IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 05-71995

RONAN TELEPHONE COMPANY AND HOT SPRINGS TELEPHONE COMPANY,

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

RESPONDENTS.

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

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUES PRESENTED

In the order on review, the Federal Communications Commission ("FCC" or "Commission") adopted a rule, section 20.11(d), which prohibits local telephone companies (also known as local exchange carriers or "LECs") from using tariffs as a means to collect compensation from commercial mobile radio service ("CMRS") providers (such as cellular telephone providers) for the transport and termination of local CMRS calls. The FCC in that order also adopted a companion rule, section 20.11(e), which in lieu of tariffs gives incumbent LECs (*i.e.*, those LECs in existence in 1996) the right

to compel CMRS providers to negotiate in good faith agreements governing payment for such calls and, if necessary, to submit to compulsory arbitration before a state regulatory commission any disputes about such payment. *Developing a Unified Intercarrier Compensation Regime*, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855 (2005) ("*T-Mobile Order*") (subsequent history omitted). Petitioners Ronan Telephone Co. ("Ronan") and Hot Springs Telephone Co. ("Hot Springs") — both incumbent LECs — seek review of the *T-Mobile Order*.

The issues on review are as follows:

1. Whether the FCC's adoption of section 20.11(d) is a reasonable exercise of its authority under sections 201, 251(b)(5), and 332(c) of the Communications Act, 47 U.S.C. §§ 201, 251(b)(5), 332.

2. Whether the doctrines of Article III standing, exhaustion, finality, and/or ripeness preclude the Court from entertaining petitioners' claim that the FCC erred by not adopting a rule giving competitive LECs (market entrants that have emerged since 1996) the right to compel a CMRS provider to negotiate an interconnection agreement and submit to arbitration; if not, whether the FCC acted within its discretion by not adopting such a rule in the *T-Mobile Order*, when no party had raised the issue in the administrative proceedings leading to that order.

3. Whether the exhaustion requirement codified in section 405(a) of the Communications Act, 47 U.S.C. § 405(a), bars Ronan and Hot Springs from arguing before this Court that the FCC did not provide the notice and the opportunity for comment required by the Administrative Procedure Act ("APA"), when they did not raise that issue before the FCC in a petition for administrative reconsideration; if not, whether the FCC complied with those APA requirements in its rulemaking.

4. Whether the Court lacks jurisdiction to review the "bill-and-keep" compensation methodology when that methodology was not adopted in the *T-Mobile Order* on review in this case.

JURISDICTIONAL STATEMENT

The Court has subject matter jurisdiction over final FCC rulemaking orders under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). Petitioners' challenge is timely. As demonstrated below, however, the Court lacks jurisdiction to entertain portions of petitioners' challenge to the rules adopted in the order on review because petitioners have not established Article III standing. Some issues raised by petitioners are also barred by principles of exhaustion and/or finality. In addition, petitioners failed to invoke the Court's jurisdiction to entertain their challenge to the bill-and-keep

compensation mechanism because that mechanism was not adopted in the order before the Court.

STATUTES AND REGULATIONS

Relevant statutes and regulations are set out in the appendix attached to this brief.

COUNTERSTATEMENT OF THE CASE

Many telephone calls require the collaboration of two or more carriers. For example, when a cell phone user makes a local call to a landline phone, the call originates on the facilities of the CMRS provider (*i.e.*, commercial wireless provider), which then transmits the call to the facilities of a LEC. The LEC in turn either itself terminates the call, *i.e.* completes the call to the intended recipient, or transports it to another LEC that in turn terminates the call. *See T-Mobile Order* ¶ 4 (ER 3).

In 2001, the Commission initiated a comprehensive proceeding to revise its rules governing the intercarrier compensation arrangements for calls that are transported on the facilities of two or more telecommunications providers. *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) ("*Intercarrier Compensation NPRM*") (SER 021). While that rulemaking was pending, a group of CMRS providers petitioned the Commission to issue an adjudicatory

ruling declaring that existing federal communications law prohibited incumbent LECs from filing tariffs with state regulatory commissions as a means of unilaterally assessing charges on CMRS providers for the LECs' role in transporting and terminating local CMRS calls.[1]

In the *T-Mobile Order*, the FCC denied the CMRS providers' petition for declaratory ruling. But in that same order, the FCC adopted a new rule that prospectively prohibits LECs from filing tariffs that assess charges on CMRS providers for the transport and termination of local CMRS calls. With tariffs no longer available as a means to collect compensation for such calls, the FCC accordingly enacted a companion rule that gives incumbent LECs the right to require CMRS providers to negotiate in good faith compensation agreements for local CMRS traffic and, if necessary, to submit any resulting disputes to compulsory arbitration before state regulatory commissions.

Petitioners Ronan and Hot Springs (both incumbent LECs) petitioned this Court to review the *T-Mobile Order*. At the same time, several other

[1] In contrast with an individually negotiated contract providing for intercarrier compensation, a tariff is a schedule of charges, terms, and conditions of service that a communications carrier unilaterally determines and files with the FCC (for interstate service) or a state regulatory commission (for intrastate service). Unless the regulatory agency suspends or rejects the tariff, those rates, terms, and conditions are "binding on the parties and ha[ve] the force of law." *Farley Transp. Co., Inc. v. Santa Fe Trail Transp. Co.*, 778 F.2d 1365, 1372 (9th Cir. 1985).

parties filed petitions for administrative reconsideration with the FCC. The FCC denied some of the reconsideration petitions in *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) ("*USF/ICC Transformation Order*") (further administrative history omitted), *petitions for review pending sub nom. In re FCC 11-161* (10th Cir. No. 11-9900, filed Dec. 18, 2011). The FCC in that order also adopted a bill-and-keep framework for all telecommunications traffic exchanged with a LEC, subject to a transition period for some services. Ronan and Hot Springs did not file a petition for review of the *USF/ICC Transformation Order*.

COUNTERSTATEMENT OF THE FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. Pre-1996 Statutory and Regulatory Framework

The Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.* ("Communications Act" or "Act"), establishes the regulatory framework governing common carrier communications services. 47 U.S.C. § 151, *et seq.* Congress in that Act created the FCC to "execute and enforce [its] provisions." 47 U.S.C. § 151. *See Nat. Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). To discharge that responsibility, section 201(b) of the Act authorizes the FCC to "prescribe such rules and regulations as may be necessary in the public interest." 47 U.S.C. § 201(b).

The Act empowers the FCC to order carriers to connect their networks in order to complete telephone calls. For example, section 332 of the Act — a provision specifically pertaining to mobile communications services — directs the FCC, upon receipt of a reasonable request from a CMRS provider, to order a common carrier to establish physical connection with that provider pursuant to section 201(a). 47 U.S.C. § 332(c)(1)(B). Section 201(a), in turn, authorizes the FCC "in cases where the Commission . . . finds such action necessary or desirable in the public interest" to order common carriers 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." 47 U.S.C. § 201(a). The FCC's authority under section 332 applies both to interstate and intrastate interconnections.[2]

Exercising its authority under sections 201(a) and 332(c), the FCC in 1994 adopted rules, codified at 47 C.F.R. § 20.11, governing the interconnection and the intercarrier compensation for calls between LECs and

[2] Although section 2(b), 47 U.S.C. § 152(b), states generally that the Act is to be construed not to give the FCC jurisdiction over intrastate communications, Congress made an exception to that jurisdictional limitation for matters regulated under section 332. *See Iowa Util. Bd. v. FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997), *rev'd in part and aff'd in part, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

CMRS providers. *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services,* Second Report and Order, 9 FCC Rcd 1411, 1497-98, 1515 (¶¶ 227-29, 288) (1994) ("*CMRS Second Report*"). The FCC determined that LECs must provide "reasonable and fair interconnection for all commercial mobile radio services," *id.* at 1497 (¶ 230), which it specified to be the type of interconnection reasonably requested by a CMRS provider unless the interconnection is not technically feasible or economically reasonable. *See* 47 C.F.R. § 20.11(a). The FCC also required LECs and CMRS providers to "comply with principles of mutual compensation," 47 C.F.R. § 20.11(b) (revised 2011). Mutual compensation principles require a LEC to compensate a CMRS provider for the reasonable costs the CMRS provider incurs in terminating calls originating on that LEC's facility; conversely, the CMRS provider must provide comparable compensation to the LEC for the costs of CMRS-originated calls that terminate on the LEC's facilities. *See CMRS Second Report*, 9 FCC Rcd at 1498 (¶ 232).[3]

[3] The FCC did not preempt the state regulation of the actual termination rates paid by LECs and CMRS providers. *AirTouch Cellular v. Pacific Bell*, 16 FCC Rcd 13502, 13507 (¶ 14) (2001).

B. Telecommunications Act of 1996

In 1996, Congress comprehensively amended the Communications Act to establish a new model of competition in telecommunications markets. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"). The 1996 Act had important implications for LEC-CMRS interconnection. Until 1996, states typically granted an exclusive franchise in each local service area to the LEC that owned and operated the local telephone network. *See AT&T Corp*., 525 U.S. at 371. The 1996 Act restructured local telephone markets by preempting state and local exclusive franchise arrangements, 47 U.S.C. § 253, and creating "a new telecommunications regime designed to foster competition in local telephone markets." *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 638 (2002).

To facilitate the rise of competition in local telephone markets, the 1996 Act imposes certain duties on all telecommunications carriers, 47 U.S.C. § 251(a); applies additional requirements to all LECs, 47 U.S.C. § 251(b); and imposes still further duties on carriers, such as the petitioners

here, that are incumbent LECs, 47 U.S.C. § 251(c).[4] Of particular relevance here is section 251(b)(5), which requires all LECs to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5).[5]

Under section 252(d)(2)(A)(i), just and reasonable reciprocal compensation charges generally are those that 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

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[4] There are two types of LECs: incumbent LECs and competitive LECs. Until the passage of the 1996 Act, the incumbent LECs provided service as state regulated monopolies. *See AT&T Commc'ns of Cal., Inc. v. Pac-West*, 651 F.3d 980, 982 (9th Cir. 2011). *See also* 47 U.S.C. § 251(h) (defining incumbent LEC). The incumbent LECs' rivals are known as competitive LECs. *See FirstCom, Inc. v. Qwest*, 555 F.3d 669, 673 (8th Cir. 2009).

