisfied "simply [by] substitut[ing] different standards." *Qwest I*, 258 F.3d at 1201.

As for the second quotation ("manifestly contrary to the statute"), petitioners have mischaracterized what the court said. The court did not use this language to describe the Commission's rate benchmark. Rather, it said:

> we agree with Petitioners Qwest, SBC, and Vermont that the Commission's definition of 'reasonably comparable' rests on a faulty, and indeed largely unsupported, construction of the Act. As such, we hold that the FCC's *construction of the statute* does not deserve deference and is manifestly contrary to the statute.

Qwest II, 398 F.3d at 1235 (internal quotation marks omitted, emphasis added). In other words, the court was talking about the FCC's general reading of "reasonably comparable," as used in section 254(b)(3), not the rate benchmark. The court specifically held that "the benchmark is rendered untenable *because of* the impermissible statutory construction on which it rests." *Id.* at 1237 (emphasis added). Thus, nothing in *Qwest II* suggests that the benchmark set at two standard deviations of the average urban rate was *inherently* flawed; the FCC had simply arrived at the benchmark by the wrong route. The FCC cured this problem on remand. In the *Order*, it expressly addressed the Tenth Circuit's concerns, revising

its interpretation of the statute to take into account its duty not only to "preserve" universal service but also to "advance" it. *See Order* ¶¶56-57 (JA).

B. The FCC Reasonably Declined to Lower the Rate Benchmark.

Petitioners further claim that the FCC acted arbitrarily in declining their proposal to lower the rate benchmark to 125 percent of the average urban rate. Br. 38-40. According to petitioners, the FCC was too dismissive of the "34% to 43% gap between urban and rural rates." *Id.* 39.

That is not the case. The FCC explained that the variance cited by petitioners has little bearing on the reasonable comparability of rural rates because "most of that fluctuation is explained by the fact that the . . . the highest urban rate increased" while "rural rates . . . have remained stable." *Order* ¶71 (JA). The FCC, moreover, found that "the task of defining 'reasonably comparable' rates is a line-drawing exercise that falls within [its] unique expertise." *Id.* ¶72 (JA); *accord Qwest I*, 258 F.3d at 1202. This Court has held that in the line-drawing context, "[t]he relevant question is whether the agency's numbers are within a zone of reasonableness, not whether its numbers are precisely right." *WorldCom, Inc. v. FCC*, 238 F.3d 449, 462 (D.C. Cir. 2001) (internal quotation marks omitted); *see also Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 541 (D.C. Cir. 2006).

The FCC's rate benchmark easily satisfies that standard. The FCC concluded that "the line [it] drew in this case . . . falls within a reasonable range, as confirmed by the high telephone subscribership rates and the overall advancement of universal service goals while the non-rural high-cost mechanism has been in

effect." *Order* ¶72 (JA). "No commenter proposing a different rate benchmark" (including petitioners) "made a comparable evidentiary showing" to that of the FCC. *Id.* Indeed, the FCC explained that "[petitioners'] proposal to lower the rate benchmark would not answer the questions posed by the Tenth Circuit on remand; it would simply increase non-rural high-cost support without guaranteeing any change in rates paid by consumers in rural areas." *Id.* In sum, while petitioners might believe that their benchmark is superior to the benchmark chosen by the FCC, they have not shown that the line drawn by the agency was unreasonable.

C. The FCC's Procedure for Providing States Supplemental High-Cost Support Is Lawful.

To the extent that a "state presents [the FCC] with documentation that unique circumstances prevent the achievement of reasonably comparable rates in that state," the FCC "can provide appropriate relief" on a case-by-case basis. *Id.* ¶¶51, 92 (JA). It did just that in the *Order* by granting supplemental high-cost support to Wyoming. *Id.* ¶¶84-91 (JA). This Court affirmed the FCC's use of a similar "exception" process, which allows a requesting carrier to seek additional high-cost support upon a showing that its current universal service subsidy is insufficient, in *Rural Cellular Ass'n,* 588 F.3d at 1104.

Petitioners nonetheless contend that a state's ability to request supplemental high-cost support cannot "save" the rate benchmark. Br. 40-41. According to petitioners, "the waiver mechanism itself is unlawful" because "a state seeking waiver *must* satisfy the two standard deviations rate benchmark rejected in *Qwest II.*" Br. 41 (emphasis added). That claim fails for two reasons.

First, *Qwest II* did not foreclose use of the rate benchmark, as shown above (pp. 33-36). Second, in adopting the rate benchmark, the FCC "emphasize[d]" that the benchmark "merely creates a presumption regarding the reasonable comparability of rural and urban rates, and is not the sole test of whether rural and urban rates are reasonably comparable." *2003 Remand Order*, 18 FCC Rcd at 22609 (¶82); *see also Order* ¶¶85-88 (adhering to same procedures). For example, a state "has the option of submitting additional rate data to demonstrate that factors other than basic service rates affect the comparability of their rates in high-cost areas." *2003 Remand Order*, 18 FCC Rcd at 22603 (¶73). Thus, "a state could explain in its certification that its rural rates were not reasonably comparable to nationwide urban rates, despite being within the safe harbor created by the nationwide urban rate benchmark." *Id.* n.277; *see also id.* at 22609, 22613-12 (¶¶82, 90) (same).

Significantly, petitioners have never sought supplemental high-cost support, despite their repeated assertion that rural rates (and services) within their borders are not reasonably comparable to urban rates (and services) nationwide. *Accord Rural Cellular Ass'n*, 588 F.3d at 1104. Instead, they attack the FCC's grant of supplemental high-cost support to Wyoming. Br. 41-42. The FCC's decision to grant support to Wyoming was reasonable. First, "section 254 states a clear preference for explicit, rather than implicit[] support." *2003 Remand Order*, 18 FCC Rcd at 22576, 22631 (¶¶26, 127); 47 U.S.C. §254(e). Consistent with that preference, Wyoming "requires cost-based pricing for all retail telecommunications services . . . and prohibits cross-subsidies and implicit

subsidies." *Order* ¶88 (JA). Second, states must share the burden of achieving rate comparability. *Qwest I,* 258 F.3d at 1203-1204; *Qwest II,* 398 F.3d at 1238. To fulfill that obligation, "Wyoming has implemented an explicit subsidy support program – the Wyoming Universal Service Fund." *Order* ¶88 (JA). Third, Wyoming submitted detailed rate data and a plan for reducing the rates of residential customers in the rural areas served by Qwest – a showing petitioners have never attempted to make.

IV. THE COMMISSION ACTED WITHIN ITS DISCRETION IN DECLINING TO ADJUST THE COST BENCHMARK USED TO DETERMINE NON-RURAL HIGH-COST SUPPORT

Petitioners claim that the FCC violated the APA by allegedly failing to consider (1) multiple proposals to reduce the cost benchmark that is used to determine high-cost support amounts for non-rural carriers (Br. 30-35), and (2) alternatives to "offset" the resulting consumer burden that would occur from a substantial increase in high-cost support (Br. 36-37).

