ORAL ARGUMENT SCHEDULED FOR MAY 10, 2011

BRIEF FOR RESPONDENTS

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

NO. 10–1257

FEATURE GROUP IP WEST, LLC, *ET AL*.

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL
COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

All parties appearing in this Court are listed in petitioners' brief.

2. Rulings under review.

Feature Group IP Petition for Forbearance from Section 251(g) of the Communications Act and Sections 51.701(b)(1) and 69.5(b) of the Commission's Rules:

Memorandum Opinion and Order, 24 FCC Rcd 1571 (2009) (J.A. 1382)

Order on Reconsideration, 25 FCC Rcd 8867 (2010) (J.A. 1526)

3. Related cases.

The Memorandum Opinion and Order cited above was before this Court in No. 09-1070, which was dismissed on October 21, 2010. The Order on Reconsideration has not previously been before this Court or any other court. We are not aware of any related cases pending in this Court or in any other court; the cases cited by petitioners (Br. iv-v) do not directly arise out of the administrative proceeding that resulted in the orders on review, and the Commission is not a party in those cases.

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Administrative Decisions

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GLOSSARY

FGIP	Feature Group IP (*i.e.*, the petitioners, collectively)
IP	Internet Protocol
ISP	Internet Service Provider
IXC	Interexchange Carrier
LEC	Local Exchange Carrier
NBP	National Broadband Plan
VoIP	Voice over Internet protocol

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JURISDICTION

The Commission released an order denying petitioners' forbearance petition on January 21, 2009. *Feature Group IP Petition for Forbearance from Section 251(g) of the Communications Act and Sections 51.701(b)(1) and 69.5(b) of the Commission's Rules*, 24 FCC Rcd 1571 (2009) (*Forbearance Order*) (J.A. 1382). It released an order denying petitioners' petition for agency reconsideration of the *Forbearance Order* on June 30, 2010. *Feature Group IP Petition for Forbearance from Section 251(g) of the*

Communications Act and Sections 51.701(b)(1) and 69.5(b) of the Commission's Rules, 25 FCC Rcd 8867 (2010) (J.A. 1526) (*Reconsideration Order*). Petitioners filed their petition for review on August 23, 2010. To the extent petitioners have standing, this Court's jurisdiction would rest on 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). However, as discussed below in Section I of the Argument, petitioners have failed to demonstrate standing in their opening brief as required by this Court. *See* D.C. Circuit Rule 28(a)(7); *Core Communications, Inc. v. FCC*, 545 F.3d 1 (D.C. Cir. 2008).

QUESTIONS PRESENTED

Pursuant to 47 U.S.C. § 160, petitioners asked the Commission to forbear from applying 47 U.S.C. § 251(g) and related rules that govern certain forms of intercarrier compensation, on the theory that another statute – 47 U.S.C. § 251(b)(5) – automatically applies to ensure just and reasonable compensation. The questions presented are:

(1) Whether petitioners have demonstrated standing to challenge the denial of their petition for forbearance.

(2) Whether the Commission lawfully denied petitioners' request for forbearance from applying 47 U.S.C. § 251(g) and the regulations preserved by that section, where the Commission concluded that section 251(b)(5) would not automatically apply to ensure just and reasonable compensation if forbearance were granted.

(3) Whether the Commission reasonably concluded that petitioners' claim for "partial" forbearance was waived because it was not presented in their forbearance petition.

(4) Whether the Commission, having denied petitioners' forbearance request on the merits, acted within its discretion when it declined to issue a declaratory ruling addressing the compensation rules applicable to petitioners' communications, because the Commission is currently conducting a comprehensive industry-wide rulemaking to address intercarrier-compensation reform.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are reproduced in the appendix to this brief.

COUNTERSTATEMENT

The Commission has the authority to "forbear from applying" any provision of the Communications Act or its regulations to a telecommunications carrier or a telecommunications service. *See* 47 U.S.C. § 160(a). In this case, the petitioners (a group of related entities we will collectively refer to as "Feature Group IP" or "FGIP") asked the Commission to exercise its statutory forbearance powers so that their communications traffic would not be subject to a form of intercarrier compensation known as "access charges." The Commission denied the request because it concluded that forbearance would not produce the result that FGIP sought. To

understand why, it is necessary to set out a brief overview of the Commission's regulation of intercarrier compensation.

I. REGULATION OF INTERCARRIER COMPENSATION

A. Access Charges and Reciprocal Compensation

1. Intercarrier compensation refers to a complex system that governs the billions of dollars that telecommunications carriers pay each other for the origination, transport, and termination of telecommunications traffic. The two main types of intercarrier compensation are implicated here: "access charges" and "reciprocal compensation." *See generally Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685, 4687 ¶ 5 (2005) (*Intercarrier Compensation FNPRM*).

Access charges are the means by which long-distance telecommunications carriers compensate local exchange carriers (LECs) for "access" to the local telephone network, which is needed to connect a long-distance caller with a specific called party. Prior to 1996, incumbent LECs provided nearly all local telephone service in the nation through monopoly franchises. If left unchecked, the incumbent LECs' market power would have enabled them unlawfully to impose "unjust" and "unreasonable" rates and practices on long-distance carriers seeking access to the local network. *See* 47 U.S.C. §§ 201-202. To prevent this, the Commission traditionally has regulated the rates, terms, and conditions that LECs may adopt for access with respect to interstate calls, while state regulatory commissions

traditionally have regulated access for intrastate calls. *See generally Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 477 (2002).

A second intercarrier-compensation regime, reciprocal compensation, arose out of the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56. The 1996 Act eliminated local monopoly franchises, *see* 47 U.S.C. § 253, and established a framework for promoting competition in local telephone markets, *see* 47 U.S.C. §§ 251-252. Local telephone competition meant that, for the first time, more than one LEC could be involved in the transmission of a local telephone call. To address that situation, Congress added section 251(b)(5) to the Communications Act, which requires LECs to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). Under a reciprocal-compensation arrangement, for example, when a customer of one LEC calls the customer of another LEC, the first LEC compensates the second LEC for the use of the second LEC's facilities in transporting and terminating the call. *See In re Core Communications, Inc.*, 455 F.3d 267, 270 (D.C. Cir. 2006). Reciprocal-compensation arrangements thus are designed to help ensure that the terminating LEC that carries a qualifying telephone call recovers the costs incurred in completing the call.

2. The Commission initially read section 251(b)(5) to "apply only to traffic that originates and terminates within a local area." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16013 ¶ 1034 (1996) (subsequent history omitted). In the

late 1990s, an increasing amount of traffic involved dial-up calls to companies providing access to the Internet (*i.e.*, Internet service providers (ISPs)). Disputes arose about how dial-up ISP-bound calls should be classified for purposes of intercarrier compensation. The Commission initially concluded that such calls were not "local" calls subject to section 251(b)(5)'s reciprocal-compensation requirement. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 3689 (1999). After this Court reversed that decision as inadequately explained, *see Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 5-8 (D.C. Cir. 2000), the Commission reconsidered its interpretation of the scope of section 251(b)(5). In its *2001 ISP Remand Order*,[1] the Commission concluded that section 251(b)(5), standing alone, applies to "*all* telecommunications traffic," not just local traffic. 16 FCC Rcd at 9166 ¶ 32. The Commission stated, however, that this interpretation did not require reciprocal-compensation arrangements for traffic that traditionally had been subject to access charges. Rather, the Commission explained that such traffic had been "carve[d] out" from the scope of section 251(b)(5) by 47 U.S.C. § 251(g). *Id.* at 9167 ¶ 34. Section 251(g) states that LECs must continue "provid[ing] exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in

[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd 9151 (2001) (*2001 ISP Remand Order*), *remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 1012 (2003).

accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation)" previously in effect "until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission." The Commission thus concluded that section 251(g) preserved the traditional access-charge regime "unless and until the Commission by regulation should determine otherwise." *Id.* at 9169 ¶ 39.

On review, this Court remanded the *2001 ISP Remand Order*. *See WorldCom*, 288 F.3d 429. In doing so, the Court did not address the Commission's interpretation of the interplay between sections 251(b)(5) and 251(g). Rather, the Court concluded that the Commission had erred by ruling that dial-up ISP-bound traffic fell within the scope of section 251(g). *Id.* at 434.

In November 2008, the Commission issued the *2008 ISP Remand Order*.[2] In that order, the Commission concluded that dial-up traffic was subject to both section 251(b)(5) and the FCC's authority under 47 U.S.C. § 201 to regulate the rates for interstate communications services, a conclusion this Court affirmed. *See Core Communications, Inc. v. FCC*, 592 F.3d 139, 141 (D.C. Cir.), *cert. denied*, 131 S. Ct. 597, 626 (2010). The *2008 ISP Remand Order* also reaffirmed the Commission's view that "traffic

[2] *High-Cost Universal Service Support*, 24 FCC Rcd 6475 (2008) (*2008 ISP Remand Order*), *aff'd*, *Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir.), *cert. denied*, 131 S. Ct. 597, 626 (2010).

encompassed by section 251(g) is excluded from section 251(b)(5) except to the extent that the Commission acts to bring that traffic within its scope." 24 FCC Rcd at 6483 ¶ 16.

B. Intercarrier Compensation Reform Proceedings

The Commission recognized early on that the issues surrounding dial-up ISP-bound traffic were just the tip of the iceberg. Internet communications (and the use of Internet protocol (IP) technology generally) were producing a technological and marketplace revolution that raised complex questions about how to distinguish between providers and users of communications services for regulatory purposes. *See IP-Enabled Services*, 19 FCC Rcd 4863, 4868-79 ¶¶ 7-22 (2004) (*IP-Enabled Services NPRM*). In addition, new entry by competitive LECs and wireless carriers (as well as Internet-based services) was putting increasing strain on "the existing patchwork of intercarrier compensation rules" and their reliance on traditional regulatory classifications. *Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4687 ¶ 3 (explaining that current compensation rules turn on regulatory distinctions that "create both opportunities for regulatory arbitrage and incentives for inefficient investment and deployment decisions").