[5] For many years after passage of the 1996 Act, the transport and termination of long-distance calls (also known as "toll" calls) were not subject to section 251(b)(5). *See USF/ICC Transformation Order*, 26 FCC Rcd at 17915-16 (¶¶ 761-63). The FCC had established a different regime of intercarrier compensation, known as access charges, for LEC origination and termination of long-distance calls. *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4687-88 (¶ 5) (2005). *See* 47 U.S.C. § 251(g) (preserving access charge regime until it is "explicitly superseded" by the Commission). The FCC, in its recent *USF/ICC Transformation Order*, decided to supersede the access charge regime and, subject to a transition mechanism, regulate terminating access traffic in accordance with the section 251(b)(5) framework. 26 FCC Rcd at 17916 (¶ 764). As used in this brief to describe CMRS calls, the term "local" denotes those calls that were not subject to the access charges regime.

network facilities of the other carrier." 47 U.S.C. § 252(d)(2)(A)(i). Section 252(d)(2)(B)(i), however, provides that section 251(b)(5) "shall not be construed 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)." 47 U.S.C. § 252(d)(2)(B)(i).[6]

Congress in the 1996 Act designed a deregulatory process that relies in the first instance on privately negotiated agreements between connecting carriers to set the terms for reciprocal compensation and other duties under section 251. Section 252(a)(1) permits an incumbent LEC and a requesting telecommunications carrier to "negotiate and enter into a binding agreement" for intercarrier compensation without regard to the standards established in the Act or the FCC's implementing regulations. *See* 47 U.S.C. § 252(a)(1).

[6] The FCC's rules define a "[b]ill-and-keep arrangement[]" as one "in which carriers exchanging telecommunications traffic do not charge each other for specific transport and/or termination functions or services," 47 C.F.R. § 51.713, but rather each carrier "recovers from its own end-users the cost of both originating traffic that it delivers to the other network and terminating traffic that it receives from the other network." *Implementation of the Local Competition Provisions In the Telecommunications Act of 1996*, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9153 n.6 (2001). In other words, instead of paying or receiving compensation from another carrier involved in transmitting the call, the originating and terminating carriers "bill" their own end-user customers to recover their costs and "keep" the revenue themselves.

Section 251(c)(1) requires incumbent LECs, upon receiving a request for interconnection, to negotiate the terms and conditions of an interconnection agreement in good faith (47 U.S.C. § 251(c)(1)), although section 251(f) exempts an incumbent LEC that qualifies as a "rural telephone company"[7] from the duties imposed on incumbent LECs under section 251(c), including the "good faith negotiation" requirement, unless certain requirements are met (47 U.S.C. § 251(f)). If an interconnection agreement is not reached, section 252 directs the state commission to arbitrate and resolve the dispute. *Id.* §§ 252(b)(1), 252(b)(4)(C).

Congress gave both the FCC and the state public utilities commissions roles in implementing the reciprocal compensation obligations of section 251. Congress authorized the FCC to promulgate rules "to carry out the 'provisions of [the Communications] Act,' which include §§ 251 and 252." *AT&T Corp.*, 525 U.S. at 378 (quoting 47 U.S.C. 201(b)). *See* 47 U.S.C. § 251(d)(1) (directing the FCC to "establish regulations to implement" section 251). The state commissions have a complementary responsibility in certain circumstances to arbitrate disputed issues (such as reciprocal compensation arrangements) between incumbent LECs and other carriers and

[7] A "rural telephone company" is a small telephone company operating in a sparsely populated area that meets one or more of the four criteria set forth in section 3(37) of the Act, 47 U.S.C. § 153(44).

to ensure that the resulting interconnection agreements address arbitrated issues in compliance with the 1996 Act and the FCC's implementing regulations. *See* 47 U.S.C. § 252. Section 251(i), however, specifies that "[n]othing in [section 251] limit[s] or otherwise affect[s] the Commission's authority under section 201." 47 U.S.C. § 251(i).

C. Local Competition Order

When it adopted rules implementing sections 251 and 252, the FCC determined that section 251(b)(5) requires LECs to establish reciprocal compensation arrangements for the exchange of local calls with CMRS carriers, *i.e.*, calls to or from a CMRS provider that originate and terminate within the same Major Trading Area ("MTA").[8] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16014, 16016 (¶¶ 1036, 1041) (1996) ("*Local Competition Order*"), *aff'd in part and rev'd in part*, *Iowa Utils. Bd. v. FCC*,

[8] Whereas a "local service area" defines the boundaries for local calls on land lines, *i.e.*, those non-toll calls not traditionally subject to access charges, an MTA, which is a larger area, delineates a similar regulatory approach to wireless calls. *See Alma Commc'ns Co. v. Missouri Pub. Serv. Comm'n*, 490 F.3d 619, 621 (8th Cir. 2007). *See* 47 C.F.R. §§ 24.202(a) (defining an MTA); 51.701(b)(2) (defining non-access telecommunications traffic as "[t]telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same [MTA].")

120 F.3d 753, *rev'd in part and aff'd in part, Iowa Utils. Bd.*, 525 U.S. 366. *See T-Mobile Order*, ¶ 3 (ER 2).

Because CMRS carriers are not LECs, the FCC determined in 1996 that CMRS carriers are "not [themselves] subject to the obligations of section 251(b)." *Local Competition Order*, 11 FCC Rcd at 15996 (¶ 1005). Accordingly, under the regime adopted in the *Local Competition Order*, LECs could not invoke the section 252 arbitration process to require CMRS carriers to compensate LECs for terminating LEC-originated calls under section 251(b)(5). *See T-Mobile Order*, ¶ 15 (ER 10).

The FCC, in applying sections 251 and 252 to LEC-CMRS interconnection in the *Local Competition Order*, did "not find[] that section 332 jurisdiction over interconnection has been repealed by implication, or reject[] it as an alternative basis for jurisdiction." 11 FCC Rcd at 16005 (¶ 1023). To the contrary, the FCC expressly recognized that "section 332 in tandem with section 201 is a basis for jurisdiction over LEC-CMRS interconnection." *Id.* The FCC "preserve[d] [its] option" to "invoke [its] jurisdiction under section 332 to regulate LEC-CMRS interconnection rates," if circumstances should so warrant. *Id.* at 16006 (¶ 1025).

II. THIS PROCEEDING

A. Proceedings Leading to the *T-Mobile Order* on Review.

In 2001, the FCC initiated a comprehensive rulemaking to re-examine "the broad universe of existing intercarrier compensation arrangements." *Intercarrier Compensation NPRM* ¶ 2 (SER 023). Several sections of that notice of proposed rulemaking specifically addressed matters relating to the interconnection compensation arrangements between LECs and CMRS providers. *Id.*, ¶¶ 78-96 (SER 048-055). Among other issues, the FCC sought "comment on the rules [the FCC] should adopt to govern LEC interconnection arrangements with CMRS providers, whether pursuant to section 332 or other statutory authority." *Id.*, ¶ 90 (SER 053). The FCC also invited comments on "the relationship between the CMRS interconnection authority assigned to the Commission under sections 201 and 332, and that granted to the states under sections 251 and 252." *Id.*, ¶ 86 (SER 052).

The FCC received 75 comments and 62 replies in response to its notice of proposed rulemaking. *T-Mobile Order*, App. B-C & App. D (¶ 4) (ER 14-17, 21). Among the commenting parties were incumbent LECs, competitive LECs, CMRS providers, communications users, Internet Service Providers, and state regulatory commissions. *Id.*, App. B-C (ER 14-17).

On September 6, 2002 — while the intercarrier compensation rulemaking was pending before the Commission — a group of CMRS providers petitioned the FCC to issue a ruling declaring that incumbent LECs are prohibited under existing law from filing state tariffs that establish charges for terminating CMRS traffic. Pet. for Declaratory Ruling, filed by T-Mobile USA, Inc., Western Wireless Corporation, Nextel Communications and Nextel Partners (Sept. 6, 2002) (SER 004).[9] The CMRS providers argued that incumbent LECs, by filing these tariffs, have circumvented the negotiation procedures established by sections 251 and 252 and unilaterally have set unfair and unlawful terms and conditions for interconnection. *Id.* at 5, 9 (SER 011, 015). The CMRS providers asked the FCC to issue an adjudicative order under section 5(d) of the APA, 47 U.S.C. § 554(d), directing the incumbent LECs to withdraw any existing wireless termination tariffs or alternatively declaring that such tariffs to be "unlawful, void and of no effect." *Id.* at ii, 1 n.2, 10-14 (SER 006, 007, 016-020).

The FCC issued a public notice incorporating the petition for declaratory ruling into the intercarrier compensation rulemaking docket (CC

[9] The FCC has adjudicatory authority to "issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e). *See* 47 C.F.R. § 1.2 (authorizing the FCC "on motion or on its own motion" to "issue a declaratory ruling terminating a controversy or removing uncertainty.").

Docket No. 01-92) and inviting interested parties to comment on the petition. "Comment Sought on Petitions for Declaratory Ruling Regarding Intercarrier Compensation for Wireless Traffic," 17 FCC Rcd 19046 (2002) ("2002 Public Notice") (SER 001). The FCC received 33 comments and 22 replies in response to the declaratory ruling petition. *See T-Mobile Order* at App. C (ER 18-19).

B. The *T-Mobile Order* on Review

In the *T-Mobile Order* on review, the FCC took two discrete actions: first, it exercised its adjudicatory authority by denying the petition for declaratory ruling (*T-Mobile Order*, ¶¶ 9-13 (ER 6-9)) and, second, it exercised its rulemaking power to revise its existing rules, with prospective-only effect, governing local CMRS-LEC traffic (*id.*, ¶¶ 14-16 (ER 9-11)).

In denying the CMRS providers' petition for declaratory ruling, the FCC explained that existing law had not prescribed how LECs are to satisfy their obligation to provide reciprocal compensation for local CMRS-LEC traffic. *Id.*, ¶¶ 9-13 (ER 6-9). Although section 251(b)(5) and the FCC's implementing rules "reference an 'arrangement' between LECs and other telecommunications carriers, including CMRS providers," the FCC pointed out that neither the statute nor its regulations "explicitly address the type of arrangement necessary to trigger the payment of reciprocal compensation or

the applicable compensation regime, if any, when carriers exchange traffic without making prior arrangements with each other." *Id.*, ¶ 4 (ER 3). The FCC thus held that incumbent LECs had not been "prohibited from filing state termination tariffs and CMRS providers [had been] obligated to accept the terms of applicable state tariffs." *Id.*, ¶¶ 4, 9-10 (ER 3, 6).