Petitioners' arguments are unpersuasive. As this Court has found, "'the fact that there are other solutions to a problem is irrelevant provided that the option selected [by the FCC] is not irrational.'" *Covad,* 450 F.3d at 544 (citation omitted). The FCC here found, based on uncontested evidence, that urban and rural rates are reasonably comparable under the current funding mechanisms. *Order* ¶¶41-48 (JA). Having rationally explained its line-drawing decision in determining the appropriate cost benchmark, the agency was not required to

separately address – and repetitively reject – numerous alternative proposals that would have drawn the line in a different place.

A. The FCC Reasonably Declined to Lower the Cost Benchmark.

Petitioners contend that the FCC abused its discretion because it considered "only" their proposal to reduce the cost benchmark to 125 percent of urban cost. Br. 31-32; *see also Order* ¶38, Appendix B (JA). Petitioners' argument assumes the *Order* left open the possibility that lowering the cost benchmark would be justified if it resulted in some lesser expansion of non-rural high-cost support (*i.e.*, anything below petitioner's proposed $2.725 billion annual increase). Br. 32.

That is not the case. The FCC found that *any* increase in support, irrespective of size, was unnecessary to satisfy section 254 of the Act. As the FCC explained, "subsidy levels" under the current non-rural mechanism "are at least sufficient to ensure reasonably comparable and affordable rates that have resulted in widespread access to telephone service." *Order* ¶33 (JA). It further found that advocates of expanded non-rural high-cost support "have failed to demonstrate how consumers living in rural areas would be harmed absent the proposed increase in funding." *Id.* ¶38. "Given [its] finding that the non-rural high-cost mechanism already provides sufficient support, and in the absence of any contrary empirical evidence that [it] need[ed] to augment that support to ensure sufficient funding," the FCC reasonably "decline[d] to add to the already heavy universal service contribution burden placed on consumers" by adjusting the cost benchmark

downward. *Id.* (JA). That decision was entirely consistent with the FCC's finding that "sufficient" support is "an affordable and sustainable amount of support that is adequate, *but no greater than necessary*, to achieve the goals of the universal service program." *Id.* ¶30 (JA) (emphasis added).

This Court and other courts have held that the FCC "enjoys broad discretion" when "balancing" the sometimes conflicting universal service principles in section 254(b) of the Act – particularly when it must balance the principles of sufficiency (section 254(b)(5)) and affordability (section 254(b)(1)). *Rural Cellular Ass'n*, 588 F.3d at 1103; *see also Qwest I*, 298 F.3d at 1200. In rejecting multiple "reform" proposals (including, but not limited to petitioners'), the FCC properly recognized its "obligation to 'strike an appropriate balance between the interests of widely dispersed customers with small stakes and a concentrated interest group seeking to increase its already large stake' in the [universal service] fund." *Order* ¶38 (citing *Rural Cellular Ass'n*, 588 F.3d at 1102) (JA). Had the FCC lowered the cost benchmark below the current level (and correspondingly increased the size of non-rural high-cost support), it would have acted contrary to the interests of consumers in net contributor states by requiring them to contribute more than is necessary to ensure that rates are affordable and reasonably comparable in beneficiary states like Maine and Vermont. *Rural Cellular Ass'n,* 588 F.3d at 1102 (concept of "sufficiency" can reasonably encompass "not just affordability for those benefitted, but fairness for those burdened.").

In any event, the FCC committed no procedural error when it declined to specifically reject the three "reform" proposals cited in petitioners' brief. Br. 33-35. First, petitioners' contention that the FCC failed to consider its alternative cost benchmark of $26.00 is barred because they effectively "abandon[ed] [it] . . . by taking inconsistent positions" before the agency. *Busse Broad. Corp. v. FCC*, 87 F.3d 1456, 1461 (D.C. Cir. 1996). In the four years prior to the *Order*, petitioners repeatedly told the FCC that it "must" lower the benchmark to no more than 125 percent of average urban cost because this "offer[ed] the only justifiable solution" to the *Qwest II* remand.[12] Thus, at the time of the FCC's decision in 2010, it was not clear that petitioners still expected the agency to consider their earlier proposal to use a $26.00 benchmark.

Second, the FCC did respond to Wyoming's proposed $26.78 benchmark (which, by its terms, would only have benefitted Wyoming and Montana), Br. 35 n.24, when it provided supplemental non-rural high-cost support for the rural residential customers of Qwest in Wyoming. *Order* ¶¶84-92 (JA).

Third, the USA Coalition did not propose a specific "lower" cost benchmark; rather, that party merely asked the FCC to base the cost benchmark on a different methodology (*i.e.*, "a flat percentage over the urban average" rather than "two standard deviation[s]"). Br. 35, citing JA ( ). In any event, the FCC rejected proposals to use a flat-percentage benchmark in the *2003 Remand Order*,

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[12] *See, e.g.*, FNPRM Comments (JA) ("reiterating their previous recommendation[]" that the FCC "modify its support mechanism to establish the national cost benchmark of 125% of urban cost.").

18 FCC Rcd at 22599 (¶66), and it reasonably did so again in the *Order* on review. Order ¶60 (JA) (declining to adopt proposals that the FCC previously rejected in the *2003 Remand Order*).

B. The FCC Reasonably Declined to Subsidize an Increase in Non-Rural High-Cost Support by Reducing Support Elsewhere.

Petitioners contend that the FCC further erred when it "declined to consider alternatives designed to offset the cost of increasing federal support to reduce rural rates." Br. 36. Having reasonably found that "the non-rural mechanism, as currently structured, provides sufficient support," there was no need for the FCC to consider proposals that would mitigate the financial impact on consumers. *Order* ¶39 (JA).

The FCC, moreover, found "that all of the proposed methods to offset the resulting increase [in non-rural high-cost support] fall outside the narrow scope of this proceeding," which was limited to responding to the *Qwest II* remand. *Id.* The FCC further explained that such "offset" proposals, including the proposals cited in petitioners' brief (Br. 36), "involve eliminating high-cost support for certain providers or adopting regulatory reforms that are unrelated to the non-rural high-cost mechanism." *Order* ¶39 (JA). Noting that such proposals were opposed by various commenters, *id.* ¶39 n.138 (JA), the FCC found "no party" that was able to "demonstrate[] how reducing funding for other programs or providers would advance, and not frustrate, the universal service objectives set forth in section 254 of the Act." *Id.* ¶39. (JA). In short, the agency reasonably declined petitioners' invitation to "rob Peter to pay Paul" by reducing support for

other universal service programs to subsidize a sizable (and unnecessary) increase in non-rural high-cost support.