In 2001, the Commission concluded that comprehensive reform of the intercarrier-compensation system was necessary in light of technological and marketplace developments. Accordingly, on the same day that the Commission released the *2001 ISP Remand Order*, it commenced a rulemaking to undertake a "fundamental re-examination of all currently

regulated forms of intercarrier compensation" and "test the concept of a unified regime for the flows of payments among telecommunications carriers." *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, 9611 ¶ 1 (2001) (*Intercarrier Compensation NPRM*). In response, the Commission received hundreds of filings and a number of detailed proposals for intercarrier-compensation reform from industry groups and state regulators. In March 2005, the Commission issued the *Intercarrier Compensation FNPRM* to seek comment on these proposals and a variety of other legal and policy issues related to compensation reform. *See Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4687 ¶ 4; *id.* at 4705-15 ¶¶ 40-59 (describing proposals).

In March 2004, the Commission initiated another rulemaking dealing specifically with the regulatory status of IP-based services, including voice services that use IP technology (known as voice-over-IP or VoIP). *See IP-Enabled Services NPRM*, 19 FCC Rcd 4863. This rulemaking asked broadly how IP-based services (or some subset of them such as VoIP) should be classified and regulated under the Communications Act, including whether such services should be treated as "telecommunications services" (which are regulated as common-carrier services) or "information services" (which are not). *Id.* at 4892-94 ¶¶ 42-44. The rulemaking also observed that the Commission had not determined "whether [access] charges apply or do not apply under existing law" to VoIP and other IP-enabled services and

accordingly sought "comment on the extent to which access charges should apply." *Id.* at 4904 ¶ 61 (footnote reference omitted).

In the *2008 ISP Remand Order*, the Commission put forth two specific proposals to reform the intercarrier-compensation system. 24 FCC Rcd at 6493 ¶ 40; *see id.* App. A, at 6497-6654 (first proposal); App. C, at 6697-6853 (second proposal). Although there are differences in the proposals, both would transition "all telecommunications traffic" (in the contiguous United States) to "the reciprocal compensation provisions of section 251(b)(5)" under a ten-year transition period designed to "minimize market disruption." *Id.* App. A, at 6582 ¶ 190; *id.* App. C, at 6780 ¶ 185.

Throughout this period, the communications marketplace continued to evolve rapidly; by the end of the decade, more Americans were accessing the Internet through broadband technology (for example, through their cable modem or DSL connection) than through dial-up, and voice calling over broadband had become a commercial fixture. *See* Connecting America: The National Broadband Plan 167 (available at http://www.broadband.gov/plan/) (NBP) (finding that 65% of Americans use broadband at home); *Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006) (describing VoIP services). In 2009, Congress responded by calling for the development of "a national broadband plan" to "ensure that all people of the United States have access to broadband capability and [to] establish benchmarks for meeting that goal." American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(1), (2), 123 Stat. 115, 515-16. After a year of study and public comment, the

national broadband plan was delivered to Congress in March 2010. The plan found that "[c]losing the broadband availability gap requires comprehensive reform of [universal service programs], as well as consideration of [intercarrier compensation]." NBP 143. Recognizing that "service providers and investors [need] time to adjust to a new regulatory regime," however, the plan cautioned against any "flash cuts." *Id.* (formatting altered). The plan instead recommended that the Commission "adopt a framework for long-term intercarrier compensation . . . reform that creates a glide path to eliminate per-minute charges while providing carriers an opportunity for adequate cost recovery." *Id.* at 136.

Consistent with the national broadband plan's recommendations, the Commission is currently considering adoption of a notice of proposed rulemaking to explore how to "moderniz[e] the . . . intercarrier compensation . . . system" and implement "a long-term transition from current high-cost [universal-service] support and [intercarrier-compensation] mechanisms to a single, fiscally responsible Connect America Fund." *FCC Announces Tentative Agenda For February 8th Open Meeting*, News Release (Jan. 18, 2011) (Jan. 18 News Release) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-304157A1.pdf); *see also* NBP 145 (recommending replacement of existing high-cost support funds with a new Connect America Fund). The Commission has tentatively scheduled a vote on this item for its February 8, 2011, open meeting. Jan. 18 News Release, *supra*.

II. THE *CORE FORBEARANCE DENIAL ORDER*

The 1996 Act added section 10 to the Communications Act to give the Commission forbearance authority "to reduce the regulatory burdens on the telephone company when competition develops." S. Rep. No. 104-23, at 5 (1995). Under section 10, the Commission must "forbear from applying" any provision of the Communications Act or its regulations to a telecommunications carrier or a telecommunications service if it finds that: (1) the statutory or regulatory provision at issue is not necessary to ensure rates and terms that are just, reasonable, and not unreasonably discriminatory; (2) the provision is not necessary to protect consumers; and (3) forbearance would be in the public interest. 47 U.S.C. § 160(a). The Commission may exercise its section 10 authority either on its own initiative or in response to a petition by a telecommunications carrier. Section 10(c) provides that a forbearance petition filed by a carrier "shall be deemed granted" after one year (plus 90 days if extended by the Commission) "if the Commission does not deny the petition for failure to meet the requirements for forbearance under [section 10(a)]." 47 U.S.C. § 160(c).

In 2006, Core Communications filed a petition with the Commission to forbear from applying section 251(g), which, as noted above, preserves LECs' pre-1996-Act equal-access and non-discriminatory interconnection restrictions and obligations "until such restrictions and obligations are explicitly superseded by regulations [thereafter] prescribed by the Commission." 47 U.S.C. § 251(g). *See Petition of Core Communications,*

Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules, 22 FCC Rcd 14118 (2007) (*Core Forbearance Denial Order*). Core's stated intent was to use the FCC's forbearance authority to eliminate the access-charge regime and thereby to apply section 251(b)(5)'s reciprocal-compensation rules to all telecommunications traffic. According to Core, "if the Commission granted forbearance from the 'carve-out' created by section 251(g), the section 251(b)(5) reciprocal compensation regime would apply to all telecommunications services." *Id.* ¶ 13.

In July 2007, the Commission denied Core's forbearance petition. The Commission explained that "[b]ecause section 251(g) explicitly contemplates affirmative Commission action in the form of new regulation, we find that forbearance from section 251(g) would not give Core the relief it seeks, because the section 251(b)(5) reciprocal compensation regime would not automatically, and by default, govern traffic that was previously subject to section 251(g)." *Core Forbearance Denial Order*, 22 FCC Rcd at 14126 ¶ 14. Instead, "[i]f the Commission were to forbear from the rate regulation preserved by section 251(g), there would be no rate regulation governing the exchange of traffic currently subject to the access charge regime." *Id.* The "regulatory void" that would be created, the Commission concluded, would fail to ensure just and reasonable rates, protect consumers, or promote the public interest. *Id.* at 14126-28 ¶¶ 14-16. Accordingly, the Commission found that Core's petition met none of the three required prongs of the section 10 forbearance test. *Id.* at 14128 ¶ 16. *See* 47 U.S.C. § 160(a).

On review, this Court dismissed Core's petition for review for failure to demonstrate standing. *Core*, 545 F.3d 1. The Court explained that Core "did not reveal what services it offered or planned to offer that are or would be affected by" section 251(g), "[n]or, to the extent that the services might be in markets that Core might *enter*, did Core say anything to indicate the seriousness of its plans." *Id.* at 2.

III. PROCEEDINGS BELOW

1. FGIP's Forbearance Petition. On October 23, 2007, almost three months after the FCC issued the *Core Forbearance Denial Order*, FGIP filed a forbearance petition with the Commission.[3] In the petition, FGIP explained that its business consists of receiving traffic from the Internet and sending it on to LECs for termination on the local telephone network. Forbearance Petition at 20-24 (J.A. 28-32). FGIP called such traffic "voice-embedded Internet communications," which it described as communication that "uses Internet Protocol to provide voice applications as part of a larger Internet communications experience." *See id.* at 2 n.3 & 3 (J.A. 10-11). In the forbearance petition, FGIP argued that this type of communication is not governed by the access-charge regime. *Id*. at 2-3 (J.A. 10-11). In the alternative, FGIP argued that if the Commission found the access-charge rules to apply, the Commission should, with respect to those communications,

[3] Petition of Feature Group IP for Forbearance . . . Pursuant to 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(a)(1), and Rule 69.5(b), WC Docket No. 07-256 (filed Oct. 23, 2007) (Forbearance Petition) (J.A. 1).

forbear from enforcement of section 251(g) and the FCC regulations that preserve the access-charge framework. Forbearance Petition at 3 (J.A. 11). *See* 47 C.F.R. §§ 51.701(b)(1), 69.5(b). FGIP contended that "even in the absence" of access-charge regulation, "there will remain a statutory and regulatory framework to govern intercarrier compensation" for voice-embedded Internet communications – "the reciprocal compensation provisions of Section 251(b)(5)" and the FCC's reciprocal-compensation rules. Forbearance Petition at 57 (J.A. 65).

2. The *Forbearance Order*. The Commission issued a public notice seeking comment on FGIP's forbearance petition.[4] On January 21, 2009, the Commission issued the *Forbearance Order* denying the forbearance petition for failure to "meet the statutory criteria necessary for forbearance under section 10(a) of the Act." *Forbearance Order* ¶ 5 (J.A. 1385-86).

