IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NO. 11-9900

IN RE: FCC 11-161

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

UNCITED JOINT UNIVERSAL SERVICE FUND PRINCIPAL BRIEF (DEFERRED APPENDIX APPEAL)

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October 23, 2012

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GLOSSARY

1996 Act or Act	Telecommunications Act of 1996
APA	Administrative Procedure Act
ARC	Access Recovery Charge
Board	Federal-State Joint Board on Universal Service
CAF	Connect America Fund
CLEC	Competitive Local Exchange Carrier
CMRS	Commercial Mobile Radio Service
COLR	Carrier of Last Resort
Communications Act	Communications Act of 1934
ETC	Eligible Telecommunications Carrier
FCC or Commission	Federal Communications Commission
HCLS	High Cost Loop Support
HCMS	High Cost Model Support
IAS	Interstate Access Support
ICC	Intercarrier Compensation
NTCA	National Telecommunications Cooperative Association
RUS	Rural Utilities Service
SNA	Safety Net Additive
USF	Universal Service Fund

STATEMENT OF ISSUES

Section 254(c)(1) of the Act, 47 U.S.C. §254(c)(1), defines "universal service" as "an evolving level of telecommunications services" and limits universal service fund (USF) support to telecommunications services. In *Connect America Fund*, 26 F.C.C.R. 17663 (2011) ("*Order*"), the FCC concluded that broadband Internet access (bundled broadband and Internet access) is an "information service," not a common carrier telecommunications service. Did the FCC exceed its authority in requiring telecommunications carriers to provide broadband Internet access "on reasonable request" as a condition of receiving USF support?

Section 254(e) of the Act, 47 U.S.C. §254(e), specifies that "only an eligible telecommunications carrier [ETC] designated under Section 214(e) … shall be eligible to receive specific federal universal service support" and shall use it only for USF-supported services. Did the FCC exceed its authority in extending USF support to non-ETCs for provision of broadband Internet access, a non-telecommunications service?

The Commission capped, limited or eliminated rural carrier high-cost USF support, but failed to quantify whether these restrictions would enable fulfillment of the statutory universal service mandate and the new performance mandates it imposed, including the broadband mandate. Did the Commission violate the requirements of 47 U.S.C. §254(b) that USF support be sufficient to ensure that supported services and rates are affordable and reasonably comparable between urban and rural customers?

Section 214(e) of the Act, 47 U.S.C. §214(e), provides that only ETCs may receive USF support and that only states may designate ETCs and their service areas. Did the FCC's determination to distribute USF through auctions unlawfully preempt states from determining which entities should qualify for USF support?

Was the Commission's directive reducing USF support in areas with "artificially low end user rates" tantamount to federal regulation of local service rates, thereby unlawfully preempting states from regulating such rates?

In ruling that high cost support to carriers with low basic rates unnecessarily burdened the USF, did the Commission arbitrarily ignore evidence that such rates were supported by state funds or were low for other reasons?

Did the Commission unlawfully deprive rural carriers of reasonable opportunities to recover their costs when it reduced USF support?

The Commission reduced RLEC recovery of costs previously incurred and found reasonable. Did its rule have arbitrary retroactive effect?

Did the Commission arbitrarily disregard evidence that use of competitive bidding to distribute USF support would degrade, not advance, universal service?

Did the Commission act arbitrarily in denying USF support to carriers serving the highest cost areas?

Did the Commission act arbitrarily in denying RLECs USF support where unsubsidized non-ETC competitors with no universal service obligation offer service?

Section 254(c)(1) of the Act requires the FCC to consider four specific factors in establishing its definition of supported telecommunications services. Did the FCC act arbitrarily in failing to explain how its new definition addressed these factors?

Several states have developed and initiated broadband deployment plans. In determining that USF support should be used to support broadband Internet access, did the FCC arbitrarily disregard comments from states that its *Order* would impede their efforts?

Provisions in the *Order* implementing the access recovery charge ("ARC"), eliminating the price adjustment mechanism for exogenous events, establishing a dual process for ICC revenue recovery for price cap carriers and rate-of-return carriers, and giving price cap carriers an exclusive right of first refusal to certain USF support were not part of the FCC's proposed rule. Did their inclusion in the *Order* violate Section 553 of the APA, 5 U.S.C. §553, by denying parties a reasonable opportunity for notice and comment on proposed agency rules?

STANDARD OF REVIEW

Sections I and III of the brief are governed by the *Chevron* standard of review set out at pp. 39-40 of the Preliminary Joint Brief.[1] Sections II, IV-XII are governed by the arbitrary and capricious standard of review set out at pp. 41-42 of that brief.

SUMMARY OF ARGUMENT

1. A central feature of the *Order* is the condition placed on USF support recipients, that they provide broadband Internet access to consumers on reasonable request. This unlawful condition is of immense consequence both to state commissions and consumer advocates responsible for protecting consumers, preserving affordable communications services and promoting their own in-state broadband efforts and to the rural carriers subject to the condition. Coupled with other restructuring changes under the *Order* discussed in Section II below, particularly limitations on ICC and cutbacks on USF support, the added unfunded burden of satisfying the broadband condition threatens the viability of rural carriers and the vital services they provide to rural consumers.

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[1] *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.,* 467 U.S. 837 (1984). Subsequent to the filing of the Joint Preliminary Brief, the Supreme Court granted certiorari to address whether *Chevron* applies at all where the issue concerns an agency's determination of its own jurisdiction. *City of Arlington, Tex. v. FCC*, 2012 U.S. LEXIS 7807 (Oct. 5, 2012).