V. THE FCC REASONABLY DECLINED TO OVERHAUL ITS COST MODEL PENDING COMPREHENSIVE UNIVERSAL SERVICE REFORM

Petitioners complain that the FCC failed to consider their proposals to update and revise the forward-looking cost model that calculates support amounts under the non-rural high-cost mechanism. Br. 46-49. Petitioners' argument lacks merit.

The FCC acknowledged that the forward-looking cost model is out of date, both with respect to the model inputs and the underlying technical assumptions. *Order* ¶65 (JA). Specifically, "the . . . cost model essentially estimates the costs of a narrowband, circuit-switched network that provides plain old telephone service (POTS), whereas today's most efficient providers are constructing fixed or mobile networks that are capable of providing broadband as well as voice services." *Id.* (JA). Given these limitations, the FCC "focus[ed] [its] efforts going forward on developing a forward-looking cost model to estimate the cost of providing broadband over a modern multi-service network." *Id.* ¶66 (JA); *see also* ¶¶79-80 (JA). The agency explained that it would "continue to use the existing model . . . on an interim basis, pending the development of an updated and more advanced model that will determine high-cost support for broadband." *Id.* ¶66 (JA).

That determination was reasonable. As this Court has recognized, "[s]ubstantial deference must be accorded an agency when it acts to maintain the status quo so that the objectives of a pending rulemaking proceeding will not be frustrated." *MCI v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984); *see also Rural Cellular Ass'n*, 588 F.3d at 1105-1106; *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410 (D.C. Cir. 2002). All that "needs to be shown to uphold the FCC is that existing, possibly inadequate rules had to be frozen to avoid compounding present difficulties." *MCI*, 750 F.2d at 141 (internal citations omitted). The FCC's decision easily meets that standard. Expending significant time and resources to update the current forward-looking cost model for provision of voice services would impede the FCC's ability to implement the congressionally-mandated National Broadband Plan, which "recommends phasing out support under the existing high-cost universal service mechanisms as it redirects that support to fund broadband deployment in an effort to minimize the contribution burden" placed on consumers.[13] *Order* n.252 (JA).

Furthermore, the cost model took years to develop with full public participation and the agency explained that "it would take a similar period to evaluate or develop a new cost model and to establish new input values." *Id.* ¶66 (JA). It was not possible for the agency to accomplish such a comprehensive

[13] The Commission has initiated a proceeding to develop a new cost model to provide support for broadband. *See CAF NOI/NPRM*, 25 FCC Rcd 6657 (2010); *USF/ICC Transformation NPRM*, 2011 WL 466775 (2011).

overhaul and still meet its timeliness obligations to petitioners and the Tenth Circuit. *Id.* ¶¶11, 66 (JA).

Petitioners do not dispute this point, but instead argue that, "in the interim," the FCC should have "simply re-run the existing model with current line-count data." Br. 46. However, updating the line counts used to estimate a non-rural carrier's forward-looking costs requires far more than simply entering different numbers into a spreadsheet, as petitioners suggest. Rather, FCC staff must first allocate the non-rural carrier's reported switched access lines across classes of service (*i.e.*, residential lines, business lines, payphone lines, and special access lines); it then must calculate high-capacity special access lines based on the number of voice-grade equivalent lines reported by non-rural carriers. *See Federal-State Joint Board on Universal Service*, 2003 WL 23009177, *1 (¶2) (WCB Dec. 24, 2003) ("*2002 Line Counts Order*"). Updating the line counts in this manner is time-consuming and calls for certain critical assumptions about the allocation of lines – assumptions that ultimately affect a non-rural carrier's level of support in each state.[14] *Id.* at *3-*8 (¶¶6-23). In any event, the Tenth Circuit in *Qwest I* made clear that absolute precision is not required of the cost model. *See*

[14] The FCC's use of line counts to determine total support differs from its use of line counts in the model. As petitioners explain, to "determine total support amounts," the FCC only has to "multipl[y] the current line count data by the per-line support figures calculated" by the forward-looking cost model. Br. 47; *see also* 47 C.F.R. §54.309. The FCC does not have to allocate lines across classes of service, as it is required to do for the line counts used in the model to determine a non-rural carrier's support per line.

Qwest I, 258 F.3d at 1206 (upholding cost model because it produced "reasonably accurate results").

VI. THE FCC REASONABLY CONCLUDED THAT THE SERVICES ELIGIBLE FOR UNIVERSAL SERVICE SUPPORT ARE REASONABLY COMPARABLE BETWEEN URBAN AND RURAL AREAS

Petitioners claim that the FCC failed to demonstrate that services are reasonably comparable in rural and urban areas and discounted service data they placed in the record. Br. 52-57. In so arguing, petitioners ignore the FCC's finding that voice telephony is available to consumers throughout the United States, *Order* ¶¶14-18 (JA), and the inadequacy of their own showing concerning the quality and availability of the services eligible for universal service support.

A. Petitioners Failed To Demonstrate That Services in the Rural Areas of Maine and Vermont Are Not Reasonably Comparable to Services in Urban Areas.

In the *Order*, the FCC found that services are "reasonably comparable" between rural and urban areas, as required by section 254(b)(3). *Order* ¶57 (JA). As the FCC found, the current levels of universal service support are sufficient to provide the vast majority of Americans access to basic telephone service, as demonstrated by ever-increasing telephone subscribership rates. *Order* ¶18 (JA). In addition to traditional wireline telephone service, consumers also have access to wireless services and newer Voice over Internet protocol ("VoIP") services – *i.e.*, Internet telephony services offered by companies such as Vonage and Skype. *Id.*

at ¶¶15-17 (JA). Indeed, "[e[ven in rural areas, approximately 98.5 percent of the population has access to mobile services offered by one or more providers." *Id.* ¶15 (JA).

Petitioners nonetheless contend that "clear evidence in the record" before the FCC "demonstrates that the level and quality of service in rural northern New England is relatively poor and not reasonably comparable to services in urban areas." Br. 50. Petitioners, by their own description, are primarily responsible for regulating service quality and availability in their states. Br. 19, citing Young Decl. ¶4, Shifman Decl. ¶4; *see also Order* ¶37 (JA); *2003 Remand Order*, 18 FCC Rcd at 22588 (¶47); *Qwest I*, 258 F.3d at 1203. Yet the totality of the "evidence" that petitioners presented to the agency consisted of the following:

> In Maine and Vermont, Verizon reduced its net investment, allowing its existing plant to age and become more highly depreciated, even as it made large capital investments elsewhere in wireless services and high-capacity fiber-based services offered in more urban states. Verizon was also slow to deploy advanced services and perform needed upgrades to systems to meet customer demand for services such as DSL.