For purposes of its forbearance analysis in this case, the agency assumed, without deciding, that "the foundation of Feature Group IP's petition is valid" – that is, that section 251(g) "appl[ies] to voice-embedded Internet communications, with the effect that at least in some circumstances, LECs may receive access charges." *Id.* ¶ 6 (J.A. 1386). The Commission declined to issue a declaratory ruling definitively resolving the intercarrier compensation obligations that apply to such communications, however,

[4] *Pleading Cycle Established for Feature Group IP Petition for Forbearance from Section 251(g) of the Communications Act and Sections 51.701(b)(1) and 69.5(b) of the Commission's Rules*, 22 FCC Rcd 21615 (2007) (J.A. 398).

because that issue was "the subject of a pending rulemaking." *Id.* n.19 (J.A. 1386) (citing *2008 ISP Remand Order*).

Turning to the first prong of the forbearance test, the Commission concluded that, assuming section 251(g) applies, it remains necessary to ensure that rates and terms are just, reasonable, and not unreasonably discriminatory. The Commission explained that section 251(g) preserves pre-1996 Act compensation obligations until they are "explicitly superseded *by regulations prescribed by the Commission*." *Forbearance Order* ¶ 8 (J.A. 1387) (quoting 47 U.S.C. § 251(g)). Because "section 251(g) explicitly contemplates affirmative Commission action in the form of new regulation," the Commission rejected FGIP's premise that forbearance from enforcement of section 251(g) would "automatically, and by default, mean that section 251(b)(5) would govern traffic that was previously subject to section 251(g)." *Id.* Instead, assuming that section 251(g) does apply, the Commission determined that forbearance would result in "no rate regulation governing the exchange of this traffic." *Id.*

The Commission observed that it had previously addressed this question in the *Core Forbearance Denial Order* and reached the same conclusion. *Forbearance Order* ¶¶ 9-10 (J.A. 1388). The Commission rejected FGIP's argument that the *Core Forbearance Denial Order* could be distinguished based on differences in "the type of providers and the traffic" involved in the two cases. *Id.* ¶ 9 (J.A. 1388). As the Commission explained, "[a]bsent affirmative action by the Commission, forbearance from section

251(g) would result in a regulatory void based on the plain language of that statutory provision, regardless of what types of carriers or traffic were involved." *Id.* ¶ 10 (J.A. 1388).

The Commission also found that it was unable "on this record" to conclude that the second and third prongs of the forbearance test – protection of consumers and the public interest – were met. *Forbearance Order* ¶ 12 (J.A. 1389). The Commission observed that FGIP "provides no evidence to support its claims" that forbearance would protect consumers or promote the public interest, and "no economic analysis of the impact of granting its petition is in the record." *Id.* (J.A. 1389-90). Furthermore, the agency could not reasonably determine the impact because the forbearance petition was "unclear as to what traffic would be covered." *Id.* (J.A. 1390). It was clear, however, that "the additional uncertainty created by the regulatory void that would result from forbearance here would be detrimental to consumers." *Id*.

3. The *Reconsideration Order*. FGIP sought agency reconsideration of the *Forbearance Order*. On June 30, 2010, the Commission issued the *Reconsideration Order* denying FGIP's reconsideration request for failure to "identify any new facts or circumstances, or any material error that would support reconsideration." *Reconsideration Order* ¶ 5 (J.A. 1529).

First, the Commission concluded that reconsideration was not warranted based on FGIP's assertion that AT&T was "relying on the [*Forbearance Order*] to justify imposing access charges for voice-embedded Internet communications." *Reconsideration Order* ¶ 7 (J.A. 1530-31).

Specifically, FGIP claimed that, after the FCC released the *Forbearance Order*, AT&T filed a letter with the Texas state commission urging that commission to read the *Forbearance Order* as reflecting "the FCC's conclusion that access charges are due for this traffic type and that they are due from FeatureGroup IP." Feature Group IP's Corrected Motion for Reconsideration, WC Docket No. 07-256 (filed Feb. 23, 2009) (Reconsideration Motion), at 4 (J.A. 1344). The Commission disagreed with FGIP that AT&T's letter to the Texas commission had used the *Forbearance Order* in this manner, but concluded in any event that "a party's self-interested construction of a Commission order is irrelevant" to the agency's determination whether the forbearance criteria have been satisfied. *Reconsideration Order* ¶ 7 (J.A. 1531).

Second, the Commission rejected FGIP's contention that the *Forbearance Order* was inconsistent with the agency's conclusion in the *2008 ISP Remand Order* that dial-up ISP-bound traffic is subject to section 251(b)(5). *Reconsideration Order* ¶ 9 (J.A. 1532). The Commission explained that it had not decided that FGIP's traffic is subject to section 251(g) instead of section 251(b)(5), but merely assumed this for purposes of conducting its forbearance analysis. *Id*. The Commission rejected FGIP's suggestion that it was compelled under section 10 to issue a declaratory ruling deciding which statutory provision applied to FGIP's traffic; rather, the FCC found that section 10 required only that it resolve the forbearance petition within the statutory timetable. *Id*. ¶¶ 9-12 (J.A. 1532-34).

Third, the Commission rejected FGIP's contention that the agency "failed to address [FGIP's] request for partial forbearance rather than complete forbearance." *Reconsideration Order* ¶ 13 (J.A. 1534). Specifically, FGIP asserted that the Commission should have determined that, under its rules, a LEC receiving traffic from FGIP cannot bill FGIP for terminating that traffic, but must instead bill FGIP's customers (*i.e.*, Internet-based entities that generate what FGIP calls voice-embedded Internet communications). *Id.* ¶ 13 (J.A. 1534-35). As an initial matter, the Commission found that the "request Feature Group IP asserts the Commission 'ignored' was not identified as a forbearance request" in the section of the forbearance petition entitled "Specific Forbearance Requested." *Id.* ¶ 14 (J.A. 1535). "More fundamentally," the Commission found, the partial forbearance request, like the classification issue, "is more appropriately characterized as a request for declaratory ruling or clarification of the rules applicable to billing for jointly provided access." *Id.* ¶ 15 (J.A. 1535). In any event, the Commission noted that FGIP failed "to provide the evidence and analysis necessary to support the forbearance requested" even if FGIP's alternative request had been properly presented to the agency. *Id.* ¶ 16 (J.A. 1535).

Finally, the Commission reaffirmed its conclusion that the record evidence failed to show that forbearance would serve the public interest. *Reconsideration Order* ¶ 18 (J.A. 1536). As the Commission explained, although FGIP made "some general statements concerning the potential

benefits that might result from its requested forbearance, all [of its] public interest arguments . . . are based on the premise that section 251(b)(5) would necessarily apply if forbearance were granted, which the Commission rejected." *Id*.

SUMMARY OF ARGUMENT

I. To invoke this Court's jurisdiction, FGIP has the duty to show that it has standing to challenge the FCC's orders denying its forbearance request. In its opening brief, it failed to demonstrate that the elements of Article III standing – injury, causation, and redressability – are present in this case. It instead has presented only a vague and cursory statement of inchoate injury and has ignored altogether the required elements of causation and redressability.

II. The Commission reasonably denied FGIP's petition for forbearance from enforcement of section 251(g) and its preservation of the access-charge regime. For purposes of its forbearance analysis in this case, the Commission assumed (without deciding) that section 251(g) applied to the communications that FGIP was sending to LECs. The Commission concluded, however, that the premise of FGIP's petition – that forbearing from section 251(g) would automatically result in the application of section 251(b)(5) to FGIP's traffic – is incorrect because section 251(g) requires explicit superseding regulations to transition communications from the grandfathering rule of section 251(g) into a different regulatory framework. Accordingly, even if section 251(g) applies to communications between FGIP

and LECs, forbearance would not automatically result in the application of a reciprocal-compensation regime, but instead would leave the LECs' access charges free from regulation altogether. This result, the Commission reasonably determined, would not ensure just and reasonable rates, protect consumers, or promote the public interest and, therefore, could not support grant of the forbearance petition.

As an alternative basis for its decision, the Commission also reasonably determined that FGIP had failed to produce sufficient record evidence to satisfy the forbearance criteria.

III. The Commission acted reasonably on reconsideration when it rejected FGIP's untimely attempt to obtain what it describes as "partial" forbearance. The Commission correctly determined that FGIP had not made that request in its forbearance petition and, therefore, had waived that claim. In any event, the Commission provided alternative bases for denying FGIP's partial forbearance request, which FGIP does not contest.

IV. The Commission reasonably declined to issue a declaratory ruling addressing the intercarrier compensation applicable to FGIP's communications. The Commission adjudicated the merits of FGIP's forbearance petition within the statutory deadline, and nothing in section 10 requires the Commission to take any other action.

STANDARD 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." *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

With respect to the remaining issues, the Commission's decisions must be upheld under the Administrative Procedure Act unless they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow, and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "[A]n extra measure of deference is warranted where the decision involves a 'high level of technical expertise' in an area of 'rapid technological and competitive change.' " *Earthlink, Inc. v. FCC*, 462 F.3d 1, 9 (D.C. Cir. 2006).

ARGUMENT

I. PETITIONERS HAVE FAILED TO DEMONSTRATE STANDING

The orders under review denied FGIP's petition for forbearance under section 10 of the Communications Act. To invoke this Court's jurisdiction properly, FGIP must establish Article III standing by showing that: (1) the FCC's orders denying its forbearance request caused it actual, concrete injury; (2) the injury was caused by the FCC's denial of forbearance; and (3) the Court can redress that injury by overturning the FCC's forbearance decisions in this case. *See Lujan v. Defenders of Wildlife,* 504 U. S. 555, 560-61 (1992). And it must make this showing no later than in its opening brief. *See* D.C. Circuit Rule 28(a)(7); *Core Communications, Inc. v. FCC,* 545 F.3d 1 (D.C. Cir. 2008).

FGIP has not satisfied these standards. In its opening brief, FGIP offers only a pair of conclusory allegations of injury, makes no effort to show how the FCC's decision to deny its forbearance request caused those purported injuries, and fails to explain how overturning the FCC's orders on review would redress any such injuries. Hence, the FCC in this brief is " 'left to flail at the unknown in an attempt to prove the negative.' " *Core*, 545 F.3d at 2 (quoting *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002)).