At the same time, the FCC found that the silence of section 251(b)(5) and its rules in addressing the types of arrangements that trigger payment obligations had resulted in disputes among carriers "as to whether and how reciprocal compensation payment obligations arise in the absence of an agreement or other arrangement between the originating and terminating carriers." *Id.*, ¶ 4 (ER 3). To "clarify the type of arrangements necessary to trigger payment obligations," *id.*, ¶ 9 (ER 6), the FCC adopted a new rule, now codified at 47 C.F.R. § 20.11(d),[10] prohibiting LECs prospectively from filing tariffs that assess charges on CMRS providers for the termination of local CMRS traffic. *T-Mobile Order*, ¶ 14 (ER 10). The FCC explained that "negotiated agreements between carriers are more consistent with the pro-competitive process and policies reflected in the 1996 Act" than unilaterally

[10] Although this rule originally was codified in 2005 at 47 C.F.R. § 20.11(e), we cite to this rule throughout this brief under its current codification, 47 C.F.R. § 20.11(d).

established tariffed charges. *Id.* The FCC relied on sections 201 and 332 as its authority to adopt this rule. *Id.*, ¶ 14 (ER 10). *See* 47 U.S.C. §§ 201, 332.

The FCC explained that section 251(b)(5) obligates LECs (not CMRS providers) to enter into reciprocal compensation arrangements and that it may be difficult for terminating LECs to persuade CMRS providers to enter into agreements for reciprocal compensation arrangements for local CMRS-LEC traffic. *Id.*, ¶ 15 (ER 10-11). The FCC noted commenters' statements in the record that "CMRS providers may lack incentives to engage in negotiations to establish reciprocal compensation arrangements." *Id.*, ¶ 15 (ER 10-11). The FCC therefore decided that incumbent LECs should have the same right to compel negotiations and arbitration as CMRS carriers have under sections 251 and 252. The FCC accordingly adopted a new rule, now codified at 47 C.F.R. § 20.11(e),[11] requiring a CMRS provider receiving a request from an incumbent LEC to negotiate an interconnection agreement in good faith and, if requested, to submit to arbitration by the state commission. *Id.*, ¶ 16 (ER 11).

The Commission in the *T-Mobile Order* made no changes to the default intercarrier compensation methodology for local CMRS traffic in section

[11] Although this rule originally was codified in 2005 at 47 C.F.R. § 20.11(f), we cite to this rule throughout this brief under its current codification, 47 C.F.R. § 20.11(e).

20.11(b). After the FCC issued the *T-Mobile Order*, section 20.11(b) thus continued to require the originating carrier, whether LEC or CMRS provider, to pay reasonable compensation to the terminating carrier with respect to calls terminating on that carrier's network. 47 C.F.R. § 20.11(b) (revised 2011). *See USF/ICC Transformation Order*, 26 FCC Rcd at 18932 (¶ 980).

III. THE USF/ICC TRANSFORMATION ORDER

On November 18, 2011, the FCC issued the *USF/ICC Transformation Order*, 26 FCC Rcd 17663, which comprehensively amended the Commission's rules regarding its universal service program and its intercarrier compensation regime. Of particular relevance to this case, the FCC: (1) adopted bill-and-keep (*see* n. 7, *supra*) as the default intercarrier compensation methodology, subject to a transition period for some services (*id.* at 17904-25, 18037-39 (¶¶ 736-81, 994-97)); (2) denied some of the petitions for administrative reconsideration or clarification of the *T-Mobile Order* (*id.* at 17947-55 (¶¶ 833-43)); and (3) instituted further rulemaking to consider, among other things, whether to extend to competitive LECs the right to require CMRS carriers to negotiate interconnection agreements in good faith and to submit to arbitration (*id.* at 17955, 18119 (¶¶ 845, 1324)).

Bill-and-Keep. Subject to a transition period for some services, the FCC in its *USF/ICC Transformation Order* decided that bill-and-keep should

be the default methodology for all intercarrier compensation traffic," *id.* at 17904 (¶ 736), including local LEC-CMRS traffic, *id.* at 18037-38 (¶¶ 994, 996). Because "both parties generally benefit from participating in a call," the FCC determined that the carriers of "both parties should split the cost of the call." *Id.* at 17907 (¶ 744). The FCC rejected the argument that bill-and-keep results in "free termination," explaining that bill-and-keep "merely shifts the responsibility for recovery from other carrier's customers to the customers that chose to purchase service from that network." *Id.* at 17909 (¶ 746).

The FCC further found that bill-and-keep had "significant . . . advantages" over other compensation methods. *Id.* at 17904 (¶ 738). The FCC explained that bill-and-keep "brings market discipline to intercarrier compensation because it ensures that the customer who chooses a network pays the network for the services the subscriber receives." *Id.* at 17905(¶ 742). The FCC found that bill-and-keep is "less burdensome" than approaches that require the FCC or state regulators to establish separate intercarrier termination charges because it avoids the need for "complicated, time consuming regulatory proceedings" to determine appropriate termination and transport charges. *Id.* at 17906 (¶ 743).

Because CMRS carriers generally "incur but do not collect termination charges," the FCC also found that bill-and-keep will benefit the consumers of

wireless services by reducing the cost of those services. *Id.* at 17909 (¶ 748). The FCC additionally determined that the bill-and-keep framework, which more accurately reflects the incremental cost of making a call, will increase carrier efficiency, promote innovation, and eliminate arbitrage and marketplace distortions. *Id.* at 17910, 17911-12 (¶¶ 749-50, 752-54). Furthermore, the Commission pointed out that section 252(d)(2)(B)(i), which explicitly permits bill-and-keep arrangements, precludes any argument that the Commission lacks authority to adopt this form of intercarrier compensation methodology. *Id.* at 17921 (¶ 774).

To implement the bill-and-keep regime for local LEC-CMRS traffic, the FCC in the *USF/ICC Transformation Order* revised section 20.11(b) by eliminating the requirement that LECs and CMRS providers comply with "principles of mutual compensation" and replacing it with the requirement that LECs and CMRS providers exchange such traffic "under a bill-and-keep arrangement . . . unless they mutually agree otherwise." *Id.*, App. A at 18158 (amending 47 C.F.R. § 20.11(b)).

Denial of Reconsideration Petitions of the *T-Mobile Order*. The FCC in the *USF/ICC Transformation Order* addressed some petitions for reconsideration or clarification of the *T-Mobile Order*. As a threshold matter, the FCC reaffirmed its reliance on sections 201 and 332 of the Act as its

authority to require CMRS providers, upon request from an incumbent LEC, to negotiate an interconnection agreement in good faith and to submit to compulsory arbitration. *Id.* at 17947-53 (¶¶ 833-42). The FCC pointed out that those statutory provisions authorized the agency to regulate the terms of LEC-CMRS interconnection, including the associated compensation for that traffic, and that it had adopted section 20.11(e) pursuant to that authority. *Id.* at 17948-49 (¶¶ 834-36). The FCC also found that it had authority to adopt section 20.11(e) pursuant to section 4(i) of the Act, which empowers the agency to, *inter alia*, "make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i); *see id.* at 17945, 17949-51 (¶¶ 826, 837-39) (citing section 4(i), and explaining how its rule is necessary to enable the agency to discharge its statutory responsibilities under sections 201, 251(b) and 332 of the Act).

The FCC clarified that, in adopting section 20.11(e), it had not construed sections 251(c) and 252 to apply directly to CMRS providers. *Id.* at 17945, 17949, 17951-53 (¶¶ 826, 833, 840-42). The FCC explained that it had "exercised its authority under sections 201, 332, 251, and 4(i) [of the Act] to apply to CMRS providers' duties *analogous* to the negotiation and

arbitration requirements" that sections 251(c) and 252 place upon incumbent LECs. *Id.* at 17952 (¶ 841) (emphasis added).

In addition, the FCC concluded that it had provided adequate public notice under the APA in adopting new rules in the *T-Mobile Order*. *Id.* at 17954 (¶ 843). *See* 5 U.S.C. § 553(b), (c). The FCC explained that its 2001 notice of proposed rulemaking explicitly invited comments "on the rules the Commission should adopt to govern LEC interconnection arrangements with CMRS providers," *id.* at 17954 (¶ 843) (quoting *Intercarrier Compensation NPRM*, ¶ 90 (SER 053)), and that the administrative record included comments urging the FCC to revise its rules to require CMRS providers to negotiate interconnection agreements with LECs, *id.* at 17954 (¶ 843 n.1626).

Further Rulemaking. The FCC in the *USF/ICC Transformation Order* declined "at this time" to extend to competitive LECs the rights to compel CMRS providers to negotiate interconnection agreements and if necessary to submit to arbitration. *Id.* at 17955 (¶ 845). The FCC explained that the administrative record did not adequately address the policy and legal issues relating to that extension. *Id.* At the same time, however, the FCC instituted a further rulemaking that invited parties, *inter alia*, to comment on whether the FCC should modify its rules to extend to competitive LECs the same right to compel negotiations and arbitrations available to incumbent LECs under

section 20.11(e). *Id.* at 18119 (¶ 1324). That further rulemaking remains pending before the Commission.

IV. SUBSEQUENT DEVELOPMENTS.

Although the FCC in the *USF/ICC Transformation Order* resolved petitions for reconsideration of the *T-Mobile Order*, neither Ronan nor Hot Springs filed a petition for review of the *USF/ICC Transformation Order*, and hence that order is not before this Court in this case. A number of other parties, however, currently are seeking judicial review of the *USF/ICC Transformation Order* in the Tenth Circuit. *See In re FCC 11-161* (10th Cir. No. 11-9900, filed Dec. 18, 2011). Ronan and Hot Springs are participating in *In re FCC 11-161* as intervenors in support of petitioners.

A number of parties have filed petitions for agency reconsideration of the 2011 *USF/ICC Transformation Order*, many of which remain pending before the agency. None of those petitions involves issues addressed in the *T-Mobile Order* or the FCC's denial of petitions requesting reconsideration of that decision.

SUMMARY OF ARGUMENT

1. The FCC acted well within its statutory authority in adopting section 20.11(d) of its rules. The FCC has broad rulemaking authority in section 201(b) to implement the Communications Act, including section

251(b)(5)'s requirement that LECs establish "reciprocal compensation arrangements." By neither defining nor describing the term "arrangement," and by granting broad rulemaking authority to the FCC to implement the Communications Act, Congress delegated authority to the Commission to delineate the contours of that statutory requirement. Moreover, sections 201(a) and 332(c), which authorize the FCC to regulate the terms of LEC-CMRS interconnection, including the associated compensation for that traffic, independently give the FCC authority to enact section 20.11(d). The Commission lawfully exercised that delegated authority in prohibiting LECs from unilaterally establishing reciprocal compensation arrangements for local CMRS traffic through tariff charges assessed on CMRS providers.

2. Petitioners' challenge to the FCC's authority to enact section 20.11(e) is not properly before the Court because petitioners (as incumbent LECs) lack Article III standing to raise that claim. Section 20.11(e) *benefits* incumbent LECs, such as Ronan and Hot Springs, by giving them the right to compel CMRS providers to negotiate in good faith and to submit to arbitration. Thus, petitioners cannot show any injury they have suffered as a result of that rule. In any event, sections 4(i), 201, and 332 of the Communications Act (47 U.S.C. §§ 154(i), 201, 332) — statutory provisions ignored by petitioners — empowered the FCC to adopt section 20.11(e).