FNPRM Comments at 5 (JA).[15]

The FCC reasonably rejected this meager discussion as "unpersuasive." *Order* ¶37 (JA). The FCC explained that petitioners "have not provided

[15] Before this court, petitioners also rely on the June 8, 2009, declaration filed by Joel Shifman. (JA). That declaration only asserts that rate comparisons cannot be used to demonstrate that services are reasonably comparable for purposes of section 254(b)(3) – it says nothing about the availability of services in rural New England relative to urban areas.

substantial empirical evidence that service quality is worse in areas where non-rural LECs receive high-cost support, relative to either areas where rural LECs receive support, or areas that do not receive any high-cost support." *Id.* As a result, the FCC was unable to determine whether the alleged service availability issues in Maine and Vermont are limited to rural areas served by non-rural LECs, and correspondingly, whether additional non-rural high-cost support would solve any such problems.[16] As the agency explained in the *2003 Remand Order*, "the burden must fall on [a] state to demonstrate the reasons underlying the failure to achieve reasonable comparability [within its borders], because only the state is in [the] position to identify the existence and sources of problems that may be unique to that state." 18 FCC Rcd at 22616 (¶96).

The only other evidentiary support petitioners proffer is a 2008 letter from the Governor of Maine describing limited wireless service availability in rural parts of the state. (JA). The FCC has acknowledged that there might be gaps in wireless coverage in certain rural areas and in fact has recently sought comment on "creat[ing] a new Mobility Fund . . . to significantly improve coverage of current-generation or better mobile voice and Internet service for consumers in areas where such coverage is currently missing." *Universal Service Reform; Mobility Fund,* 2010 WL 4059849 at *1 (¶1) (2010). But increasing support under the non-rural

[16] The FCC noted the "diminished service quality and service availability" in Maine and Vermont could be attributed to the "investment decisions [of] Verizon, the former non-rural incumbent LEC, . . . and not insufficient . . . high-cost support." *Id.* n.130 (JA).

high-cost support mechanism would not address this issue until the Mobility Fund is in place. In 2008, the FCC enacted an interim cap on all high-cost support disbursements to competitive eligible telecommunications carriers ("ETCs"), the vast majority of which are wireless carriers. *High-Cost Universal Service Support*, 23 FCC Rcd 8834 (2008), *aff'd Rural Cellular Ass'n*, 588 F.3d 1095. Due to the interim cap, expanding support under the current non-rural mechanism would provide little to no additional universal service funding to wireless carriers serving Maine.

Indeed, the FCC found that petitioners had "not demonstrated that more support would in fact improve service quality or service availability, nor ha[d] they quantified, in a verifiable manner, what level of support would ensure adequate service quality and service availability." *Order* ¶37 (JA). Requiring petitioners to make such a showing should not have been burdensome given their responsibility for "determining the level of state universal service support needed" in their states. Br. 19. Yet "[w]ithout such evidence," the FCC found that it "would be subject to the same criticisms raised in *Qwest II*" – namely, that it failed to provide empirical evidence that the non-rural high-cost support mechanism achieves reasonably comparable rates and services, as required by section 254(b)(3). *Order* ¶37 (JA); *Qwest II*, 398 F.3d at 1237.

The FCC further found that "devoting more funding to the existing non-rural high-cost support mechanism" would not be "the most efficient way to promote" the broadband deployment that petitioners seek to advance in their states. *Order* ¶82 n.255 (JA). "[O]nly voice service is a 'supported service' under the current

mechanism," so "carriers receiving high-cost support are not required to provide any households in their service area with some minimal level of broadband service, much less provide such service to all households." *Id.* Moreover, the current mechanism "only supports certain components of a network, such as local loops and switching equipment – but not other components necessary for broadband." *Id.*; *see also id.* ¶¶65-66 (JA).

The FCC shares petitioners' interest in promoting broadband deployment. However, the FCC reasonably found that the best way to achieve that goal is through proceedings that address recommendations in the National Broadband Plan – which proposes to "shift the high-cost universal service program from primarily supporting voice communications to supporting broadband platforms" – rather than updating and expanding the current non-rural high-cost support mechanism that only supports voice services. *Id.* ¶79 (JA). This approach is a lawful exercise of the FCC's authority to "engage in incremental rulemaking." *Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1210 (D.C. Cir. 1984); *see also Brand X*, 545 U.S. at 1002. To that end, the FCC has recently taken an important step toward re-orienting universal service to support deployment of broadband services for all Americans.[17]

B. The FCC Is Not Obligated to Collect Data Regarding Service Comparability.

Petitioners finally claim that the FCC has a statutory duty to collect service quality data to determine whether services are reasonably comparable between

[17] *USF/ICC Transformation NPRM*, 2011 WL 466775.

rural and urban areas under section 254(b)(3) of the Act. Br. 52-57; FNPRM Comments at 39-40 (JA). The FCC has reasonably – and consistently – rejected this position since 1997.

Consistent with the Joint Board's recommendations, the FCC concluded in the *First Report and Order* that it would "rely upon service quality data provided by the states in combination with those data that the Commission already gathers . . . to monitor service quality trends." 12 FCC Rcd 8832 (¶100). Because most states had established mechanisms designed to ensure service quality in their jurisdictions, the FCC reasoned that additional efforts undertaken at the federal level would be largely redundant. *Id.* at 8831-32 (¶99). It further found that such efforts "would be inconsistent with the 1996 Act's goal of a 'pro-competitive, de-regulatory national policy framework,' because of the administrative burden on carriers," particularly the smaller carriers that typically serve rural areas. *Id.*

The *2003 Remand Order* was in a similar vein. On remand from the Tenth Circuit, the FCC acknowledged that "service quality is an important goal," but explained that "states are in the best position to address service quality issues and will have ample opportunity to do so in the rate review and expanded certification process" adopted in that order. *2003 Remand Order,* 18 FCC Rcd at 25888 (¶47). Tellingly, petitioners have never used that process to show that services in the rural parts of Maine and Vermont are not reasonably comparable to services in urban areas. *Cf. Rural Cellular Assn,* 588 F.3d at 1103-04. In any event, petitioners have provided no basis to reconsider the FCC's earlier judgment that service quality and

availability are best measured through existing state and federal reporting mechanisms.

CONCLUSION

For the foregoing reasons, the Court should dismiss those claims barred by 47 U.S.C. §405(a) and otherwise should deny the petition for review.[18]

[18] Even if this Court were to remand, petitioners provide no basis for their extraordinary request that the Court impose a deadline (and require the FCC to provide a schedule) for agency action on remand (Br. 58). *See Qwest II*, 398 F.3d at 1238-39 (rejecting request to impose an "arbitrary deadline").