FGIP's lead argument – limited to a single sentence – is that its "non-Texas related CLEC entities" suffer from an inability "to begin providing service because of the prevailing uncertainty and lack of direction." Br. xvii. But like the petitioner in *Core,* FGIP failed to explain "what services it

planned to offer" or "the seriousness of its plans, which might range from a gleam in management's eye to a well-developed business plan." *Core*, 545 F.3d at 2. FGIP thus has not demonstrated actual, concrete injury resulting from the FCC's *denial of forbearance from section 251(g)*. And even if it had demonstrated injury and causation, FGIP has not explained how this Court could redress that alleged injury by overturning the FCC's decision to deny FGIP's forbearance petition. Hence, FGIP's lead argument provides no basis for Article III standing. *Id*.

Next, FGIP complains that the FCC somehow is affecting litigation pending before the Texas regulatory commission involving petitioner UTEX and that UTEX therefore "is now mired in a regulatory void of the FCC's making." Br. xviii. But, once again, FGIP does not explain how the FCC's orders under review declining to grant FGIP's petition for forbearance from applying section 251(g) injure UTEX in an actual, concrete way. To the extent UTEX is harmed in that Texas proceeding, that harm would seem to be caused by the actions of the Texas regulatory commission – not the FCC's denial of forbearance. And whatever the alleged harm, FGIP has not shown how this Court could address that unexplained injury by overturning the FCC's orders on review. For example, FGIP does not include an affidavit or citations to the administrative record from which such a determination can be made. *See American Chemistry Council v. DOT*, 468 F.3d 810, 820-21 (D.C. Cir. 2006) (declining "to assume missing links" in the absence of "declarations or citations to the record from petitioners that establish a

concrete harm"). At no point in its opening brief does FGIP "show how its position, with respect to some specific service, would be improved by grant of its petition for forbearance." *Core*, 545 F.3d at 4. This case should accordingly be dismissed for failure to demonstrate standing.[5]

II. THE COMMISSION REASONABLY DENIED FGIP'S PETITION TO FORBEAR FROM ENFORCING SECTION 251(g)

FGIP argued that if the Commission forbore from enforcing access-charge regulation under section 251(g) with respect to FGIP's communications, all such communications would automatically be subject to section 251(b)(5)'s reciprocal-compensation framework. The Commission denied FGIP's forbearance request primarily because it rejected that reading of the Communications Act. The Commission concluded instead that, assuming for purposes of its analysis that section 251(g) applied to this traffic, forbearance would leave a regulatory void, and that result would not prevent unjust and unreasonable rates, protect consumers, or promote the public interest. As an alternative basis for its decision, the Commission also concluded that the record evidence did not support a finding that the forbearance criteria had been satisfied. The Commission's reasoning was well-founded.

[5] Because Article III does not apply to the FCC, the "Commission may choose to allow persons without Article III 'standing' to participate in FCC proceedings, as it did in this case." *California Ass'n of Physically Handicapped v. FCC*, 778 F.2d 823, 826 n.8 (D.C. Cir. 1985).

A. Section 251(g) is a "transitional device, preserving various LEC duties that antedated the 1996 Act until such time as the Commission should adopt new rules pursuant to the Act." *WorldCom*, 288 F.3d at 430. Accordingly, section 251(g) states that LECs must continue to abide by certain pre-1996 Act "restrictions and obligations" until they "are *explicitly superseded by regulations* prescribed by the Commission." 47 U.S.C. § 251(g) (emphasis added). In the *Forbearance Order*, the Commission explained that section 251(g) "explicitly contemplates affirmative Commission action in the form of new regulation" as the sole means of replacing the pre-1996 Act access-charge regime preserved under section 251(g) with another regulatory regime. *Forbearance Order* ¶ 8 (J.A. 1387).[6] Thus, the Commission concluded that, if section 251(g) applies to the traffic at issue, granting FGIP's forbearance petition would preclude the agency from enforcing access-charge regulation against incumbent LECs, but it would not automatically bring the underlying traffic within section 251(b)(5). To do that, section 251(g) requires the FCC to promulgate explicit superseding regulations. Consistent with its decision in the *Core*

[6] *See 2001 ISP Remand Order*, 16 FCC Rcd at 9170 ¶ 40 (stating that section 251(g) contemplates "an affirmative determination [by the Commission] to adopt rules that subject such traffic to obligations different than those that existed pre-[1996] Act."); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, 407 ¶ 47 (1999) (stating that section 251(g) "is merely a continuation of the equal access and nondiscrimination provisions of the Consent Decree until superseded by subsequent regulations of the Commission").

Forbearance Denial Order, the Commission explained that the regulatory void that would result from forbearance alone would fail to ensure reasonable rates, protect consumers, or serve the public interest. FGIP's forbearance petition, therefore, failed the section 10 forbearance test. *Id.* ¶¶ 8, 12 (J.A. 1387, 1389-90).

FGIP argues that grant of its forbearance petition would not create a regulatory void because its traffic is "clearly" already subject to section 251(b)(5) rather than section 251(g). Br. 33; *see also id.* at 29-30. As the Commission explained, however, "if the voice-embedded Internet communications at issue in this proceeding" are not subject to section 251(g), "forbearance would be unnecessary to achieve the result Feature Group IP seeks." *Reconsideration Order* n.34 (J.A. 1532). Thus, the "foundation" of FGIP's forbearance request is that section 251(g) *does* apply to such communications. *Forbearance Order* ¶ 6 (J.A. 1386). Otherwise, there would be nothing from which to forbear. *See United States Telecom Ass'n v. FCC*, 359 F.3d 554, 579 (D.C. Cir.) (explaining that section 10 "obviously comes into play only for requirements that exist"), *cert. denied*, 543 U.S. 925 (2004); *see also Reconsideration Order* n.52 (J.A. 1535); FGIP Br. 9 (acknowledging that "Petitioners' request for forbearance . . . was unnecessary and moot" if "the traffic in issue is not subject to the access charge regime"). Accordingly, to conduct the forbearance analysis in this case, the Commission necessarily assumed (without deciding) that section 251(g) does apply to the traffic at issue.

FGIP argues that, even if its communications are subject to section 251(g), forbearance would not create a regulatory void because such communications would "automatically" be governed by section 251(b)(5). Br. 31, 33. Although FGIP recognizes that the Commission reached a different conclusion in the *Core Forbearance Denial Order*, *see* p.16, *supra*, FGIP nevertheless contends that its forbearance request is distinguishable because the traffic involved here "is much less sweeping in scope." Br. 33. As the Commission explained, however, forbearance cannot remove communications from section 251(g) (to be governed by section 251(b)(5) or otherwise) because section 251(g) provides that its restrictions or obligations may be superseded only by explicit regulations. 47 U.S.C. § 251(g); *see Forbearance Order* ¶ 8 (J.A. 1387); *Core Forbearance Denial Order*, 22 FCC Rcd at 14126 ¶ 14; *see also Ethyl Corp. v. EPA*, 306 F.3d 1144, 1148-49 (D.C. Cir. 2002) (agency cannot act solely on a case-by-case basis in the face of a clear congressional command that it "proceed[] by regulation"). Because of that express requirement – not the scope or character of the communications at issue – section 251(b)(5) would not automatically apply if the Commission were to forbear from enforcing section 251(g). FGIP offers no reason for rejecting the Commission's statutory analysis, to which this Court owes deference.

B. In addition to the regulatory void that would result from grant of FGIP's forbearance request, and as an alternative basis for its ruling, the Commission concluded that the record evidence did not support a finding that

the three forbearance criteria had been satisfied. The Commission concluded that FGIP "provide[d] no evidence to support its claims, and no economic analysis of the impact of granting its petition." *Forbearance Order* ¶ 12 (J.A. 1389). This conclusion provides an independent basis for affirming the orders on review. *See, e.g., BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) ("When an agency offers multiple grounds for a decision, we will affirm the agency so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable.").

FGIP challenges the Commission's evaluation of the record. According to FGIP, it provided "extensive economic analysis" demonstrating that forbearance would "facilitate the expansion and use of the [telephone network] to support 'Group Forming Networks.' " Br. 41. FGIP further asserts that it showed that forbearance would promote the public interest by enabling FGIP to introduce new services, lower prices, and improve the quality of its service. Br. 34-35.

The Commission reasonably found that the record was insufficient to support the findings required for forbearance under section 10. FGIP's "economic analysis" consists of little more than conclusory statements about the benefits of its technology. *See* Br. 41 (citing Forbearance Petition at iii-iv, 8-9, 20-22, 31-41, 53-56, and Appendix B (J.A. 4-5, 16-17, 28-30, 39-49, 61-64, 136-300)). For example, FGIP made generic assertions such as: "[v]oice-embedded Internet communication is a revolutionary, lifestyle-

changing technology and, arguably, the most vibrant innovation to come into the American economy, the global economy, in decades, perhaps centuries," Forbearance Petition at 32 (J.A. 24); and FGIP "is on the leading edge of intermediating Voice-embedded Internet communications with the [telephone network] and each other," *id.* at 36 (J.A. 28). Even after parties specifically challenged the sufficiency of FGIP's evidentiary showing on reconsideration, FGIP failed to proffer or identify any substantive analysis in the record of economic impact that grant of its forbearance petition would have.[7]

FGIP claims (Br. 39) that under the first prong of the forbearance test – which asks whether rates and terms would be just, reasonable, and nondiscriminatory – the Commission may consider only the interests of the carrier *requesting* forbearance.[8] In fact, under the first prong, the Commission may consider the broader effects of forbearance, including the

[7] *Compare* Opposition of Verizon to Feature Group IP's Petition for Reconsideration, WC Docket No. 07-256 (filed Mar. 5, 2009), at 8 (J.A. 1430) *and* Opposition of Embarq to Petition for Reconsideration, WC Docket No. 07-256 (filed Mar. 5, 2009), at 14-15 (J.A. 1452-53) *with* Feature Group IP's Reply to Responses to its Motion for Reconsideration, WC Docket No. 07-256 (filed Mar. 13, 2009), at 9-10 (J.A. 1470-71).