3. Like their challenge to section 20.11(e), petitioners' claim that the FCC erred by not enacting a rule giving competitive LECs the right to require a CMRS provider to negotiate an interconnection agreement in good faith and submit to arbitration is not properly before the Court. Because that issue was not presented to the FCC in the administrative proceedings leading to the *T-Mobile Order* on review, nor raised by petitioners in a petition for agency reconsideration, section 405(a) of the Act, 47 U.S.C. § 405(a), bars petitioners from raising that issue on review. As incumbent LECs (rather than competitive LECs), Ronan and Hot Springs also lack Article III standing to raise the issue because they have not shown that they are injured by the FCC's failure to adopt a rule giving competitive LECs the right to compel negotiations and arbitrations. Furthermore, the Commission in the *T-Mobile Order* made no decision as to whether competitive LECs should be given a right to require CMRS providers to negotiate and submit to arbitrations, let alone a decision that is final and ripe for review. The FCC is considering the issue in a pending rulemaking and the doctrines of finality and ripeness additionally bar the Court's consideration of that issue at this time.

In any event, the Commission committed no error in declining at this time to afford competitive LECs (as opposed to incumbent LECs like petitioners) the right to compel negotiations and arbitrations in the *T-Mobile*

Order. Section 4(j) of the Communications Act, 47 U.S.C. § 154(j), gives the Commission broad authority to determine the scope of its proceedings. It is lawful and appropriate for the Commission to first address whether incumbent LECs should have the right to compel negotiations and arbitrations, and then consider whether to extend that right to competitive LECs.

4. The FCC complied fully with the APA's notice-and-comment requirements. The 2001 notice of proposed rulemaking initiating this proceeding both provided a clear description of the subjects and issues involved in the rulemaking, and gave interested parties the opportunity to comment on those matters. As incumbent LECs, petitioners lack third-party standing to argue that the FCC failed to provide adequate notice to different parties (*i.e.*, competitive LECs) that are not before the Court in this case. In addition, petitioners are barred by section 405(a) of the Act from raising the APA issue on review because they failed to exhaust their administrative remedies.

5. Finally, the Court lacks jurisdiction to consider petitioners' challenge to the bill-and-keep methodology, which was adopted in an order that is not before the Court. In the *T-Mobile Order* on review in this case, the FCC did not impose a bill-and-keep methodology for local LEC-CMRS calls,

or even mention the term. In any event, petitioners' claim that bill-and-keep violates the 1996 Act is directly at odds with section 252(d)(2)(B)(i), a provision in the 1996 Act that expressly permits bill-and-keep reciprocal compensation arrangements. 47 U.S.C. § 252(d)(2)(B)(i). And because a bill-and-keep mechanism allows LECs to recover their costs of transporting and terminating CMRS calls from their own local exchange customers plus explicit universal service support where necessary, it does not violate the Takings Clause of the Fifth Amendment.

ARGUMENT

I. THE COURT SHOULD REVIEW THE *T-MOBILE ORDER* UNDER DEFERENTIAL STANDARDS OF REVIEW.

Petitioners bear a heavy burden to demonstrate that the *T-Mobile Order* is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this "highly deferential" standard, the Court presumes the validity of agency action, *Northwest Ecosystem Alliance v. United States Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (citation omitted), and does not "substitute its judgment for that of the Commission." *Am. Civil Liberties Union v. FCC*, 523 F.2d 1344, 1350 (9th Cir. 1975). The Court must affirm unless the FCC failed to consider the relevant factors or made a clear error in judgment. *E.g.*, *Judulang v. Holder*, 132 S. Ct. 476, 483 (2011).

For challenges to an agency's interpretation of a statute it administers, the Court reviews the agency's decision in accordance with the two-step approach prescribed by *Chevron USA Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). Under the first step, the Court must determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If so, "the [C]ourt, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43.

Where "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843; *see also Osorio v. Mayorkas*. 656 F.3d 954, 464-65 (9th Cir. 2011). Under this "deferential standard," *Redmond-Issaquah R.R. Pres. Ass'n v. STB*, 223 F.3d 1057, 1063 (9th Cir. 2000), silence or ambiguity in a statute that the agency is charged with administering is a Congressional "delegation[] of authority to the agency to fill the statutory gap in reasonable fashion." *Brand X*, 545 U.S. at 980. "Filling th[ose] gaps," the Court explained, "involves difficult policy choices that agencies are better equipped to make than courts." *Id.* Thus, where there is statutory silence or ambiguity, a federal court must accept the administering agency's reasonable interpretation of the statute even if that interpretation is not "the only one it permissibly could have adopted . . . or

even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11.

The standard of review set forth in petitioners' brief is internally inconsistent and contains significant legal errors.[12] Contrary to petitioners' assertions that the Court should give the FCC no (or limited) deference in reviewing the rules the Commission adopts to fill in a gap in the Communications Act (*see* Pet. Brief at 8), the Supreme Court many times has held otherwise. *E.g.*, *Brand X*, 545 U.S. at 980; *Verizon Commc'ns v. FCC*, 535 U.S. 467, 502, n.20, 523, 534-35 (2002); *AT&T Corp.*, 525 U.S. at 387, 397.

[12] On the one hand, petitioners correctly acknowledge that "[g]enerally, courts defer to an agency's interpretation of the statute that such agency is empowered to enforce" and that "[t]he court reviews FCC implementation of the 1996 Act in accordance with *Chevron*." Pet. Brief at 7, 8. On the other hand, petitioners incorrectly contend — in direct conflict with *Chevron* — that "deference to an agency interpretation applies only in the case of an agency interpretation of its own regulations, not its interpretation of Congressional statute" and that an agency's interpretation of a federal statute is "reviewed de novo by the court." Pet. Brief at 7, 8.

II. PETITIONERS' CHALLENGE TO THE LAWFULNESS OF SECTION 20.11(D) LACKS MERIT.

A. The FCC Adopted Section 20.11(d) as a Lawful Exercise Of its Authority Under Sections 201 and 332(c) of the Act.

Contrary to petitioners' claims (Pet. Br. 8-13), the FCC acted well within its statutory authority in adopting section 20.11(d) of its rules. Section 201(b) of the Communications Act gives the FCC wide-ranging authority to adopt rules "to carry out the 'provisions of [the Communications] Act,' which include [section] 251." *AT&T Corp.*, 525 U.S. at 378 (quoting 47 U.S.C. 201(b)); *see also Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (section 201(b) gives the FCC "broad power to enforce all provisions of the statute."). Section 201(b) thus authorizes the FCC to implement section 251(b)(5) by adopting a rule barring LECs from establishing tariffed reciprocal compensation arrangements for local CMRS service. And because section 20.11(d) involves intercarrier compensation for traffic between LECs and CMRS providers, sections 332(c) and 201(a) independently give the FCC authority to adopt section 20.11(d). *T-Mobile Order*, ¶ 14 & n.58 (ER 10). *See also Qwest v. FCC*, 252 F.3d 462, 465-66 (D.C. Cir. 2001); *Iowa Utils. Bd.*, 120 F.3d at 800 n.21. Although the FCC expressly relied upon sections 332(c) and 201 as the source of its authority to enact section 20.11(d), *T-Mobile Order*, ¶ 14 (ER 10), petitioners in contending that the FCC lacked

authority to enact section 20.11(d) never even mention those statutory provisions.

Petitioners argue that the FCC lacked authority to adopt section 20.11(d) because "Congress intended the term 'arrangements' used in section 251(b)(5) to be interpreted more broadly than the FCC did in the *Order*." Pet Brief at 9. Contrary to petitioners' contention, the FCC in the *T-Mobile Order* did not hold that Congress, in using the term "arrangement" in section 251(b)(5), intended to exclude arrangements established by tariff. *T-Mobile Order*, ¶ 4 (ER 3). *See* Pet. Brief at 10. To the contrary, the FCC, in denying the petition for declaratory ruling, declined to find unlawful under section 251(b)(5) the existing state termination tariffs that the LECs had filed to establish reciprocal compensation arrangements for local CMRS traffic. *See T-Mobile Order*, ¶¶ 10-13 (ER 6-9).

Although Congress required LECs to establish reciprocal compensation "arrangements," 47 U.S.C. § 251(b)(5), it did not define or otherwise specify the types of arrangements covered by that statutory term. *See T-Mobile Order*, ¶ 4 (ER 3). Congress' use of the broad, ambiguous term "arrangement," coupled with its affirmative grant to the FCC of rulemaking authority to "execute and enforce" the Communications Act, 47 U.S.C. § 151,

is a delegation of authority to the FCC to delineate the contours of that statutory requirement.

The FCC in exercising its rulemaking authority to implement section 251(b)(5) has considerable discretion to use its experience and expertise to make "reasonable policy choice[s]." *See, e.g.*, *Mayo Found. For Med. Educ. And Research v. United States*, 131 S. Ct. 704, 713 (2011) (administering agency required "to make interpretive choices for statutory implementation."). For example, the FCC's rules implementing the requirement in section 252(d)(1)(A) that rates for network elements be "based on . . . cost" prescribe use of the total element long-run incremental cost ("TELRIC") methodology. *See* 47 C.F.R. §§ 51.503, 51.505. Even though Congress in section 252(d)(1)(A) did not specifically mandate that cost-based rates be based on a TELRIC methodology, the Supreme Court upheld the TELRIC rules as a lawful implementation of section 252(d)(1)(A). *Verizon*, 535 U.S. 467.[13] Similarly, the fact that Congress in section 251(b)(5) did not expressly bar termination tariffs as reciprocal compensation arrangements does not prevent the FCC from adopting that prohibition in the exercise of its own authority under section 201(b) to adopt rules to implement and give

[13] Petitioners' claim that TELRIC rates are not "reasonable" rates, Pet. Brief at 13, is contrary to the holding of the Supreme Court in *Verizon*.

specificity to section 251(b)(5). Nor is there anything in section 251(b)(5) that limits the FCC's authority under sections 201 and 332 to regulate the terms of LEC-CMRS interconnection, including the associated compensation for that traffic. Specifically, nothing in the undefined term "arrangements" in section 251(b)(5) unambiguously requires the FCC to permit the filing of tariffs among the permissible reciprocal compensation arrangements. *Cf. Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 709 (D.C. Cir. 2011) (petitioners "have no basis for arguing that section 628 [of the Communications Act] *unambiguously* precludes the Commission" from exercising rulemaking authority).