Respectfully submitted,

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February 17, 2011

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

VERMONT PUBLIC SERVICE BOARD AND MAINE PUBLIC UTILITIES COMMISSION PETITIONERS, V. FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA RESPONDENTS.	)	NO. 10-1184

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 13725 words.

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APPENDIX:
STATUTES AND REGULATIONS

5 U.S.C. §553
5 U.S.C. §706
47 U.S.C. §151
47 U.S.C. §153(44)
47 U.S.C. §254
47 U.S.C. §402
47 U.S.C. §405
47 C.F.R. §54.309
47 C.F.R. §54.316
47 C.F.R. §54.706

5 U.S.C. §553

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. §706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

47 U.S.C. §151

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the “Federal Communications Commission”, which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

47 U.S.C. §153(44)

Rural telephone company

The term “rural telephone company” means a local exchange carrier operating entity to the extent that such entity--

(A) provides common carrier service to any local exchange carrier study area that does not include either--

(i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or

(ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(D) has less than 15 percent of its access lines in communities of more than 50,000 on February 8, 1996.

47 U.S.C. §254

(a) Procedures to review universal service requirements

(1) Federal-State Joint Board on universal service

Within one month after February 8, 1996, the Commission shall institute and refer to a Federal-State Joint Board under section 410(c) of this title a proceeding to recommend changes to any of its regulations in order to implement sections 214(e) of this title and this section, including the definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for completion of such recommendations. In addition to the members of the Joint Board required under section 410(c) of this title, one member of such Joint Board shall be a State-appointed utility consumer advocate nominated by a national organization of State utility consumer advocates. The Joint Board shall, after notice and opportunity for public comment, make its recommendations to the Commission 9 months after February 8, 1996.

(2) Commission action

The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board required by paragraph (1) and shall complete such proceeding within 15 months after February 8, 1996. The rules established by such proceeding shall include a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation. Thereafter, the Commission shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations.

(b) Universal service principles

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

(1) Quality and rates

Quality services should be available at just, reasonable, and affordable rates.

(2) Access to advanced services

Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in rural and high cost areas

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) Equitable and nondiscriminatory contributions

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) Specific and predictable support mechanisms

There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) Access to advanced telecommunications services for schools, health care, and libraries

Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h) of this section.

(7) Additional principles

Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.

(c) Definition

(1) In general

Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services--

(A) are essential to education, public health, or public safety;

(B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;

(C) are being deployed in public telecommunications networks by telecommunications carriers; and

(D) are consistent with the public interest, convenience, and necessity.

(2) Alterations and modifications

The Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms.

(3) Special services

In addition to the services included in the definition of universal service under paragraph (1), the Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h) of this section.

(d) Telecommunications carrier contribution

Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to

the preservation and advancement of universal service if the public interest so requires.

(e) Universal service support

After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

(f) State authority

A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

(g) Interexchange and interstate services

Within 6 months after February 8, 1996, the Commission shall adopt rules to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State.

(h) Telecommunications services for certain providers

(1) In general

(A) Health care providers for rural areas

A telecommunications carrier shall, upon receiving a bona fide request, provide telecommunications services which are necessary for the provision of health care services in a State, including instruction relating to such services, to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State. A telecommunications carrier providing service under this paragraph shall be entitled to have an amount equal to the difference, if any, between the rates for services provided to health care providers for rural areas in a State and the rates for similar services provided to other customers in comparable rural areas in that State treated as a service obligation as a part of its obligation to participate in the mechanisms to preserve and advance universal service.

(B) Educational providers and libraries

All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3) of this section, provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. The discount shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities. A telecommunications carrier providing service under this paragraph shall--

(i) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or

(ii) notwithstanding the provisions of subsection (e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service.

(2) Advanced services

The Commission shall establish competitively neutral rules--

(A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and

nonprofit elementary and secondary school classrooms, health care providers, and libraries; and

(B) to define the circumstances under which a telecommunications carrier may be required to connect its network to such public institutional telecommunications users.

(3) Terms and conditions

Telecommunications services and network capacity provided to a public institutional telecommunications user under this subsection may not be sold, resold, or otherwise transferred by such user in consideration for money or any other thing of value.

(4) Eligibility of users

No entity listed in this subsection shall be entitled to preferential rates or treatment as required by this subsection, if such entity operates as a for-profit business, is a school described in paragraph (7)(A) with an endowment of more than $50,000,000, or is a library or library consortium not eligible for assistance from a State library administrative agency under the Library Services and Technology Act [20 U.S.C.A. § 9121 et seq.].

(5) Requirements for certain schools with computers having internet access

(A) Internet safety

(i) In general

Except as provided in clause (ii), an elementary or secondary school having computers with Internet access may not receive services at discount rates under paragraph (1)(B) unless the school, school board, local educational agency, or other authority with responsibility for administration of the school--

(I) submits to the Commission the certifications described in subparagraphs (B) and (C);

(II) submits to the Commission a certification that an Internet safety policy has been adopted and implemented for the school under subsection (l) of this section; and

(III) ensures the use of such computers in accordance with the certifications.

(ii) Applicability

The prohibition in clause (i) shall not apply with respect to a school that receives services at discount rates under paragraph (1)(B) only for purposes other than the provision of Internet access, Internet service, or internal connections.

(iii) Public notice; hearing

An elementary or secondary school described in clause (i), or the school board, local educational agency, or other authority with responsibility for administration of the school, shall provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy. In the case of an elementary or secondary school other than an elementary or secondary school as defined in section 8801 of Title 20, the notice and hearing required by this clause may be limited to those members of the public with a relationship to the school.

(B) Certification with respect to minors

A certification under this subparagraph is a certification that the school, school board, local educational agency, or other authority with responsibility for administration of the school--

(i) is enforcing a policy of Internet safety for minors that includes monitoring the online activities of minors and the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are--

(I) obscene;

(II) child pornography; or

(III) harmful to minors;

(ii) is enforcing the operation of such technology protection measure during any use of such computers by minors; and

(iii) as part of its Internet safety policy is educating minors about appropriate online behavior, including interacting with other individuals on social networking websites and in chat rooms and cyberbullying awareness and response.

(C) Certification with respect to adults

A certification under this paragraph is a certification that the school, school board, local educational agency, or other authority with responsibility for administration of the school--

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are--

(I) obscene; or

(II) child pornography; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers.

(D) Disabling during adult use

An administrator, supervisor, or other person authorized by the certifying authority under subparagraph (A)(i) may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose.

(E) Timing of implementation

(i) In general

Subject to clause (ii) in the case of any school covered by this paragraph as of the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certification under subparagraphs (B) and (C) shall be made--

(I) with respect to the first program funding year under this subsection following such effective date, not later than 120 days after the beginning of such program funding year; and

(II) with respect to any subsequent program funding year, as part of the application process for such program funding year.