[8] As the Commission explained, the purported benefits of forbearance to FGIP are "premised on the assumption that forbearance . . . would result in [its] traffic being governed by section 251(b)(5)." *See Forbearance Order* ¶ 12 (J.A. 1390); *Reconsideration Order* ¶ 18 (J.A. 1536); *see also* Feature Group IP's Corrected Motion for Reconsideration, WC Docket No. 07-256 (filed Feb. 23, 2009) (Reconsideration Motion), at 20 (J.A. 1360) (stating that the FCC's finding of insufficient evidence "ignores FeatureGroup IP's position that § 251(b)(5) applies"). As discussed above, that assumption is incorrect.

effect on the carrier (or the service) subject to the statutory and regulatory provisions from which forbearance is sought. *See* 47 U.S.C. § 160(a)(1). In this case, the access-charge regulations from which FGIP sought forbearance are not imposed on FGIP but on the LECs that receive FGIP's traffic. Likewise, the second and third prongs of the forbearance test – "protection of consumers" and the "public interest" – require the FCC to expand its inquiry beyond one telecommunications carrier or telecommunications service. 47 U.S.C. §§ 160(a)(2), (3).

FGIP complains that the Commission imposed an evidentiary standard that is "impossible" to satisfy. Br. 38, 42. That is incorrect. The Commission explained that "Feature Group IP faced the same burden as other petitioners seeking forbearance under the statute." *Reconsideration Order* ¶ 18 (J.A. 1537). The Commission did not impose a heightened standard of proof on FGIP; it simply ruled that FGIP had failed to present sufficient evidence in this record to support a finding that its forbearance request satisfied the section 10 standard.

C. FGIP also challenges the FCC's decision to deny reconsideration of the *Forbearance Order* in light of certain "post decision facts." Br. 43. To the extent FGIP's claim of new facts rests on a letter that AT&T filed with the Texas commission after the *Forbearance Order* was released (*see* Br. 44), the Commission reasonably concluded that this letter "does not provide a sufficient basis for reconsideration." *Reconsideration Order* ¶ 7 (J.A. 1531). The Commission disagreed with FGIP's contention that AT&T's letter

represented that the *Forbearance Order* "determines the issues involved in the parties' dispute before the Texas Commission over the proper interpretation of an interconnection agreement" between AT&T and FGIP. *Id.* In any event, the Commission concluded, "a party's self-interested construction of a Commission order" cannot control the agency's determination whether the forbearance criteria have been satisfied. *Id.* The Commission's analysis was sound.

III. THE COMMISSION REASONABLY REJECTED FGIP'S CLAIM ON RECONSIDERATION THAT THE FCC SHOULD HAVE GRANTED "PARTIAL" FORBEARANCE

In its motion for reconsideration of the *Forbearance Order*, Feature Group IP argued that the Commission "failed to address its request for partial forbearance rather than complete forbearance." *Reconsideration Order* ¶ 13 (J.A. 1534). Specifically, FGIP claimed on reconsideration that the Commission should have decided whether, under its rules, a LEC that receives traffic from FGIP may bill FGIP for terminating that traffic or whether the LEC instead may only bill FGIP's customers (*i.e.*, the entities that generate such traffic from Internet-based services and send it to FGIP for transmission to the LEC). *See id.* (citing Reconsideration Motion at 17 (J.A. 1357)).

The Commission rejected FGIP's request for partial forbearance for three independent reasons. First, the Commission concluded that FGIP had failed to make that request in its forbearance petition, which focused on whether access charges should apply at all, not on who should be billed if

such charges did apply. *Reconsideration Order* ¶ 14 (J.A. 1535). Second, the Commission found that FGIP's newly raised request was, in effect, "a request for declaratory ruling or clarification of the rules applicable to billing for jointly provided access," rather than a request for forbearance relief. *Id.* ¶ 15 (J.A. 1535). Finally, the Commission determined that, even if FGIP had properly presented a request for partial forbearance, it had nonetheless failed "to provide the evidence and analysis necessary to support the forbearance requested." *Id.* ¶ 16 (J.A. 1535).

FGIP challenges only the Commission's first determination. Br. 36-38. It has thus forfeited any claims it may have had with regard to the other two reasons the Commission gave for denying its partial forbearance request. *See, e.g.*, *Network IP, LLC v. FCC*, 548 F.3d 116, 128 n.10 (D.C. Cir. 2008). Because each of those reasons provides an independent basis supporting the FCC's decision, the Court may affirm the Commission without reaching the Commission's conclusion that FGIP failed to make a request for partial forbearance in its petition. *See BDPCS*, 351 F.3d at 1183.

In any event, the Commission correctly concluded that FGIP had failed to raise its partial forbearance request in its original petition. FGIP's claim that it did properly raise the issue focuses primarily on its January 12, 2009, letter and slideshow presentation filed with the agency nine days before the *Forbearance Order* was adopted. *See* Br. 38. This filing, however, merely reiterates FGIP's "primary position" that access charges do not apply to voice-embedded Internet services and its alternative position that, if such

charges do apply, the Commission should forbear from "applicable statutes and rules that would allow an ILEC to impose exchange access charges on FGIP."[9] Nothing in the January 12 Letter reveals a third position in which the Commission would partially forbear so that FGIP could avoid being billed for access charges even if such access charges applied to FGIP's traffic. Indeed, to the extent FGIP's slideshow even mentioned the possibility of incumbent LECs billing FGIP's customers directly, it did so only to discuss the potential consequences if the FCC in the future decided to treat FGIP's customers as long-distance carriers; the presentation did not argue that the FCC should use its forbearance authority to achieve that result. Jan. 12 Letter, Att. at 6 (J.A. 1274).

FGIP also offers other miscellaneous record citations that it alleges show that it "explained in every way possible" that it had requested partial forbearance relief. Br. 36-37. As this Court has explained in an analogous context, however, "the Commission 'need not sift pleadings and documents to identify arguments that are not stated with clarity by a petitioner.' " *Qwest Corp. v. FCC*, 482 F.3d 471, 478 (D.C. Cir. 2007) (quoting *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997) (internal quotation marks omitted)). Here, the Commission stated that the Reconsideration Motion "does not contain a single citation or otherwise identify where in the

[9] Letter from W. Scott McCollough, General Counsel, UTEX Communications Corp. d/b/a FeatureGroup IP, to Marlene H. Dortch, Secretary, FCC (Jan. 12, 2009) (Jan. 12 Letter), Attachment at 5 (J.A. 1273).

[Forbearance Petition] this claim [for partial forbearance] was raised." *Reconsideration Order* ¶ 14 (J.A. 1535). Given that FGIP "has the burden of clarifying its position before the agency," *Bartholdi*, 114 F.3d at 280 (internal quotation marks omitted), its claim that it adequately presented its alternative request for partial forbearance necessarily fails.

IV. THE COMMISSION ACTED WITHIN ITS DISCRETION WHEN IT DECLINED TO ISSUE A DECLARATORY RULING ON THE INTERCARRIER COMPENSATION FRAMEWORK APPLICABLE TO FGIP'S TRAFFIC

In evaluating FGIP's forbearance request, the Commission assumed for purposes of its analysis that the communications that FGIP sends to LECs are governed by the access-charge regime preserved by section 251(g), but decided not to resolve what intercarrier-compensation regime applies to such communications. As the Commission explained, this question and others are the subject of comprehensive, industry-wide rulemakings, and are best answered as part of those broader proceedings. *See Forbearance Order* nn.15, 19 (J.A. 1386); *Reconsideration Order* ¶¶ 9-12 & n.39 (J.A. 1532-34). FGIP now claims that it was arbitrary for the Commission to resolve the forbearance request without deciding the compensation question. Br. 28-30. The Commission's decision, however, is eminently reasonable and is entitled to deference.

A. As the Commission explained, a decision in this proceeding on what intercarrier compensation should apply to FGIP's communications

would effectively be a declaratory ruling,[10] and declaratory rulings are outside the scope of section 10, which provides that the Commission may grant or deny a petition in whole or in part, or otherwise the petition will be "deemed granted." 47 U.S.C. § 160(c). *See Forbearance Order* n.15 (J.A. 1386); *Reconsideration Order* ¶¶ 9-10 (J.A. 1532-33).

Nor did the Commission abuse its discretion in declining to issue a declaratory ruling in this context. *See Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973) (decision not to issue a declaratory ruling can be reversed only for "clear abuse of discretion"). Although the Commission, "in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty," 5 U.S.C. § 554(e), *see also* 47 C.F.R. § 1.2 (same), it "is not *required* to issue such a declaratory statement merely because a [party] asks for one," *Yale Broadcasting*, 478 F.2d at 602. As the Commission explained, "the current compensation rules for these types of communications . . . are the subject of a pending rulemaking" broadly addressing intercarrier-compensation reform. *Forbearance Order* n.19 (J.A. 1386). Moreover, "the question of

[10] FGIP's contention (Br. 27) that its forbearance petition did not "functionally [seek] a declaratory ruling" is wholly without merit. *See* Forbearance Petition at 3 (J.A. 11) (stating that the Commission could *deny* the forbearance petition if it concluded that access charges do not apply to voice-embedded Internet communications, but that it should grant the petition if access charges do apply); *see also* Reconsideration Motion at 2 (J.A. 1342) (raising "two questions": (1) "can an [incumbent LEC] impose access charges" on voice-embedded Internet communications; and (2) if so, whether the FCC should grant forbearance relief).

whether access charges apply to voice-enabled Internet communications is a significantly contested area of the law . . . in other, industry-wide, proceedings." *Reconsideration Order* n.39 (J.A. 1533).[11] Here, the Commission sensibly concluded that it should satisfy its obligations under section 10 without prejudicing the outcome of the broader reform inquiry pending in other proceedings. *Forbearance Order* n.15 (J.A. 1386).[12]

FGIP nonetheless maintains (Br. 29-30; *see also id.* at 17) that it was unreasonable for the Commission to assume that section 251(g) applies to FGIP's traffic because such traffic must necessarily be treated like dial-up ISP-bound traffic, which is subject to reciprocal compensation. Not all parties in this proceeding shared FGIP's confidence. For example, associations representing rural and mid-sized LECs argued that there is a regulatory difference between traffic *to* the Internet, the purpose of which is to access information, and voice calls *from* the Internet, which "constitute

[11] *See, e.g.*, *Climax Molybdenum Co. v. Secretary of Labor*, 703 F.2d 447, 452 (10th Cir. 1983) ("The Commission may reasonably withhold declaratory relief in anticipation of a clearer exposition of government policy."); *Intercity Transport Co. v. United States*, 737 F.2d 103, 109 (D.C. Cir. 1984) (upholding agency's "judgment that the institution of a declaratory order proceeding to resolve this private classification dispute would be an imprudent and inefficient allocation of agency resources").