B. Petitioners' Argument Concerning Section 257(b)(7) Is Statutorily Barred And, In Any Event, Lacks Merit.

Section 259(b)(7) of the Act — a provision involving infrastructure sharing — requires LECs to "file with the Commission or State for public inspection, [specified] tariffs, contracts or other arrangements." 47 U.S.C. § 259(b)(7). According to petitioners, the language of section 259(b)(7) shows that Congress in section 251(b)(5) specifically intended to permit LECs to establish tariffed reciprocal compensation arrangements and thus section 20.11(d) is "plainly inconsistent" with section 251(b)(5). Pet. Brief at 10. Petitioners' argument is not properly before the Court and, in any event, is meritless.

Section 405(a) of the Act provides that the filing of a petition for agency reconsideration is "a condition precedent to judicial review" whenever a litigant "relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass." 47 U.S.C. § 405(a). *See Fones4All Corp. v. FCC*, 550 F.3d 811 (9th Cir. 2008), *reh. denied*, 561 F.3d 1031 (9th Cir. 2009). Because no party in the administrative proceedings leading to the order on review had argued that section 259(b)(7) shows that the FCC cannot prohibit LECs from establishing reciprocal compensation arrangements required by section 251(b)(5) through tariffed termination charges assessed on CMRS providers, the FCC had no opportunity to pass on that legal question. Ronan and Hot Springs did not raise the issue in a petition for reconsideration, and thus section 405(a) bars them from presenting it on judicial review. *Fones4All*, 561 F.3d at 1033 (section 405 exhaustion rule is strictly enforced). *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("[A]s a general rule . . . courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.")

In any event, petitioners' argument is unavailing. Section 259(b)(7) expressly states that the arrangements that a LEC must file with the FCC

include "tariffs," whereas section 251(b)(5) does not describe the types of arrangements that satisfy the reciprocal compensation obligation. The fact that Congress chose different — and more precise — wording in section 259(b)(7) than in section 251(b)(5) is an indication that where Congress specifically intended to include tariffs in the types of arrangements used to satisfy a statutory obligation, it expressed that intent with plainly worded language. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation and internal quotation marks omitted). Conversely, the omission of specific language in section 251(b)(5) comparable to that in section 259(b)(7) signifies that Congress chose not to specify what type of arrangements satisfy the reciprocal compensation obligation, *see T-Mobile Order*, at ¶ 4 (ER 3). Congress's failure to specify in section 251(b)(5) the particular types of reciprocal compensation "arrangements" contemplated thus left the FCC free to reasonably exercise its rulemaking authority consistent with the ambiguous statutory language.

C. Section 20.11 Leaves Intact the Section 251(f)(1) Rural Exemption.

Petitioners next challenge the lawfulness of section 20.11(d) on the ground that the rule allegedly terminates the rural exemption in section 251(f)(1) of the Communications Act, thus usurping the power of state public utility commissions to determine that section 251(f)(1) exempts a rural incumbent LEC from its duty to negotiate in good faith an interconnection agreement with a CMRS provider. Pet. Brief at 6, 9, 12. That argument is baseless.

Section 251(c)(1) generally requires an incumbent LEC, upon receiving a request from a telecommunications carrier for interconnection, services, or network elements, to negotiate an agreement with the requesting telecommunications carrier in good faith. 47 U.S.C. §§ 251(c)(1), 252(a)(1). Section 251(f), however, exempts rural incumbent LECs from the duty to negotiate with a party making a *bona fide* request unless a state commission determines that the request "is not unduly economically burdensome, is technically feasible" and generally is consistent with statutory universal service requirements. 47 U.S.C. § 251(f)(1). When a rural incumbent LEC refuses to negotiate with a party making a *bona fide* request for negotiation under section 251(c), the requesting party can submit a notice of its request to the state commission, which in turn conducts an expedited inquiry to

determine whether the statutory criteria for terminating the rural exemption are met. 47 U.S.C. § 251(f)(1)(B).

Nothing in section 20.11 of the FCC's rules colorably affects either the right of a rural incumbent LEC to invoke the section 251(f)(1) exemption to the duty to negotiate under section 251(c)(1) or the authority of a state commission to give that exemption effect. A state commission retains the power, upon receiving a request to compel a rural incumbent LEC to negotiate, to adjudicate whether the statutory criteria for terminating the rural exemption have been met. And unless it terminates the rural exemption, the state commission will apply that exemption in denying the request to compel negotiations under section 251(c)(1).

In any event, petitioners — as LECs — unquestionably have the duty to establish reciprocal compensation arrangements under section 251(b)(5). The exemption in section 251(f)(1), where applicable, exempts rural incumbent LECs only from the requirements of *section 251(c)*, not from the additional obligations set forth in *section 251(b)*, including the duty to establish reciprocal compensation arrangements. *See CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act*, 26 FCC Rcd 8259, 8267 (2011). Moreover, as shown above, the FCC adopted section 20.11(d) pursuant to,

inter alia, its authority under sections 201 and 332 to establish rules governing the intercarrier compensation for traffic between LECs and CMRS providers, which is not subject to the exemption in section 251(f)(1).

Although their argument is not clearly articulated, petitioners appear to contend that section 20.11(d), by prohibiting rural incumbent LECs from receiving compensation for terminating local CMRS traffic through tariffed termination charges assessed on CMRS providers, effectively requires those carriers to negotiate interconnection agreements with CMRS providers in order to receive compensation for terminating CMRS-LEC calls. That argument is meritless. As noted above, in the absence of an intercarrier agreement prescribing a different reciprocal compensation arrangement, section 20.11(b) provides for a bill-and-keep arrangement for local CMRS-LEC traffic. 47 C.F.R. § 20.11(b). Thus, the FCC's rules give incumbent LECs (rural or otherwise) the choice of recovering the costs of transporting and terminating local CMRS-LEC calls either by the mechanism prescribed in a negotiated intercarrier compensation agreement or from their own local exchange customers (plus universal service support payments, if necessary) through a bill-and-keep arrangement.[14]

[14] As discussed in section VI, the lawfulness of section 20.11(b) is not before the Court in this case.

D. Section 20.11(d) Is Reasonable.

Petitioners next contend that section 20.11(d) arbitrarily compels LECs to incur the costs of engaging in individualized negotiations. Pet. Brief at 11. That is incorrect. As noted above, LECs can avoid the costs of negotiating interconnection agreements with CMRS providers by using a bill-and-keep compensation methodology. *See* 47 C.F.R. § 20.11(b). Under that mechanism, LECs may recover the costs of transporting and terminating local CMRS traffic: a bill-and-keep regime merely shifts the source of that recovery from CMRS providers to the LECs' own local exchange customers (with the potential for recovery of additional government subsidies under the Universal Service Program, where necessary). *USF/ICC Transformation Order*, 26 FCC Rcd at 17909 (¶ 746).

Moreover, as the FCC explained in adopting section 20.11(d), individually negotiated intercarrier agreements "are more consistent with the pro-competitive process and policies reflected in the 1996 Act" than are unilaterally imposed tariff charges imposed upon CMRS providers. *T-Mobile Order*, ¶ 14 (ER 9). The decisions of this Court and other courts amply support that conclusion. *See, e.g., Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003) ("[T]he point of § 252 is to replace the comprehensive state and federal regulatory scheme with a more market-

driven system that is self-regulated through negotiated interconnection agreements."); *MCI Telecomms. Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 500 (3d Cir. 2001) (the 1996 Act reflects Congress's "clear preference . . . for . . . negotiated agreements"); *Quick Commc'ns, Inc. v. Michigan Bell Tel. Co.*, 515 F.3d 581, 585 (6th Cir. 2008) ("Congress's chosen mechanism for increasing competition in the local telecommunications market" was "the private and voluntary mutual negotiation of interconnection agreements.").

Petitioners further contend that the FCC's decision in the *T-Mobile Order* to prohibit tariffs for local CMRS service is inconsistent with its subsequent determination in the *USF/ICC Transformation Order*, 26 FCC Rcd at 17939 (¶ 812) to permit the continued tariffing of certain traffic that had been subject to the FCC's access charges regime during a transition period.

Section 405(a) of the Act, 47 U.S.C. § 405(a), bars petitioners from raising that argument on judicial review, because petitioners never presented it to the FCC in the proceedings below. *See Fones4All*, 550 F.3d at 817-19. The fact that the alleged inconsistency could not have occurred until six years after the *T-Mobile* Order was issued does not preclude application of section 405(a)'s exhaustion requirement. Section 405(a) contains no exception for an

argument that the FCC ignored a "'precedent[]' that d[oes] not precede," *Northampton Media Assoc. v. FCC*, 941 F.2d 1214, 1217 (D.C. Cir. 1991), and this Court has made clear that it will not read "'exceptions into [the] statutory exhaustion [requirement] where Congress has provided otherwise,'" *Fones4All*, 550 F.3d at 818 (quoting *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001)).

In any event, petitioners' argument lacks merit. The FCC in the *USF/ICC Transformation Order* "adopt[ed] bill-and-keep as the default methodology for all intercarrier compensation traffic," 26 FCC Rcd at 17904 (¶ 736), but permitted the LECs to continue to file access charge tariffs for the transport and termination of *toll* traffic during a limited transition period to "avoid [the] disruption" of "flash-cutting the whole industry to a new regime." *id.* at 17939, 18023 (¶¶ 812, 964). That transition is consistent with section 251(g), which expressly preserves the tariffed access charge regime for such toll traffic until "explicitly superseded" by the Commission. 47 U.S.C. § 251(g). The FCC fully explained in the *USF/ICC Transformation Order* the unique considerations justifying distinct treatment of that separate form of traffic, *see* 26 FCC Rcd at 17939, 18023 (¶¶ 812, 964), and these different considerations belie petitioners' claim that the agency arbitrarily

created an inconsistency between the *T-Mobile Order* challenged in this case and the subsequent *USF/ICC Transformation Order*.

III. PETITIONERS' CLAIM THAT THE FCC UNLAWFULLY GAVE INCUMBENT LECS THE RIGHT TO COMPEL NEGOTIATIONS AND ARBITRATIONS IS NOT PROPERLY BEFORE THE COURT AND LACKS MERIT.