(ii) Process

(I) Schools with internet safety policy and technology protection measures in place

A school covered by clause (i) that has in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C) shall certify its compliance with subparagraphs (B) and (C) during each annual program application cycle under this subsection, except that with respect to the first program funding year after the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certifications shall be made not later than 120 days after the beginning of such first program funding year.

(II) Schools without internet safety policy and technology protection measures in place

A school covered by clause (i) that does not have in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C)--

(aa) for the first program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is undertaking such actions, including any necessary procurement procedures, to put in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C); and

(bb) for the second program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is in compliance with subparagraphs (B) and (C).

Any school that is unable to certify compliance with such requirements in such second program year shall be ineligible for services at discount rates or funding in lieu of services at such rates under this subsection for such second year and all subsequent program years under this subsection, until such time as such school comes into compliance with this paragraph.

(III) Waivers

Any school subject to subclause (II) that cannot come into compliance with subparagraphs (B) and (C) in such second year program may seek a waiver of subclause (II)(bb) if State or local procurement rules or regulations or competitive bidding requirements prevent the making of the certification otherwise required by such subclause. A school, school board, local educational agency, or other authority with responsibility for administration of the school shall notify the Commission of the applicability of such subclause to the school. Such notice shall certify that the school in question will be brought into compliance before the start of the third program year after the effective date of this subsection in which the school is applying for funds under this subsection.

(F) Noncompliance

(i) Failure to submit certification

Any school that knowingly fails to comply with the application guidelines regarding the annual submission of certification required by this paragraph shall not be eligible for services at discount rates or funding in lieu of services at such rates under this subsection.

(ii) Failure to comply with certification

Any school that knowingly fails to ensure the use of its computers in accordance with a certification under subparagraphs (B) and (C) shall reimburse any funds and discounts received under this subsection for the period covered by such certification.

(iii) Remedy of noncompliance

(I) Failure to submit

A school that has failed to submit a certification under clause (i) may remedy the failure by submitting the certification to which the failure relates. Upon submittal of such certification, the school shall be eligible for services at discount rates under this subsection.

(II) Failure to comply

A school that has failed to comply with a certification as described in clause (ii) may remedy the failure by ensuring the use of its computers in accordance with such certification. Upon submittal to the Commission of a certification or other appropriate evidence of such remedy, the school shall be eligible for services at discount rates under this subsection.

(6) Requirements for certain libraries with computers having internet access

(A) Internet safety

(i) In general

Except as provided in clause (ii), a library having one or more computers with Internet access may not receive services at discount rates under paragraph (1)(B) unless the library--

(I) submits to the Commission the certifications described in subparagraphs (B) and (C); and

(II) submits to the Commission a certification that an Internet safety policy has been adopted and implemented for the library under subsection (l) of this section; and

(III) ensures the use of such computers in accordance with the certifications.

(ii) Applicability

The prohibition in clause (i) shall not apply with respect to a library that receives services at discount rates under paragraph (1)(B) only for purposes other than the provision of Internet access, Internet service, or internal connections.

(iii) Public notice; hearing

A library described in clause (i) shall provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy.

(B) Certification with respect to minors

A certification under this subparagraph is a certification that the library--

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are--

(I) obscene;

(II) child pornography; or

(III) harmful to minors; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers by minors.

(C) Certification with respect to adults

A certification under this paragraph is a certification that the library--

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are--

(I) obscene; or

(II) child pornography; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers.

(D) Disabling during adult use

An administrator, supervisor, or other person authorized by the certifying authority under subparagraph (A)(i) may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose.

(E) Timing of implementation

(i) In general

Subject to clause (ii) in the case of any library covered by this paragraph as of the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certification under subparagraphs (B) and (C) shall be made--

(I) with respect to the first program funding year under this subsection following such effective date, not later than 120 days after the beginning of such program funding year; and

(II) with respect to any subsequent program funding year, as part of the application process for such program funding year.

(ii) Process

(I) Libraries with Internet safety policy and technology protection measures in place

A library covered by clause (i) that has in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C) shall certify its compliance with subparagraphs (B) and (C) during each annual program application cycle under this subsection, except that with respect to the first program funding year after the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certifications shall be made not later than 120 days after the beginning of such first program funding year.

(II) Libraries without internet safety policy and technology protection measures in place

A library covered by clause (i) that does not have in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C)--

(aa) for the first program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is undertaking such actions, including any necessary procurement procedures, to put in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C); and

(bb) for the second program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is in compliance with subparagraphs (B) and (C).

Any library that is unable to certify compliance with such requirements in such second program year shall be ineligible for services at discount rates or funding in lieu of services at such rates under this subsection for such second year and all subsequent program years under this subsection, until such time as such library comes into compliance with this paragraph.

(III) Waivers

Any library subject to subclause (II) that cannot come into compliance with subparagraphs (B) and (C) in such second year may seek a waiver of subclause (II)(bb) if State or local procurement rules or regulations or competitive bidding requirements prevent the making of the certification otherwise required by such subclause. A library, library board, or other authority with responsibility for administration of the library shall notify the Commission of the applicability of such subclause to the library. Such notice shall certify that the library in question will be brought into compliance before the start of the third program year after the effective date of this subsection in which the library is applying for funds under this subsection.

(F) Noncompliance

(i) Failure to submit certification

Any library that knowingly fails to comply with the application guidelines regarding the annual submission of certification required by this paragraph shall not be eligible for services at discount rates or funding in lieu of services at such rates under this subsection.

(ii) Failure to comply with certification

Any library that knowingly fails to ensure the use of its computers in accordance with a certification under subparagraphs (B) and (C) shall reimburse all funds and discounts received under this subsection for the period covered by such certification.

(iii) Remedy of noncompliance

(I) Failure to submit

A library that has failed to submit a certification under clause (i) may remedy the failure by submitting the certification to which the failure relates. Upon submittal of such certification, the library shall be eligible for services at discount rates under this subsection.

(II) Failure to comply

A library that has failed to comply with a certification as described in clause (ii) may remedy the failure by ensuring the use of its computers in accordance with such certification. Upon submittal to the Commission of a certification or other appropriate evidence of such remedy, the library shall be eligible for services at discount rates under this subsection.

(7) Definitions

For purposes of this subsection:

(A) Elementary and secondary schools

The term “elementary and secondary schools” means elementary schools and secondary schools, as defined in section 7801 of Title 20.

(B) Health care provider

The term “health care provider” means--

(i) post-secondary educational institutions offering health care instruction, teaching hospitals, and medical schools;

(ii) community health centers or health centers providing health care to migrants;

(iii) local health departments or agencies;

(iv) community mental health centers;

(v) not-for-profit hospitals;

(vi) rural health clinics; and

(vii) consortia of health care providers consisting of one or more entities described in clauses (i) through (vi).