[12] For similar reasons, FGIP errs in suggesting (Br. 30) that the Commission should have decided whether "one LEC [can] be an 'access customer' of another LEC." The Commission did not need to resolve that question (or the related question whether FGIP is acting as a LEC when it carriers voice-embedded Internet traffic) to adjudicate the merits of FGIP's forbearance petition.

ordinary voice telephone traffic, and are therefore subject to the same compensation obligations as other such traffic."[13] Regardless of which view is correct, it was reasonable for the Commission to conclude that this "significantly contested area of the law" is most appropriately resolved in "other, industry-wide" proceedings. *Reconsideration Order* n.39 (J.A. 1533).

FGIP also complains that, while the Commission considers comprehensive reform of intercarrier compensation, some state regulatory commissions have "step[ped] in" to resolve particular compensation disputes. Br. 45. Congress, however, assigned state commissions exactly the task they are performing. Under 47 U.S.C. § 252, state commissions have primary responsibility for arbitrating interconnection disputes and approving interconnection agreements. Although state commissions must follow federal rules, *see AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1996), state commissions, in their role as arbiters of interconnection controversies, will often be required to adjudicate uncertain areas of law. *See id.* at 397 (recognizing that the 1996 Act is "not a model of clarity" but instead a "model of ambiguity"). For present purposes, the key point is that the states' statutory role in resolving interconnection disputes does not limit the Commission's broad discretion to decide whether and when to issue a declaratory ruling to address a controversy, and it does not render

[13] Opposition to Motion for Reconsideration, National Exchange Carrier Association, Inc., *et al.*, WC Docket No. 07-256 (filed Mar. 5, 2009), at 6 (J.A. 1399).

unreasonable the agency's decision in this case to address compensation issues relating to specific types of communications traffic as part of its comprehensive reform rulemaking.

B. Although FGIP acknowledges that the Commission is generally entitled to broad discretion in the conduct of its proceedings (Br. 26-27, 46-47), it argues that the Court should not defer to the Commission's decision not to issue a declaratory ruling here because, in its view, the Commission has unreasonably delayed completing its rulemaking proceedings on intercarrier-compensation reform. Thus, in its prayer for relief, FGIP asks the Court to remand the case with instructions that the Commission decide whether access charges apply to FGIP's traffic. *Id.* at 46-48.

The Court should reject FGIP's invitation to reach beyond the Commission's forbearance decision and decide whether the Commission has engaged in unreasonable delay with respect to proceedings not currently before the Court.[14] The orders on review make clear that, regardless of what intercarrier-compensation obligations may apply to FGIP's communications, FGIP's forbearance petition does not satisfy the statutory forbearance criteria. *See Forbearance Order* ¶ 6 & n.19 (J.A. 1386); *Reconsideration Order* ¶ 9 &

[14] To the extent FGIP believes that it has been adversely affected by agency delay in some other proceeding, the appropriate vehicle for raising that claim is a petition for a writ of mandamus. *See Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004).

n.34 (J.A. 1532). That is the only determination to which FGIP is entitled within the time limits specified in section 10.

CONCLUSION

The petition for review should be dismissed because FGIP has failed to demonstrate standing. Alternatively, the petition for review should be denied.

Respectfully submitted,

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March 23, 2011

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

FEATURE GROUP IP WEST, LLC, *ET AL.*, PETITIONERS, V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	)	No. No. 10–1257

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 9246 words.

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March 23, 2011

STATUTORY AND REGULATORY APPENDIX

Contents

in the Appendix to this title, and section 410 of Title 39, and enacting provisions set out as notes under this section] may be cited as the 'Government in the Sunshine Act'.''

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions of law requiring submittal to Congress of any annual, semiannual, or other regular periodic report listed in House Document No. 103–7 (in which the report required by subsec. (j) of this section is listed on page 151), see section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance.

TERMINATION OF ADMINISTRATIVE CONFERENCE OF UNITED STATES

For termination of Administrative Conference of United States, see provision of title IV of Pub. L. 104–52, set out as a note preceding section 591 of this title.

DECLARATION OF POLICY AND STATEMENT OF PURPOSE

Section 2 of Pub. L. 94–409 provided that: ''It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government. It is the purpose of this Act [see Short Title note set out above] to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.''

§ 553. Rule making

(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.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 383.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1003.	June 11, 1946, ch. 324, §4, 60 Stat. 238.

In subsection (a)(1), the words ''or naval'' are omitted as included in ''military''.

In subsection (b), the word ''when'' is substituted for ''in any situation in which''.

In subsection (c), the words ''for oral presentation'' are substituted for ''to present the same orally in any manner''. The words ''sections 556 and 557 of this title apply instead of this subsection'' are substituted for ''the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection''.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

CODIFICATION

Section 553 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2245 of Title 7, Agriculture.

EXECUTIVE ORDER NO. 12044

Ex. Ord. No. 12044, Mar. 23, 1978, 43 F.R. 12661, as amended by Ex. Ord. No. 12221, June 27, 1980, 45 F.R. 44249, which related to the improvement of Federal regulations, was revoked by Ex. Ord. No. 12291, Feb. 17, 1981, 46 F.R. 13193, formerly set out as a note under section 601 of this title.

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a[1] administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

[1] So in original.

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 384; Pub. L. 95–251, § 2(a)(1), Mar. 27, 1978, 92 Stat. 183.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1004.	June 11, 1946, ch. 324, § 5, 60 Stat. 239.

In subsection (a)(2), the word ''employee'' is substituted for ''officer or employee of the United States'' in view of the definition of ''employee'' in section 2105.

In subsection (a)(4), the word ''naval'' is omitted as included in ''military''.

In subsection (a)(5), the word ''or'' is substituted for ''and'' since the exception is applicable if any one of the factors are involved.

In subsection (a)(6), the word ''worker'' is substituted for ''employee'', since the latter is defined in section 2105 as meaning Federal employees.

In subsection (b), the word ''When'' is substituted for ''In instances in which''.

In subsection (c)(2), the comma after the word ''hearing'' is omitted to correct an editorial error.

In subsection (d), the words ''The employee'' and ''such an employee'' are substituted in the first two sentences for ''The same officers'' and ''such officers'' in view of the definition of ''employee'' in section 2105. The word ''officer'' is omitted in the third and fourth sentences as included in ''employee'' as defined in section 2105. The prohibition in the third and fourth sentences is restated in positive form. In paragraph (C) of the last sentence, the words ''in any manner'' are omitted as surplusage.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

CODIFICATION

Section 554 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2246 of Title 7, Agriculture.

AMENDMENTS

1978—Subsec. (a)(2). Pub. L. 95–251 substituted ''administrative law judge'' for ''hearing examiner''.

§ 555. Ancillary matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, §10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, §10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

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.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

Sec.
801. Congressional review.
802. Congressional disapproval procedure.
803. Special rule on statutory, regulatory, and judicial deadlines.
804. Definitions.
805. Judicial review.
806. Applicability; severability.
807. Exemption for monetary policy.
808. Effective date of certain rules.

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section

SCHEDULE OF REGULATORY FEES—CONTINUED

Bureau/Category	Annual Regulatory Fee
Earth Stations (47 C.F.R. Part 25)	
VSAT and equivalent C-Band antennas (per 100 antennas)	6
Mobile satellite earth stations (per 100 antennas)	6
Earth station antennas	
Less than 9 meters (per 100 antennas)	6
9 Meters or more	
Transmit/Receive and Transmit Only (per meter)	85
Receive only (per meter)	55
Carriers	
Inter-Exchange Carrier (per 1,000 pre-subscribed access lines)	60
Local Exchange Carrier (per 1,000 access lines)	60
Competitive access provider (per 1,000 subscribers)	60
International circuits (per 100 active 64KB circuit or equivalent)	220

(h) Exceptions

The charges established under this section shall not be applicable to (1) governmental entities or nonprofit entities; or (2) to amateur radio operator licenses under part 97 of the Commission's regulations (47 C.F.R. Part 97).

(i) Accounting system

The Commission shall develop accounting systems necessary to making the adjustments authorized by subsection (b)(3) of this section. In the Commission's annual report, the Commission shall prepare an analysis of its progress in developing such systems and shall afford interested persons the opportunity to submit comments concerning the allocation of the costs of performing the functions described in subsection (a) of this section among the services in the Schedule.

(June 19, 1934, ch. 652, title I, §9, as added Pub. L. 103–66, title VI, §6003(a)(1), Aug. 10, 1993, 107 Stat. 397; amended Pub. L. 103–121, title I, Oct. 27, 1993, 107 Stat. 1167; Pub. L. 103–414, title III, §303(a)(5), (6), Oct. 25, 1994, 108 Stat. 4294.)