Petitioners lack standing to argue that the FCC had no statutory authority to adopt a rule giving incumbent LECs the right to compel CMRS providers to negotiate interconnection agreements and if necessary to submit to arbitration. *See* Pet. Brief at 18. It is well established that Article III of the Constitution requires a party that seeks to invoke the court's jurisdiction to show, *inter alia*, a concrete and particularized injury-in-fact that is traceable to the challenged action. *See, e.g.*, *Horne v. Flores*, 129 S.Ct. 2579, 2592 (2009); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Barnum Timber Co. v. EPA*, 633 F.3d 894, 897 (9th Cir. 2011).[15] As the parties seeking to invoke federal jurisdiction, petitioners bear the burden of establishing each element of constitutional standing. *Lujan*, 504 U.S. at 561;

[15] Courts have held that parties challenging administrative orders (including those that were parties to the proceedings before the agency) likewise must establish their standing to invoke the jurisdiction of an Article III court. *E.g.*, *Branch v. FCC*, 824 F.2d 37, 40 (D.C. Cir. 1987); *California Ass'n of Physically Handicapped, Inc. v. FCC*, 778 F.2d 823, 825-26 (D.C. Cir. 1985).

see Schmier v. United States Court of Appeals for the Ninth Circuit, 279 F.3d 817, 821 (9th Cir. 2002).

Ronan and Hot Springs (both incumbent LECs) have not shown that section 20.11(e) — a rule that *benefits* incumbent LECs — subjects them to any injury. That new provision simply provides incumbent LECs another option of which they can take advantage if they so choose. That additional option thus caused no harm to petitioners, and they thus lack standing to raise this claim. *Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9th Cir. 2001) (party "must demonstrate standing for each form of relief he seeks.")

In any event, petitioners are wrong in contending that the FCC lacked authority to promulgate section 20.11(e). Sections 201 and 332 of the Act give the FCC authority to adopt a rule giving incumbent LECs the right to request interconnection, including associated compensation, from CMRS providers and to compel them to negotiate interconnection agreements and submit to arbitration if necessary. *See USF/ICC Transformation Order*, 26 FCC Rcd at 17947-49 (¶ 833-36). In addition, the FCC was authorized to adopt section 20.11(e) pursuant to section 4(i) of the Act, which empowers the agency, among other things, to "make such rules and regulations, and issue such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). As the Commission

explained, exercise of its authority under section 4(i) was reasonably necessary to implement the agency's express statutory duties under sections 201, 251(b)(5), and 332 of the Act. *See id.* at 17945, 17949-50 (¶¶ 826, 837-39) (citing 47 U.S.C. § 154(i)). Petitioners do not even mention sections 201, 332 or 4(i), let alone show why those grants of statutory authority do not permit the FCC to adopt section 20.11(e) of its rules.

IV. PETITIONERS' CLAIM THAT THE FCC ERRED IN NOT GIVING COMPETITIVE LECS A RIGHT TO COMPEL NEGOTIATIONS AND ARBITRATIONS IS NOT PROPERLY BEFORE THE COURT AND LACKS MERIT.

Having argued that the FCC lacked authority to adopt section 20.11(e) as to incumbent LECs, petitioners next argue that the FCC erred by not extending that (allegedly unlawful) rule to competitive LECs to entitle them to compel a CMRS provider to negotiate an interconnection agreement in good faith, and to compel arbitration if necessary. As shown below, whether viewed under the rubric of exhaustion, standing, finality, or ripeness, that challenge is not properly before the Court, and in any event it lacks merit.

A. The Court Has No Jurisdiction to Entertain Petitioners' Argument.

1. Section 405 Bars Petitioners' Claim.

Section 405(a) bars petitioners from arguing on review that the FCC erred by not giving competitive LECs a right to compel CMRS providers to negotiate interconnection agreements and submit to arbitration if necessary.

47 U.S.C. § 405(a). *See Fones4All*, 550 F.3d at 817-19. The FCC was "afforded no opportunity to pass" on the issue because no party presented it in the agency proceedings leading to the adoption of the *T-Mobile Order*. 47 U.S.C. § 405. As petitioners did not raise the issue in a petition for agency reconsideration, they failed to fulfill the statutory "condition precedent to judicial review." *Id.*

The fact that the FCC subsequently addressed the issue in the *USF/ICC Transformation Order*, 26 FCC Rcd at 17955 (¶ 845), does not render section 405(a) inapplicable. In *Great Falls Cmty. TV Cable v. FCC*, 416 F.2d 238 (9th Cir. 1969), *disapproved*, *Fones4All*, 561 F.3d 1031, this Court held that section 405 did not bar the petitioner from presenting an issue that the FCC had addressed in an order not before the Court on review. The Court found that it had "discretion to determine whether and to what extent judicial review of questions not raised before the agency should be denied." *Id.* at 239. In *Fones4All*, however, this Court explicitly disavowed the "flexible attitude toward exhaustion" articulated in *Great Falls*. 561 F.3d at 1033. Emphasizing that "section 405's exhaustion requirement is statutory," the Court explained that the *Great Falls* exhaustion analysis "represent[s] a prior era of administrative law" that "has been superseded by intervening Supreme Court authority and is no longer binding." *Fones4All*, 561 F.3d 1032-33.

2. Petitioners' Lack Article III Standing.

The Court lacks jurisdiction over petitioners' argument on the additional and independent ground that petitioners have not shown how they are injured by the fact that the *T-Mobile Order* did not afford competitive LECs the right to compel CMRS providers to negotiate and submit to compulsory arbitration. They thus lack standing to raise that issue on review. *See Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442 (2011); *Horne*, 129 S.Ct. at 2592; *Lujan*, 504 U.S. at 560. Ronan and Hot Springs are *incumbent* LECs, *see* Pet. Br. at 14 n.4, not *competitive* LECs, and thus are not among the class of carriers affected by the challenged agency inaction.

Petitioners make no claim that Hot Springs is injured because the FCC did not extend to competitive LECs the right to compel negotiations and arbitrations. In a footnote in their brief, petitioners allege that Ronan has "plans" to offer services as a competitive LEC, Pet. Br. at 14 n.4, but that claim falls short. First, to establish standing, the party seeking review must submit "affidavits or other evidence" substantiating with "specific facts" its claim of injury-in-fact. *Lujan*, 504 U.S. at 563. Ronan presented no affidavits from company officials or other evidence substantiating its plans to become a competitive LEC. Nor has Ronan described those plans except in

vague and conclusory terms. In *Core v. FCC*, 545 F.3d 1 (D.C. Cir. 2008), the court held that a LEC had failed to substantiate an alleged injury-in-fact by claiming that the FCC's action would affect services it planned to offer. The court explained that the LEC in *Core*, like Ronan in this case, did not "say anything to indicate the seriousness of its plans, which might range from a gleam in management's eye to a well-developed business plan." 545 F.3d at 2. So too here.

Second, Ronan has failed to indicate when its "plans" to become a competitive LEC will be put into effect. As the Supreme Court has stated, "'some day' intentions — without. . . any specification of *when* the some day will be — do not support a finding of the 'actual and imminent' injury." *Lujan*, 504 U.S. at 564. Ronan's inchoate plan to become a competitive LEC at some indefinite date in the future is therefore insufficient to establish its Article III standing.

3. Petitioners Do Not Challenge Final Agency Action, And Their Challenge Is Unripe.

The Court has jurisdiction only over FCC decisions that are "final." 28 U.S.C. § 2342. *See Coal. for a Healthy California v. FCC*, 87 F.3d 383 (9th Cir. 1996). *See also* 5 U.S.C. § 704 (judicial review in APA limited to "final agency action."). "The core question [in determining finality] is whether the agency has completed its decision-making process, and whether the result of

that process is one that will directly affect the parties [seeking review]." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). "Only if the [agency] has rendered its last word on the matter in question is its action 'final' and thus reviewable." *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 479 (2001) (internal citation omitted). In determining the finality of agency action, courts take a "pragmatic" approach, "focusing on whether judicial review at [this] time will disrupt the administrative process." *Bell v. New Jersey*, 461 U.S. 773, 779 (1983).

The FCC in the *T-Mobile Order* made no decision, let alone a final decision, as to whether it should give competitive LECs the same right to compel negotiations and arbitrations as CRMS providers. To be sure, the FCC in that order adopted a rule giving that right to incumbent LECs. But no party to the administrative proceedings leading to the *T-Mobile Order* specifically argued that the FCC should confer that right on competitive LECs, and the agency in that order reasonably did not attempt to resolve that matter without the benefit of a record on the issue. The FCC first addressed the issue six years later in the *USF/ICC Transformation Order* — an order not on review in this case — when it initiated a rulemaking to compile a record that would enable it to make an informed decision on the matter. 26 FCC Rcd at 17955, 18119 (¶¶ 845, 1324). The FCC has not yet issued a decision in that rulemaking.

Until the FCC actually makes a ruling, the Court should not adjudicate whether the FCC is legally required to give competitive LECs right to compel negotiations and arbitration in a manner analogous to the section 251/252 framework. "As the Supreme Court has noted, it is difficult to review an agency decision that has yet to be made." *Confederated Tribes and Bands of the Yakama Nation v. United States*, 296 Fed. Appx. 566, 569 (9th Cir. 2008) (citation omitted).[16]

B. The Commission Was Not Required to Give Competitive LECs the Right to Compel Negotiations and Arbitrations In the Rulemaking on Review.

Section 4(j) of the Act gives the FCC wide discretion to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j). *See FCC v. Schreiber*, 381 U.S. 279, 290 (1965); *Iacopi v. FCC*, 451 F.2d 1142, 1149 (9th Cir. 1971). By this statute, Congress gave the FCC "broad discretion in structuring its own proceedings." *City of Angels v. FCC*, 745 F.2d 656, 664 (D.C. Cir. 1984).

[16] For similar reasons, petitioners' challenge to the absence of a negotiation-and-arbitration procedure for competitive LECs parallel to the procedure applicable to incumbent LECs (like petitioners themselves) is unripe for judicial review. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162-63 (1967).

Given the "broad procedural authority" conferred by section 4(j), *see Schreiber*, 381 U.S. at 289, it is well established that the FCC need not deal with every aspect of a problem in "'one fell swoop.'" *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 92-93 (2d Cir. 2000) (citation omitted). Rather, the FCC has broad discretion to "proceed one step at a time," *Cincinnati Bell Tel. Co. v.* FCC, 69 F.3d 752, 767 (6th Cir. 1995), "addressing itself to the phase of the problem which seems most acute," *United States Cellular Corp. v. FCC*, 254 F.3d 78, 86 (D.C. Cir. 2001) (citation and internal quotation marks omitted).

That is exactly what the FCC did here. Because no parties had addressed in the proceedings leading to the *T-Mobile Order* the need to give competitive LECs the right to compel CMRS providers to negotiate in good faith, and if necessary to submit to binding arbitration, the FCC reasonably did not address that matter in its rulemaking order. When the matter was brought to the FCC's attention, it initiated a further rulemaking to compile a record sufficient to render an informed decision on the matter. That approach is well within the broad discretion accorded to the FCC by section 4(j) to order its own proceedings.