(C) Public institutional telecommunications user

The term “public institutional telecommunications user” means an elementary or secondary school, a library, or a health care provider as those terms are defined in this paragraph.

(D) Minor

The term “minor” means any individual who has not attained the age of 17 years.

(E) Obscene

The term “obscene” has the meaning given such term in section 1460 of Title 18.

(F) Child pornography

The term “child pornography” has the meaning given such term in section 2256 of Title 18.

(G) Harmful to minors

The term “harmful to minors” means any picture, image, graphic image file, or other visual depiction that--

(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;

(ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and

(iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

(H) Sexual act; sexual contact

The terms “sexual act” and “sexual contact” have the meanings given such terms in section 2246 of Title 18.

(I) Technology protection measure

The term “technology protection measure” means a specific technology that blocks or filters Internet access to the material covered by a certification under paragraph (5) or (6) to which such certification relates.

(i) Consumer protection

The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.

(j) Lifeline assistance

Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission under regulations set forth in section 69.117 of title 47, Code of Federal Regulations, and other related sections of such title.

(k) Subsidy of competitive services prohibited

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

(l) Internet safety policy requirement for schools and libraries

(1) In general

In carrying out its responsibilities under subsection (h) of this section, each school or library to which subsection (h) of this section applies shall--

(A) adopt and implement an Internet safety policy that addresses--

(i) access by minors to inappropriate matter on the Internet and World Wide Web;

(ii) the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications;

(iii) unauthorized access, including so-called “hacking”, and other unlawful activities by minors online;

(iv) unauthorized disclosure, use, and dissemination of personal identification information regarding minors; and

(v) measures designed to restrict minors' access to materials harmful to minors; and

(B) provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy.

(2) Local determination of content

A determination regarding what matter is inappropriate for minors shall be made by the school board, local educational agency, library, or other authority responsible for making the determination. No agency or instrumentality of the United States Government may--

(A) establish criteria for making such determination;

(B) review the determination made by the certifying school, school board, local educational agency, library, or other authority; or

(C) consider the criteria employed by the certifying school, school board, local educational agency, library, or other authority in the administration of subsection (h)(1)(B) of this section.

(3) Availability for review

Each Internet safety policy adopted under this subsection shall be made available to the Commission, upon request of the Commission, by the school, school board, local educational agency, library, or other authority responsible for adopting such Internet safety policy for purposes of the review of such Internet safety policy by the Commission.

(4) Effective date

This subsection shall apply with respect to schools and libraries on or after the date that is 120 days after December 21, 2000.

47 U.S.C. §402

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

(10) By any person who is aggrieved or whose interests are adversely affected by a determination made by the Commission under section 618(a)(3) of this title.

(c) Filing notice of appeal; contents; jurisdiction; temporary orders

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) Notice to interested parties; filing of record

Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28.

(e) Intervention

Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person

who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) Records and briefs

The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) Time of hearing; procedure

The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of Title 5.

(h) Remand

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) Judgment for costs

The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) Finality of decision; review by Supreme Court

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

47 U.S.C. §405

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

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

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

47 C.F.R. §54.309

(a) Calculation of total support available per state. Beginning January 1, 2000, non-rural incumbent local exchange carriers, and eligible telecommunications carriers serving lines in the service areas of non-rural incumbent local exchange carriers, shall receive universal service support for the forward-looking economic costs of providing supported services in high-cost areas, provided that the State in which the lines served by the carrier are located has complied with the certification requirements in § 54.313. The total amount of forward-looking support available in each State shall be determined according to the following methodology:

(1) For each State, the Commission's cost model shall determine the statewide average forward-looking economic cost (FLEC) per line of providing the supported services. The statewide average FLEC per line shall equal the total FLEC for non-rural carriers to provide the supported services in the State, divided by the number of switched lines used in the Commission's cost model. The total FLEC shall equal average FLEC multiplied by the number of switched lines used in the Commission's cost model.

(2) The Commission's cost model shall determine the national average FLEC per line of providing the supported services. The national average FLEC per line shall equal the total FLEC for non-rural carriers to provide the supported services in all States, divided by the total number of switched lines in all States used in the Commission's cost model.

(3) The national cost benchmark shall equal two weighted standard deviations above the national average FLEC per line.

(4) Support calculated pursuant to this section shall be provided to non-rural carriers in each State where the statewide average FLEC per line exceeds the national cost benchmark. The total amount of support provided to non-rural carriers in each State where the statewide average FLEC per line exceeds the national cost benchmark shall equal 76 percent of the amount of the statewide average FLEC per line that exceeds the national cost benchmark, multiplied by the number of lines reported pursuant to § 36.611, § 36.612, and § 54.307 of this chapter.

(5) In the event that a State's statewide average FLEC per line does not exceed the national cost benchmark, non-rural carriers in such State shall be eligible for support pursuant to § 54.311. In the event that a State's statewide average FLEC

per line exceeds the national cost benchmark, but the amount of support otherwise provided to a non-rural carrier in that State pursuant to this section is less than the amount that would be provided pursuant to § 54.311, the carrier shall be eligible for support pursuant to § 54.311.

(b) Distribution of total support available per state. The total amount of support available per State calculated pursuant to paragraph (a) of this section shall be distributed to non-rural incumbent local exchange carriers, and eligible telecommunications carriers serving lines in the service areas of non-rural incumbent local exchange carriers, in the following manner:

(1) The Commission's cost model shall determine the percentage of the total amount of support available in the State for each wire center by calculating the ratio of the wire center's FLEC above the national cost benchmark to the total FLEC above the national cost benchmark of all wire centers within the State. A wire center's FLEC above the national cost benchmark shall be equal to the wire center's average FLEC per line above the national cost benchmark, multiplied by the number of switched lines in the wire center used in the Commission's cost model;

(2) The total amount of support distributed to each wire center shall be equal to the percentage calculated for the wire center pursuant to paragraph (b)(1) of this section multiplied by the total amount of support available in the state;

(3) The total amount of support for each wire center pursuant to paragraph (b)(2) of this section shall be divided by the number of lines in the wire center reported pursuant to § 36.611, § 36.612, and § 54.307 of this chapter to determine the per-line amount of forward-looking support for that wire center;

(4) The per-line amount of support for each wire center pursuant to paragraph (b)(3) of this section shall be multiplied by the number of lines served by a non-rural incumbent local exchange carrier in that wire center, or by an eligible telecommunications carrier in that wire center, as reported pursuant to § 36.611, § 36.612, and § 54.307 of this chapter, to determine the amount of forward-looking support to be provided to that carrier.