AMENDMENTS

1994—Subsec. (f). Pub. L. 103–414, §303(a)(5), designated second sentence of par. (1) as par. (2) and inserted par. (2) heading.

Subsec. (g). Pub. L. 103–414, §303(a)(6), inserted ''95'' after ''(47 C.F.R. Part'' in item pertaining to Interactive Video Data Service under Private Radio Bureau in Schedule of Regulatory Fees.

1993—Subsec. (a). Pub. L. 103–121 designated existing provisions as par. (1), inserted heading, and added par. (2).

§ 160. Competition in provision of telecommunications service

(a) Regulatory flexibility

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

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

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

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

(b) Competitive effect to be weighed

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

(c) Petition for forbearance

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

(d) Limitation

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

(e) State enforcement after Commission forbearance

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

(June 19, 1934, ch. 652, title I, §10, as added Pub. L. 104–104, title IV, §401, Feb. 8, 1996, 110 Stat. 128.)

§ 161. Regulatory reform

(a) Biennial review of regulations

In every even-numbered year (beginning with 1998), the Commission—

(1) shall review all regulations issued under this chapter in effect at the time of the review that apply to the operations or activities of any provider of telecommunications service; and

(2) shall determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.

(b) Effect of determination

The Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest.

(June 19, 1934, ch. 652, title I, § 11, as added Pub. L. 104–104, title IV, § 402(a), Feb. 8, 1996, 110 Stat. 129.)

SUBCHAPTER II—COMMON CARRIERS

PART I—COMMON CARRIER REGULATION

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

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

(June 19, 1934, ch. 652, title II, § 201, 48 Stat. 1070; May 31, 1938, ch. 296, 52 Stat. 588.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (b), was in the original ''this Act'', meaning act June 19, 1934, ch. 652, 48 Stat. 1064, as amended, known as the Communications Act of 1934, which is classified principally to this chapter. For complete classification of this Act to the Code, see section 609 of this title and Tables.

AMENDMENTS

1938—Subsec. (b). Act May 31, 1938, inserted proviso relating to reports of positions of ships at sea.

TELEPHONE RATES FOR MEMBERS OF ARMED FORCES DEPLOYED ABROAD

Pub. L. 109–459, § 2, Dec. 22, 2006, 120 Stat. 3399, provided that:

''(a) IN GENERAL.—The Federal Communications Commission shall take such action as may be necessary to reduce the cost of calling home for Armed Forces personnel who are stationed outside the United States under official military orders or deployed outside the United States in support of military operations, training exercises, or other purposes as approved by the Secretary of Defense, including the reduction of such costs through the waiver of government fees, assessments, or other charges for such calls. The Commission may not regulate rates in order to carry out this section.

''(b) FACTORS TO CONSIDER.—In taking the action described in subsection (a), the Commission, in coordination with the Department of Defense and the Department of State, shall—

''(1) evaluate and analyze the costs to Armed Forces personnel of such telephone calls to and from American military bases abroad;

''(2) evaluate methods of reducing the rates imposed on such calls, including deployment of new technology such as voice over Internet protocol or other Internet protocol technology;

''(3) encourage telecommunications carriers (as defined in section 3(44) of the Communications Act of 1934 (47 U.S.C. 153(44))) to adopt flexible billing procedures and policies for Armed Forces personnel and their dependents for telephone calls to and from such Armed Forces personnel; and

''(4) seek agreements with foreign governments to reduce international surcharges on such telephone calls.

''(c) DEFINITIONS.—In this section:

''(1) ARMED FORCES.—The term 'Armed Forces' has the meaning given that term by section 2101(2) of title 5, United States Code.

''(2) MILITARY BASE.—The term 'military base' includes official duty stations to include vessels, whether such vessels are in port or underway outside of the United States.''

Pub. L. 102–538, title II, § 213, Oct. 27, 1992, 106 Stat. 3545, which required the Federal Communications Commission to make efforts to reduce telephone rates for Armed Forces personnel in certain countries, was repealed by Pub. L. 109–459, § 3, Dec. 22, 2006, 120 Stat. 3400.

§ 202. Discriminations and preferences

(a) Charges, services, etc.

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or

advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services included

Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Penalty

Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

(June 19, 1934, ch. 652, title II, § 202, 48 Stat. 1070; Pub. L. 86–751, Sept. 13, 1960, 74 Stat. 888; Pub. L. 101–239, title III, § 3002(a), Dec. 19, 1989, 103 Stat. 2131.)

AMENDMENTS

1989—Subsec. (c). Pub. L. 101–239 substituted ''$6,000'' for ''$500'' and ''$300'' for ''$25''.

1960—Subsec. (b). Pub. L. 86–751 substituted ''common carrier lines of communication, whether derived from wire or radio facilities,'' for ''wires''.

§ 203. Schedules of charges

(a) Filing; public display

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) Rejection or refusal

The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) Penalty for violations

In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $6,000 for each such offense, and $300 for each and every day of the continuance of such offense.

(June 19, 1934, ch. 652, title II, § 203, 48 Stat. 1070; Pub. L. 94–376, § 1, Aug. 4, 1976, 90 Stat. 1080; Pub. L. 101–239, title III, § 3002(b), Dec. 19, 1989, 103 Stat. 2131; Pub. L. 101–396, § 7, Sept. 28, 1990, 104 Stat. 850.)

AMENDMENTS

1990—Subsec. (b). Pub. L. 101–396 substituted ''one hundred and twenty days'' for ''ninety days'' in pars. (1) and (2).

1989—Subsec. (e). Pub. L. 101–239 substituted ''$6,000'' for ''$500'' and ''$300'' for ''$25''.

1976—Subsec. (b). Pub. L. 94–376 designated existing provisions as par. (1), substituted ''after ninety days notice'' for ''after thirty days' notice'', and struck out provision that the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions, and added par. (2).

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

(a)(1) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and

Speaker of the House of Representatives and by the Majority Leader of the Senate. Members of the Commission appointed on or before October 31, 1999, shall remain members.

''(2) EX OFFICIO MEMBERS.—The Commission shall include the following officials:

''(A) The Assistant Secretary (or the Assistant Secretary's designee).

''(B) The Attorney General (or the Attorney General's designee).

''(C) The Chairman of the Federal Trade Commission (or the Chairman's designee).

''(3) PROHIBITION OF PAY.—Members of the Commission shall not receive any pay by reason of their membership on the Commission.

''(c) FIRST MEETING.—The Commission shall hold its first meeting not later than March 31, 2000.

''(d) CHAIRPERSON.—The chairperson of the Commission shall be elected by a vote of a majority of the members, which shall take place not later than 30 days after the first meeting of the Commission.

''(e) STUDY.—

''(1) IN GENERAL.—The Commission shall conduct a study to identify technological or other methods that—

''(A) will help reduce access by minors to material that is harmful to minors on the Internet; and

''(B) may meet the requirements for use as affirmative defenses for purposes of section 231(c) of the Communications Act of 1934 [47 U.S.C. 231(c)] (as added by this title).

''Any methods so identified shall be used as the basis for making legislative recommendations to the Congress under subsection (d)(3).

''(2) SPECIFIC METHODS.—In carrying out the study, the Commission shall identify and analyze various technological tools and methods for protecting minors from material that is harmful to minors, which shall include (without limitation)—

''(A) a common resource for parents to use to help protect minors (such as a 'one-click-away' resource);

''(B) filtering or blocking software or services;

''(C) labeling or rating systems;

''(D) age verification systems;

''(E) the establishment of a domain name for posting of any material that is harmful to minors; and

''(F) any other existing or proposed technologies or methods for reducing access by minors to such material.

''(3) ANALYSIS.—In analyzing technologies and other methods identified pursuant to paragraph (2), the Commission shall examine—

''(A) the cost of such technologies and methods;

''(B) the effects of such technologies and methods on law enforcement entities;

''(C) the effects of such technologies and methods on privacy;

''(D) the extent to which material that is harmful to minors is globally distributed and the effect of such technologies and methods on such distribution;

''(E) the accessibility of such technologies and methods to parents; and

''(F) such other factors and issues as the Commission considers relevant and appropriate.

''(f) REPORT.—Not later than 2 years after the enactment of this Act [Oct. 21, 1998], the Commission shall submit a report to the Congress containing the results of the study under this section, which shall include—

''(1) a description of the technologies and methods identified by the study and the results of the analysis of each such technology and method;

''(2) the conclusions and recommendations of the Commission regarding each such technology or method;

''(3) recommendations for legislative or administrative actions to implement the conclusions of the committee; and

''(4) a description of the technologies or methods identified by the study that may meet the requirements for use as affirmative defenses for purposes of section 231(c) of the Communications Act of 1934 [47 U.S.C. 231(c)] (as added by this title).

''(g) RULES OF THE COMMISSION.—

''(1) QUORUM.—Nine members of the Commission shall constitute a quorum for conducting the business of the Commission.

''(2) MEETINGS.—Any meetings held by the Commission shall be duly noticed at least 14 days in advance and shall be open to the public.

''(3) OPPORTUNITIES TO TESTIFY.—The Commission shall provide opportunities for representatives of the general public to testify.

''(4) ADDITIONAL RULES.—The Commission may adopt other rules as necessary to carry out this section.

''(h) GIFTS, BEQUESTS, AND DEVISES.—The Commission may accept, use, and dispose of gifts, bequests, or devises of services or property, both real (including the use of office space) and personal, for the purpose of aiding or facilitating the work of the Commission. Gifts or grants not used at the termination of the Commission shall be returned to the donor or grantee.

''(*l*)[i] TERMINATION.—The Commission shall terminate 30 days after the submission of the report under subsection (d) or November 30, 2000, whichever occurs earlier.

''(m)[j] INAPPLICABILITY OF FEDERAL ADVISORY COMMITTEE ACT.—The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Commission.''