V. PETITIONERS' CLAIM THAT THE FCC VIOLATED THE NOTICE-AND-COMMENT REQUIREMENTS OF THE APA FAILS.

The APA generally requires an agency, before adopting a substantive rule, to publish a "notice of proposed rulemaking" that includes "either the terms or the substance of the proposed rule or a description of the subjects and issues involved," 5 U.S.C. § 553(b)(3); *see also Louis v. Dept. of Labor*, 419 F.3d 970, 974 (9th Cir. 2005), and to give interested persons an opportunity to comment, 5 U.S.C. § 553(c); *see also United States v. Valverde*, 628 F.3d 1159, 1162 (9th Cir. 2010). Petitioners are wrong in contending that the FCC failed to comply with these procedural requirements in the rulemaking below.

The FCC, in the 2001 notice of proposed rulemaking initiating the proceeding below, clearly stated its intention to re-examine all existing intercarrier compensation arrangements, including interconnection compensation arrangements between LECs and CMRS providers. *Intercarrier Compensation NPRM*, ¶¶ 78-96 (SER 048-055). *See USF/ICC Transformation Order*, 26 FCC Rcd 17954 (¶ 843); *T-Mobile Order*, ¶ 5 (ER 3-4). The FCC also specifically invited interested parties to file comments on the matters at issue in the rulemaking, including "comment[s] on the rules [the FCC] should adopt to govern LEC interconnection arrangements with

CMRS providers, whether pursuant to section 332, or other statutory authority." *Intercarrier Compensation NPRM*, ¶ 90 (SER 053).

In arguing that the FCC failed to provide adequate notice of its rulemaking, petitioners fail to even acknowledge the *Intercarrier Compensation NPRM* that initiated the rulemaking below. Instead, they predicate their argument entirely upon a public notice the FCC issued one year later on the CMRS providers' petition for declaratory ruling. Pet. Brief at 14 (citing 2002 Public Notice (SER 001)). Petitioners rely upon the wrong FCC document. The FCC did not initiate the rulemaking below by issuing a public notice of a request for adjudication. As explained above, it initiated the rulemaking in the *Intercarrier Compensation NPRM*, and petitioners do not purport to identify any procedural deficiencies as to that notice.

Moreover, petitioners — which submitted comments in the rulemaking below — do not argue that *they* lacked adequate notice. They instead contend that "the FCC did not provide adequate notice to *non*-[*incumbent LECs*] that it would be creating a rule impacting their business operations." Pet. Brief at 14 (emphasis added). Because Ronan and Hot Springs are incumbent LECs, not competitive LECs, they lack standing to challenge the adequacy of notice given to competitive LECs. *See* Section IV.A.2, *supra*. *See LaMadrid v. Hegstrom*, 830 F.2d 1524, 1530 (9th Cir. 1987) (APA notice requirement

ensures that "*the challenging part*[*ies*] had notice of the agency's contemplated action") (emphasis added). Tellingly, no competitive LEC has challenged the FCC's compliance with the APA either by seeking judicial review of the *T-Mobile Order* or by intervening in support of petitioners in this case.

In an attempt to salvage their claim that competitive LECs were not given adequate notice, petitioners assert that "[competitive LECs] did not participate, file comments, or submit replies in the proceeding." Pet. Brief at 14. That assertion is unfounded. The FCC in fact received pleadings from a number of competitive LECs in the administrative proceedings below. *See T-Mobile Order*, App. B-C & App. D (ER 14-17, 21).

Finally, like many of their other arguments, petitioners' APA argument is jurisdictionally barred by section 405 of the Act, 47 U.S.C. § 405(a), for failure to exhaust their administrative remedies. *See Fones4All*, 550 F.3d at 817-19. The APA issue was not presented to the FCC in the administrative proceedings leading to the adoption of the *T-Mobile Order*, and petitioners failed to satisfy the statutory "condition precedent to judicial review" by raising the issue in a petition for agency reconsideration. 47 U.S.C. § 405(a). *See, e.g., Globalstar v. FCC*, 564 F.3d 476, 483-85 (D.C. Cir. 2009) (section 405 bars petitioner from raising APA notice-and-comment issue); *Cassell v.*

FCC, 154 F.3d 478 (D.C. Cir. 1998) (same); *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1163-64 (D.C. Cir. 1987) (same).[17]

VI. THE COURT LACKS JURISDICTION TO CONSIDER PETITIONERS' CHALLENGE TO THE BILL-AND-KEEP REGIME.

In purporting to challenge the bill-and-keep mechanism, petitioners seek judicial review of the wrong order. *See* Pet. Brief at 19-21. The FCC did not impose a bill-and-keep mechanism for local LEC-CMRS calls — or even mention the subject of bill-and-keep compensation arrangements — in the *T-Mobile Order* before the Court. As noted above, the Commission adopted bill-and-keep as the default mechanism for local LEC-CMRS traffic more than six years later in the *USF/ICC Transformation Order*. *USF/ICC Transformation Order*, 26 FCC Rcd at 18037, 18038 (¶¶ 994, 996). Neither Ronan nor Hot Springs filed a petition for review of the *USF/ICC Transformation Order*,[18] which currently is on review in the Tenth Circuit.

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[17] Petitioners cannot circumvent section 405's jurisdictional bar by pointing to the fact that the FCC subsequently addressed the APA issue in a *different* order — the *USF/ICC Transformation Order*, 26 FCC Rcd at 17954 (¶ 843) — that is not before the Court in this case. *See* Section IV.A.1, *supra*.

[18] Petitioners could have invoked this Court's jurisdiction to review the Commission's adoption of bill-and-keep as a default methodology by filing a petition for review of the *USF/ICC Transformation Order* and moving to consolidate that petition for review (and the other petitions for review of the *USF/ICC Transformation Order*) with this case. Petitioners, however, failed to do so.

See In re FCC 11-161 (10th Cir. No. 11-9900, filed Dec. 18, 2011). Thus, the Court lacks jurisdiction to entertain petitioners' challenge to FCC's default bill-and-keep regime.

In the event the Court reaches this claim — and it should not — the Court should reject it. Petitioners contend that "'bill-and-keep' violates the language of the 1996 Act," Pet. Brief at 13, but in the very next sentence of their brief they concede that section 252(d)(2)(B)(i) expressly states that the 1996 Act is not to be construed "'to preclude' offsetting reciprocal obligations such as 'bill and keep' [arrangements]," *id.* (citing 47 U.S.C. § 252(d)(2)(B)(i)). Section 252(d)(2)(B)(i), which expressly permits bill-and-keep reciprocal compensation arrangements, is thus fatal to petitioners' claim that bill-and-keep "contradicts Congressional intent," Pet. Brief at 19.

Petitioners' contention that bill-and-keep violates the Takings Clause of the Fifth Amendment fares no better. *See* U.S. CONST. amend. V. It is "settled beyond dispute" that rate regulation is "constitutionally permissible . . . [s]o long as the rates set are not confiscatory." *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987). The FCC's adoption of bill-and-keep as a default mechanism for local CMRS calls prescribes no rates, let alone rates that are confiscatory. A bill-and-keep compensation methodology applies only if the CMRS provider and the LEC have not agreed to a different

compensation methodology. And even where it applies, the default bill-and-keep compensation system does not preclude the LEC from recovering its costs of transporting and terminating local CMRS traffic; it merely shifts the source of that recovery from the CMRS provider to the LEC's own telephone customers (with additional universal service support, where necessary). *USF/ICC Transformation Order*, 26 FCC Rcd at 17909 (¶ 746). Thus, petitioners' statutory and constitutional objections to the bill-and-keep regime have no colorable basis.

CONCLUSION

The Court should dismiss the petition for review in part for lack of jurisdiction as indicated above, and otherwise should in part deny the petition for review and affirm the *T-Mobile Order*.

Respectfully submitted,

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July 16, 2012

STATEMENT OF PENDENCY OF OTHER RELATED PROCEEDINGS OR CASES

The Order on review has not been before this Court or any other court previously. A subsequent order arising from the same administrative proceeding as the *T-Mobile Order* is before the Tenth Circuit in *In re FCC 11-1161* (10th Cir. No. 11-9900, filed Dec. 18, 2011).

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STATUTORY APPENDIX

5 U.S.C. § 553

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 5. ADMINISTRATIVE PROCEDURE
SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

§ 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.

5 U.S.C. § 554

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 5. ADMINISTRATIVE PROCEDURE
SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

§ 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 [FN1] 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

(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.

28 U.S.C. § 2342

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 158. ORDERS OF FEDERAL AGENCIES; REVIEW

§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of--

(A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101-56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and

(B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

47 U.S.C. § 151

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

§ 151. Purposes of chapter; Federal Communications Commission created

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

47 U.S.C. § 153(44)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5 -- WIRE OR RADIO COMMUNICATION
SUBCHAPTER I -- GENERAL PROVISIONS

§ 153. Definitions

* * * * * *

(44) Rural telephone company

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

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

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

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

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

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

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

* * * * * *

47 U.S.C. § 154(i) & (j)

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

§ 154. Federal Communications Commission

* * * * * *

(i) Duties and powers

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

(j) Conduct of proceedings; hearings

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

* * * * * *

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
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.

47 U.S.C. § 251

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTHER II. COMMON CARRIERS
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) Definition of incumbent local exchange carrier

(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.

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CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART II. DEVELOPMENT OF COMPETITIVE MARKETS

§ 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.

47 U.S.C. § 253

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CHAPTER 5. WIRE OR RADIO COMMUNICATION
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PART II. DEVELOPMENT OF COMPETITIVE MARKETS

§ 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 imposed 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.

47 U.S.C. § 259(b)(7)

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§ 259. Infrastructure sharing

* * * * * *

(b) Terms and conditions of regulations

The regulations prescribed by the Commission pursuant to this section shall-

(7) require that such local exchange carrier file with the Commission or State for public inspection, any tariffs, contracts, or other arrangements showing the rates, terms, and conditions under which such carrier is making available public switched network infrastructure and functions under this section.

* * * * * *

47 U.S.C. § 332

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CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER III. SPECIAL PROVISIONS RELATING TO RADIO
PART I. GENERAL PROVISIONS

§ 332. Mobile services

(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will--

(1) promote the safety of life and property;

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;

(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services.

(b) Advisory coordinating committees

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not

be subject to or affected by the provisions of part III of Title 5 or section 1342 of Title 31.

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that--

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

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection

pursuant to this chapter.

(C) The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition. As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to August 10, 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that--

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on

such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [47 U.S.C.A. § 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C.A. § 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation

Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph--

(i) the term “personal wireless services” means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term “personal wireless service facilities” means facilities for the provision of personal wireless services; and

(iii) the term “unlicensed wireless service” means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity,

then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to such services.