(5) The total amount of support calculated for each wire center pursuant to paragraph (b)(4) of this section shall be divided by the number of lines in the wire center to determine the per-line amount of forward-looking support for that wire center;

(6) The per-line amount of support for a wire center calculated pursuant to paragraph (b)(5) of the section shall be multiplied by the number of lines served by a non-rural incumbent local exchange carrier in that wire center, or by an eligible telecommunications carrier in that wire center, to determine the amount of forward-looking support to be provided to that carrier.

(c) Petition for waiver. Pursuant to section 1.3 of this chapter, any State may file a petition for waiver of paragraph (b) of this section, asking the Commission to distribute support calculated pursuant to paragraph (a) of this section to a geographic area different than the wire center. Such petition must contain a description of the particular geographic level to which the State desires support to be distributed, and an explanation of how waiver of paragraph (b) of this section will further the preservation and advancement of universal service within the State.

47 C.F.R. §54.316

(a) Certification. Each state will be required annually to review the comparability of residential rates in rural areas of the state served by non-rural incumbent local exchange carriers to urban rates nationwide, and to certify to the Commission and the Administrator as to whether the rates are reasonably comparable, for purposes of section 254(b)(3) of the Telecommunications Act of 1996. If a state does not rely on the safe harbor described in paragraph (b) of this section, or certifies that the rates are not reasonably comparable, the state must fully explain its rate comparability analysis and provide data supporting its certification, including but not limited to residential rate data for rural areas within the state served by non-rural incumbent local exchange carriers. If a state certifies that the rates are not reasonably comparable, it must also explain why the rates are not reasonably comparable and explain what action it intends to take to achieve rate comparability.

(b) Safe harbor. For the purposes of its certification, a state may presume that the residential rates in rural areas served by non-rural incumbent local exchange carriers are reasonably comparable to urban rates nationwide if the rates are below the nationwide urban rate benchmark. The nationwide urban rate benchmark shall equal the most recent average urban rate plus two weighted standard deviations. The benchmark shall be calculated using the average urban rate and standard deviation shown in the most recent annual Reference Book of Rates, Price Indices, and Expenditures for Telephone Service published by the Wireline Competition Bureau. To the extent that a state relies on the safe harbor, the rates that it compares to the nationwide urban rate benchmark shall include the access charges and other mandatory monthly rates included in the rate survey published in the most recent annual Reference Book of Rates, Price Indices, and Expenditures for Telephone Service. The Reference Book of Rates, Price Indices, and Expenditures for Telephone Service is available for public inspection at the Commission's Reference Center at 445 12th Street, S.W., Washington, D.C. 20554 and on the Commission Web site at www.fcc.gov/wcb/iatd/lec.html.

(c) Definition of “rural area.” For the purposes of this section, a “rural area” is a non-metropolitan county or county equivalent, as defined in the Office of Management and Budget's (OMB) Revised Standards for Defining Metropolitan Areas in the 1990s and identifiable from the most recent Metropolitan Statistical Area (MSA) list released by OMB. At a state's discretion, a “rural area” may also include any wire center designated by the state as rural for the purposes of this section. In the event that a state designates a wire center as rural, it must provide an

explanation supporting such designation in its certification pursuant to paragraph (a) of this section.

(d) Schedule for certification. Annual certifications are required on the schedule set forth in § 54.313(d)(3), beginning October 1, 2004. Certifications due on October 1 of each year shall pertain to rates as of the prior July 1. Certifications filed during the remainder of the schedule set forth in § 54.313(d)(3) shall pertain to the same date as if they had been filed on October 1.

(e) Effect of failure to certify. In the event that a state fails to certify, no eligible telecommunications carrier in the state shall receive support pursuant to § 54.309.

47 C.F.R. §54.706

(a) Entities that provide interstate telecommunications to the public, or to such classes of users as to be effectively available to the public, for a fee will be considered telecommunications carriers providing interstate telecommunications services and must contribute to the universal service support mechanisms. Certain other providers of interstate telecommunications, such as payphone providers that are aggregators, providers of interstate telecommunications for a fee on a non-common carrier basis, and interconnected VoIP providers, also must contribute to the universal service support mechanisms. Interstate telecommunications include, but are not limited to:

(1) Cellular telephone and paging services;

(2) Mobile radio services;

(3) Operator services;

(4) Personal communications services (PCS);

(5) Access to interexchange service;

(6) Special access service;

(7) WATS;

(8) Toll-free service;

(9) 900 service;

(10) Message telephone service (MTS);

(11) Private line service;

(12) Telex;

(13) Telegraph;

(14) Video services;

(15) Satellite service;

(16) Resale of interstate services;

(17) Payphone services; and

(18) Interconnected VoIP services.

(19) Prepaid calling card providers.

(b) Except as provided in paragraph (c) of this section, every entity required to contribute to the federal universal service support mechanisms under paragraph (a) of this section shall contribute on the basis of its projected collected interstate and international end-user telecommunications revenues, net of projected contributions.

(c) Any entity required to contribute to the federal universal service support mechanisms whose projected collected interstate end-user telecommunications revenues comprise less than 12 percent of its combined projected collected interstate and international end-user telecommunications revenues shall contribute based only on such entity's projected collected interstate end-user telecommunications revenues, net of projected contributions. For purposes of this paragraph, an “entity” shall refer to the entity that is subject to the universal service reporting requirements in § 54.711 and shall include all of that entity's affiliated providers of interstate and international telecommunications and telecommunications services.

(d) Entities providing open video systems (OVS), cable leased access, or direct broadcast satellite (DBS) services are not required to contribute on the basis of revenues derived from those services. The following entities will not be required to contribute to universal service: non-profit health care providers; broadcasters; systems integrators that derive less than five percent of their systems integration revenues from the resale of telecommunications. Prepaid calling card providers are not required to contribute on the basis of revenues derived from prepaid calling cards sold by, to, or pursuant to contract with the Department of Defense (DoD) or a DoD entity.

(e) Any entity required to contribute to the federal universal service support mechanisms shall retain, for at least five years from the date of the contribution, all records that may be required to demonstrate to auditors that the contributions made were in compliance with the Commission's universal service rules. These records

shall include without limitation the following: Financial statements and supporting documentation; accounting records; historical customer records; general ledgers; and any other relevant documentation. This document retention requirement also applies to any contractor or consultant working on behalf of the contributor.

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

Vermont Public Service Board, et al., Petitioner,

v.

Federal Communications Commission and United States of America, Respondents.

CERTIFICATE OF SERVICE

I, Maureen K. Flood, hereby certify that on February 17, 2011, I electronically filed the foregoing Initial Brief with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Some of the participants in the case, denoted with asterisks below, are not CM/ECF users. I certify further that I have directed that copies of the foregoing document be mailed by First-Class Mail to those persons, unless another attorney at the same mailing address is receiving electronic service.

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