PART II—DEVELOPMENT OF COMPETITIVE MARKETS

§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to

competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether—

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis.

The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9–1–1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9–1–1 is not in use as an emergency telephone number on October 26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification—

(A) is necessary—

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996, under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996, and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) "Incumbent local exchange carrier" defined

(1) Definition

For purposes of this section, the term ''incumbent local exchange carrier'' means, with respect to an area, the local exchange carrier that—

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if—

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

(June 19, 1934, ch. 652, title II, § 251, as added Pub. L. 104–104, title I, § 101(a), Feb. 8, 1996, 110 Stat. 61; amended Pub. L. 106–81, § 3(a), Oct. 26, 1999, 113 Stat. 1287.)

AMENDMENTS

1999—Subsec. (e)(3). Pub. L. 106–81 added par. (3).

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning—

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed—

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject—

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that—

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction

of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission—

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) "Incumbent local exchange carrier" defined

For purposes of this section, the term ''incumbent local exchange carrier'' has the meaning provided in section 251(h) of this title.

(June 19, 1934, ch. 652, title II, §252, as added Pub. L. 104–104, title I, §101(a), Feb. 8, 1996, 110 Stat. 66.)

§ 253. Removal of barriers to entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or im-

posed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural markets

It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply—

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services.

(June 19, 1934, ch. 652, title II, § 253, as added Pub. L. 104–104, title I, § 101(a), Feb. 8, 1996, 110 Stat. 70.)

§ 254. Universal service

(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—

EDITORIAL NOTE: Nomenclature changes to part 1 appear at 63 FR 54077, Oct. 8, 1998.

Subpart A—General Rules of Practice and Procedure

SOURCE: 28 FR 12415, Nov. 22, 1963, unless otherwise noted.

GENERAL

§ 1.1 Proceedings before the Commission.

The Commission may on its own motion or petition of any interested party hold such proceedings as it may deem necessary from time to time in connection with the investigation of any matter which it has power to investigate under the law, or for the purpose of obtaining information necessary or helpful in the determination of its policies, the carrying out of its duties or the formulation or amendment of its rules and regulations. For such purposes it may subpena witnesses and require the production of evidence. Procedures to be followed by the Commission shall, unless specifically prescribed in this part, be such as in the opinion of the Commission will best serve the purposes of such proceedings.

(Sec. 403, 48 Stat. 1094; 47 U.S.C. 403)

§ 1.2 Declaratory rulings.

The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.

(5 U.S.C. 554)

§ 1.3 Suspension, amendment, or waiver of rules.

The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.

CROSS REFERENCE: See subpart C of this part for practice and procedure involving rulemaking.

§ 1.4 Computation of time.

(a) *Purpose.* The purpose of this rule section is to detail the method for computing the amount of time within which persons or entities must act in response to deadlines established by the Commission. It also applies to computation of time for seeking both reconsideration and judicial review of Commission decisions.

(b) *General Rule—Computation of Beginning Date When Action is Initiated by Commission or Staff.* Unless otherwise provided, the first day to be counted when a period of time begins with an action taken by the Commission, an Administrative Law Judge or by members of the Commission or its staff pursuant to delegated authority is the *day after the day* on which public notice of that action is given. *See* §1.4(b) (1)–(5) of this section. Unless otherwise provided, all Rules measuring time from the date of the issuance of a Commission document entitled ''Public Notice'' shall be calculated in accordance with this section. *See* §1.4(b)(4) of this section for a description of the ''Public Notice'' document. Unless otherwise provided in §1.4 (g) and (h) of this section, it is immaterial whether the first day is a ''holiday.'' For purposes of this section, the term *public notice* means the date of any of the following events: *See* §1.4(e)(1) of this section for definition of ''holiday.''

(1) For all documents in notice and comment and non-notice and comment rulemaking proceedings required by the Administrative Procedure Act, 5 U.S.C. 552, 553, to be published in the FEDERAL REGISTER, including summaries thereof, the date of publication in the FEDERAL REGISTER.

NOTE TO PARAGRAPH (b)(1): Licensing and other adjudicatory decisions with respect to specific parties that may be associated with or contained in rulemaking documents are governed by the provisions of §1.4(b)(2).

Example 1: A document in a Commission rule making proceeding is published in the FEDERAL REGISTER on Wednesday, May 6, 1987. Public notice commences on Wednesday, May 6, 1987. The first day to be counted in computing the beginning date of a period

interexchange carrier, upon requesting carriers that purchase telephone exchange service for resale. The specific end user common line charge to be assessed will depend upon the identity of the end user served by the requesting carrier.

(b) When an incumbent LEC provides telephone exchange service to a requesting carrier at wholesale rates for resale, the incumbent LEC shall continue to assess the interstate access charges provided in part 69 of this chapter, other than the end user common line charge, upon interexchange carriers that use the incumbent LEC's facilities to provide interstate or international telecommunications services to the interexchange carriers' subscribers.

Subpart H—Reciprocal Compensation for Transport and Termination of Telecommunications Traffic

EDITORIAL NOTE: Nomenclature changes to subpart H appear at 66 FR 26806, May 15, 2001.

§ 51.701 Scope of transport and termination pricing rules.

(a) The provisions of this subpart apply to reciprocal compensation for transport and termination of telecommunications traffic between LECs and other telecommunications carriers.

(b) *Telecommunications traffic.* For purposes of this subpart, telecommunications traffic means:

(1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access (*see* FCC 01–131, paragraphs 34, 36, 39, 42–43); or

(2) Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.

(c) *Transport.* For purposes of this subpart, transport is the transmission and any necessary tandem switching of telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.

(d) *Termination.* For purposes of this subpart, termination is the switching of telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.

(e) *Reciprocal compensation.* For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier.

[61 FR 45619, Aug. 29, 1996, as amended at 66 FR 26806, May 15, 2001]

§ 51.703 Reciprocal compensation obligation of LECs.

(a) Each LEC shall establish reciprocal compensation arrangements for transport and termination of telecommunications traffic with any requesting telecommunications carrier.

(b) A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.

§ 51.705 Incumbent LECs' rates for transport and termination.

(a) An incumbent LEC's rates for transport and termination of telecommunications traffic shall be established, at the election of the state commission, on the basis of:

(1) The forward-looking economic costs of such offerings, using a cost study pursuant to §§ 51.505 and 51.511;

(2) Default proxies, as provided in § 51.707; or

(3) A bill-and-keep arrangement, as provided in § 51.713.

(b) In cases where both carriers in a reciprocal compensation arrangement are incumbent LECs, state commissions shall establish the rates of the

charges for expanded interconnection. The carrier's carrier charges for access service filed with this Commission by the telephone companies not specified in § 64.1401(a) of this chapter may include an element for connection charges for expanded interconnection.

(f) [Reserved]

(g) Local exchange carriers may establish appropriate rate elements for a new service, within the meaning of § 61.3(x) of this chapter, in any tariff filing.

(h) In addition to the charges specified in paragraph (b) of this section, the carrier's carrier charges for access service filed with this Commission by price cap local exchange carriers shall include charges for each of the following elements:

(1) Presubscribed interexchange carrier;

(2) Per-minute residual interconnection;

(3) Dedicated local switching trunk port;

(4) Shared local switching trunk pork;

(5) Dedicated tandem switching trunk port;

(6) [Reserved]

(7) Multiplexers associated with tandem switching.

(i) Paragraphs (b) and (h) of this section are not applicable to a price cap local exchange carrier to the extent that it has been granted the pricing flexibility in § 69.727(b)(1).

(j) In addition to the charges specified in paragraph (b) of this section, the carrier's carrier charges for access service filed with this Commission by non-price cap local exchange carriers may include charges for each of the following elements:

(1) Dedicated local switching trunk port;

(2) Shared local switching trunk port;

(3) Dedicated tandem switching trunk port;

(4) Multiplexers associated with tandem switching;

(5) DS1/voice grade multiplexers associated with analog switches; and

(6) Per-message call setup.

[48 FR 43017, Sept. 21, 1983]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 69.4, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 69.5 Persons to be assessed.

(a) End user charges shall be computed and assessed upon public end users, and upon providers of public telephones, as defined in this subpart, and as provided in subpart B of this part.

(b) Carrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.

(c) Special access surcharges shall be assessed upon users of exchange facilities that interconnect these facilities with means of interstate or foreign telecommunications to the extent that carrier's carrier charges are not assessed upon such interconnected usage. As an interim measure pending the development of techniques accurately to measure such interconnected use and to assess such charges on a reasonable and non-discriminatory basis, telephone companies shall assess special access surcharges upon the closed ends of private line services and WATS services pursuant to the provisions of § 69.115 of this part.

(d) [Reserved]

(47 U.S.C. 154 (i) and (j), 201, 202, 203, 205, 218 and 403 and 5 U.S.C. 553)

[48 FR 43017, Sept. 21, 1983, as amended at 51 FR 10840, Mar. 31, 1986; 51 FR 33752, Sept. 23, 1986; 52 FR 21540, June 8, 1987; 54 FR 50624, Dec. 8, 1989; 61 FR 65364, Dec. 12, 1996; 64 FR 60359, Nov. 5, 1999]

Subpart B—Computation of Charges

§ 69.101 General.

Except as provided in § 69.1 and subpart C of this part, charges for each access element shall be computed and assessed as provided in this subpart.

[55 FR 42386, Oct. 19, 1990]

§ 69.104 End user common line for non-price cap incumbent local exchange carriers.

(a) This section is applicable only to incumbent local exchange carriers that are not subject to price cap regulation

10-1257

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

Feature Group IP West LLC, et al., Petitioners,

v.

Federal Communications Commission and United States of America, Respondents.

CERTIFICATE OF SERVICE

I, Nandan Joshi, hereby certify that on March 23, 2011, I electronically filed the foregoing Final Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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