(d) Definitions

For purposes of this section--

(1) the term “commercial mobile service” means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term “interconnected service” means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section; and

(3) the term “private mobile service” means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

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

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

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further

proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

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

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

47 C.F.R. § 1.2

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A. GENERAL
PART 1. PRACTICE AND PROCEDURE
SUBPART A. GENERAL RULES OF PRACTICE AND PROCEDURE - GENERAL

§ 1.2 Declaratory rulings.

(a) 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.

(b) The bureau or office to which a petition for declaratory ruling has been submitted or assigned by the Commission should docket such a petition within an existing or current proceeding, depending on whether the issues raised within the petition substantially relate to an existing proceeding. The bureau or office then should seek comment on the petition via public notice. Unless otherwise specified by the bureau or office, the filing deadline for responsive pleadings to a docketed petition for declaratory ruling will be 30 days from the release date of the public notice, and the default filing deadline for any replies will be 15 days thereafter.

47 C.F.R. § 20.11(2005)

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 20. COMMERCIAL MOBILE SERVICES

(Effective: April 29, 2005 to December 28, 2011)

§ 20.11 Interconnection to facilities of local exchange carriers.

(a) A local exchange carrier must provide the type of interconnection reasonably requested by a mobile service licensee or carrier, within a reasonable time after the request, unless such interconnection is not technically feasible or economically reasonable. Complaints against carriers under section 208 of the Communications Act, 47 U.S.C. 208, alleging a violation of this section shall follow the requirements of §§ 1.711–1.734 of this chapter, 47 CFR 1.711–1.734.

<Text of subsection (b) effective until Dec. 29, 2011.>

(b) Local exchange carriers and commercial mobile radio service providers shall comply with principles of mutual compensation.

(1) A local exchange carrier shall pay reasonable compensation to a commercial mobile radio service provider in connection with terminating traffic that originates on facilities of the local exchange carrier.

(2) A commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider.

<Text of subsection (b) effective Dec. 29, 2011.>

(b) Local exchange carriers and commercial mobile radio service providers shall exchange Non–Access Telecommunications Traffic, as defined in §

51.701 of this chapter, under a bill-and-keep arrangement, as defined in § 51.713 of this chapter, unless they mutually agree otherwise.

(c) Local exchange carriers and commercial mobile radio service providers shall also comply with applicable provisions of part 51 of this chapter.

(d) Local exchange carriers may not impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers pursuant to tariffs.

(e) An incumbent local exchange carrier may request interconnection from a commercial mobile radio service provider and invoke the negotiation and arbitration procedures contained in section 252 of the Act. A commercial mobile radio service provider receiving a request for interconnection must negotiate in good faith and must, if requested, submit to arbitration by the state commission. Once a request for interconnection is made, the interim transport and termination pricing described in § 51.715 of this chapter shall apply.

47 C.F.R. § 20.11(2012)

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 20. COMMERCIAL MOBILE SERVICES

(Effective: January 11, 2012)

§ 20.11 Interconnection to facilities of local exchange carriers.

(a) A local exchange carrier must provide the type of interconnection reasonably requested by a mobile service licensee or carrier, within a reasonable time after the request, unless such interconnection is not technically feasible or economically reasonable. Complaints against carriers under section 208 of the Communications Act, 47 U.S.C. 208, alleging a violation of this section shall follow the requirements of §§ 1.711–1.734 of this chapter, 47 CFR 1.711–1.734.

(b) Local exchange carriers and commercial mobile radio service providers shall exchange Non–Access Telecommunications Traffic, as defined in § 51.701 of this chapter, under a bill-and-keep arrangement, as defined in § 51.713 of this chapter, unless they mutually agree otherwise.

(c) Local exchange carriers and commercial mobile radio service providers shall also comply with applicable provisions of part 51 of this chapter.

(d) Local exchange carriers may not impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers pursuant to tariffs.

(e) An incumbent local exchange carrier may request interconnection from a commercial mobile radio service provider and invoke the negotiation and arbitration procedures contained in section 252 of the Act. A commercial mobile radio service provider receiving a request for interconnection must negotiate in good faith and must, if requested, submit to arbitration by the state commission.

47 C.F.R. § 24.202

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 24. PERSONAL COMMUNICATIONS SERVICES
SUBPART E. BROADBAND PCS

§ 24.202 Service areas.

Broadband PCS service areas are Major Trading Areas (MTAs) and Basic Trading Areas (BTAs) as defined in this section. MTAs and BTAs are based on the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 38–39 (“BTA/MTA Map”). Rand McNally organizes the 50 states and the District of Columbia into 47 MTAs and 487 BTAs. The BTA/MTA Map is available for public inspection at the Office of Engineering and Technology's Technical Information Center, 445 12th Street, SW, Washington, DC 20554.

(a) The MTA service areas are based on the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 38–39, with the following exceptions and additions:

(1) Alaska is separated from the Seattle MTA and is licensed separately.

(2) Guam and the Northern Mariana Islands are licensed as a single MTA-like area.

(3) Puerto Rico and the United States Virgin Islands are licensed as a single MTA-like area.

(4) American Samoa is licensed as a single MTA-like area.

(b) The BTA service areas are based on the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 38–39, with

the following additions licensed separately as BTA-like areas: American Samoa; Guam; Northern Mariana Islands; Mayagüez/Aguadilla–Ponce, Puerto Rico; San Juan, Puerto Rico; and the United States Virgin Islands. The Mayagüez/Aguadilla–Ponce BTA consists of the following municipios: Adjuntas, Aguada, Aguadilla, Añasco, Arroyo, Cabo Rojo, Coamo, Guánica, Guayama, Guayanilla, Hormigueros, Isabela, Jayuya, Juana Díaz, Lajas, Las Marías, Mayagüez, Maricao, Maunabo, Moca, Patillas, Peñuelas, Ponce, Quebradillas, Rincón, Sabana Grande, Salinas, San Germán, Santa Isabel, Villalba, and Yauco. The San Juan BTA consists of all other municipios in Puerto Rico.

47 C.F.R. § 51.503

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 51. INTERCONNECTION
SUBPART F. PRICING OF ELEMENTS

§ 51.503 General pricing standard.

(a) An incumbent LEC shall offer elements to requesting telecommunications carriers at rates, terms, and conditions that are just, reasonable, and nondiscriminatory.

(b) An incumbent LEC's rates for each element it offers shall comply with the rate structure rules set forth in §§ 51.507 and 51.509, and shall be established, at the election of the state commission--

(1) Pursuant to the forward-looking economic cost-based pricing methodology set forth in §§ 51.505 and 51.511; or

(2) Consistent with the proxy ceilings and ranges set forth in § 51.513.

(c) The rates that an incumbent LEC assesses for elements shall not vary on the basis of the class of customers served by the requesting carrier, or on the type of services that the requesting carrier purchasing such elements uses them to provide.

47 C.F.R. § 51.505

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 51. INTERCONNECTION
SUBPART F. PRICING OF ELEMENTS

§ 51.505 Forward-looking economic cost.

(a) In general. The forward-looking economic cost of an element equals the sum of:

(1) The total element long-run incremental cost of the element, as described in paragraph (b); and

(2) A reasonable allocation of forward-looking common costs, as described in paragraph (c).

(b) Total element long-run incremental cost. The total element long-run incremental cost of an element is the forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent LEC's provision of other elements.

(1) Efficient network configuration. The total element long-run incremental cost of an element should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers.

(2) Forward-looking cost of capital. The forward-looking cost of capital shall be used in calculating the total element long-run incremental cost of an element.

(3) Depreciation rates. The depreciation rates used in calculating forward-looking economic costs of elements shall be economic depreciation rates.

(c) Reasonable allocation of forward-looking common costs--

(1) Forward-looking common costs. Forward-looking common costs are economic costs efficiently incurred in providing a group of elements or services (which may include all elements or services provided by the incumbent LEC) that cannot be attributed directly to individual elements or services.

(2) Reasonable allocation.

(i) The sum of a reasonable allocation of forward-looking common costs and the total element long-run incremental cost of an element shall not exceed the stand-alone costs associated with the element. In this context, stand-alone costs are the total forward-looking costs, including corporate costs, that would be incurred to produce a given element if that element were provided by an efficient firm that produced nothing but the given element.

(ii) The sum of the allocation of forward-looking common costs for all elements and services shall equal the total forward-looking common costs, exclusive of retail costs, attributable to operating the incumbent LEC's total network, so as to provide all the elements and services offered.

(d) Factors that may not be considered. The following factors shall not be considered in a calculation of the forward-looking economic cost of an element:

(1) Embedded costs. Embedded costs are the costs that the incumbent LEC incurred in the past and that are recorded in the incumbent LEC's books of accounts;

(2) Retail costs. Retail costs include the costs of marketing, billing, collection, and other costs associated with offering retail telecommunications services to subscribers who are not telecommunications carriers, described in § 51.609;

(3) Opportunity costs. Opportunity costs include the revenues that the incumbent LEC would have received for the sale of telecommunications services, in the absence of competition from telecommunications carriers that purchase elements; and

(4) Revenues to subsidize other services. Revenues to subsidize other services include revenues associated with elements or telecommunications service offerings other than the element for which a rate is being established.

(e) Cost study requirements. An incumbent LEC must prove to the state commission that the rates for each element it offers do not exceed the forward-looking economic cost per unit of providing the element, using a cost study that complies with the methodology set forth in this section and § 51.511.

(1) A state commission may set a rate outside the proxy ranges or above the proxy ceilings described in § 51.513 only if that commission has given full and fair effect to the economic cost based pricing methodology described in this section and § 51.511 in a state proceeding that meets the requirements of paragraph (e)(2) of this section.

(2) Any state proceeding conducted pursuant to this section shall provide notice and an opportunity for comment to affected parties and shall result in the creation of a written factual record that is sufficient for purposes of review. The record of any state proceeding in which a state commission considers a cost study for purposes of establishing rates under this section shall include any such cost study.

47 C.F.R. § 51.713

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 51. INTERCONNECTION
SUBPART H. RECIPROCAL COMPENSATION FOR TRANSPORT AND TERMINATION OF TELECOMMUNICATIONS TRAFFIC

§ 51.713 Bill-and-keep arrangements.

Bill-and-keep arrangements are those in which carriers exchanging telecommunications traffic do not charge each other for specific transport and/or termination functions or services.

05-71995

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Ronan Telephone Co., et al, Petitioner

v.

Federal Communications Commission and the United States of America, Respondents.

CERTIFICATE OF SERVICE

I, Laurel R. Bergold, hereby certify that on July 16, 2012, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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

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