The *Order's* requirement that USF recipients must provide broadband Internet access services has two fundamental flaws: (1) in violation of Section 254(c)(1) of the Act it conditions receipt of USF support statutorily limited to supporting "telecommunications services" on the recipient's agreement to provide on "reasonable request" broadband Internet access, a non-telecommunications "information service" and (2) in violation of Section 254(e), it distributes USF support to entities that are not telecommunications carriers and provide no telecommunications services.

In the face of these unambiguous statutory limitations, the FCC states that, under Section 254 it has previously authorized the use of USF support to build *facilities* dually capable of providing telecommunications and broadband services. But the agency's own order merely *authorizing* the use of USF support to build dual capability *facilities* self-evidently cannot establish a *mandate* for using USF support to provide unsupported information services, much less give it power to distribute USF to entities who provide no telecommunications services.

The FCC also claims Section 706[2] authority to impose its broadband condition, but that provision, as the FCC itself previously held, grants no substantive authority; by its express terms it simply authorizes the Commission to

[2] 1996 Act, Pub. L. No. 104-104, Title VII, §706(a), 110 Stat. 56, 153 (1996).

"encourage" broadband deployment and to "remove barriers" to infrastructure development. Even assuming some ambiguity in that Section, the FCC's reversal of its earlier longstanding Section 706 interpretation reduces any deference its new interpretation might otherwise be due and its rationale in any event unreasonably interprets Section 706(b)'s general directive to reduce barriers to broadband deployment to override Section 254's explicit provisions limiting USF support to ETCs and limiting supported services to telecommunications services.

2. Carriers providing voice services in costly-to-serve areas historically received USF support through several mechanisms. The *Order* either caps, reduces or eliminates these mechanisms, while also reducing ICC revenues: (1) without quantifying whether carriers can then fulfill the statutory universal service mandate; and (2) while simultaneously requiring these carriers to fulfill a new obligation to provide broadband services, the cost of which the FCC admittedly does not know.

3. Section 254 of the Act directs that any federal USF program: (1) allow customers in high-cost areas to receive services reasonably comparable to other Americans at reasonably comparable rates, (2) ensure that carriers' USF support is "sufficient" to this task, (3) assure that carriers making investments to serve high-cost areas will receive a "predictable" level of support, and (4) meet standards of equity. The Commission never analyzed whether its USF support cuts and caps

would in fact leave rural carriers able to carry out the universal service mandate by providing "sufficient" support to ensure delivery of reasonably comparable services at reasonably comparable rates. Nor did it attempt to determine the added cost of meeting new broadband "conditions." In short, the agency simply does not and cannot know whether the reduced support under its revised USF mechanism meets its statutory obligations. Its regression rule for limiting support levels compounds the error by rendering wholly unpredictable even the reduced USF support levels available to rural carriers for their expanded obligations.

4. The *Order* utilizes auctions to distribute USF support, which may go to non-telecommunications carriers. But Section 214(e) provides that only ETCs may receive USF support and that, with narrow exceptions, only states may designate ETCs and their service areas. The *Order*, therefore, unlawfully usurps the states' delegated role to decide *who* would receive universal service support and *where* supported services should be provided.

5. The *Order's* reduction in USF support in areas with what it termed "artificially low end user rates" has the *de facto* effect of setting local rates. Since local rate setting is exclusively the province of state commissions under the Act, the *Order* unlawfully usurps state authority. The *Order's* perverse result is that to avoid depriving rural carriers of needed USF support, states must raise some local rates above levels they would have deemed reasonable. This support reduction also

arbitrarily ignores that (1) the services at issue may not be comparable (*e.g.*, the local calling area covered by the "low" basic service rate may be much smaller than that in urban areas) and (2) these rates may have been kept low by state funds, placing no burden on the federal USF fund.

6. Carriers subject to the Commission's rate jurisdiction, while not guaranteed recovery, are guaranteed a reasonable opportunity to recover their prudently incurred investments and related operating expenses. The same USF support caps, reductions and eliminations that violate Section 254 also deprive rural carriers of this right. Universal service support mechanisms are intended to ensure rural consumers can obtain services that would otherwise be far too costly if they bore "full freight." If carrier USF support used to maintain affordable rates is cut or carriers' costs are increased by an expanded broadband obligation, these carriers have, by definition, been deprived of a reasonable opportunity to recover these costs. That carriers may seek a waiver is irrelevant since waiver mechanisms cannot salvage an unlawful or arbitrary rule (even assuming the waiver provisions were reasonable, which they are not).

7. The USF support reductions also operate retroactively to deny rural carriers recovery of costs that were previously incurred under, and actually required or encouraged by, then-effective federal rules and policy. Absent clear

Congressional intent to bestow such power on the agency, however, impairment of investments made in reliance on prior regulatory policies is arbitrary.

8. Evidence below indicated that use of competitive bidding to allocate USF to rural price cap carriers would reduce service quality because carriers would only bid to meet FCC minimum standards inadequate to protect service reliability or ensure system upgradability. The agency's failure to address arguments that its auction mechanism would harm, not promote, universal service was arbitrary. Equally arbitrary was the agency's dismissal of concerns that the auction would unduly favor large carriers. Its assertion that a well-designed auction would address that problem is not subject to meaningful review since the *Order* contains no auction mechanism.

9. The FCC arbitrarily denies any high cost support in the areas with the highest cost to serve, saying that it has a limited budget and promising only the possibility of a Remote Areas Fund it has yet to design. But the agency failed to consider reasonable alternatives presented on the record, and its decision denying high cost support to the highest cost areas is inconsistent with the agency's statutory obligation and the very objective of universal service.

10. The *Order's* directive that RLEC high cost support be phased out where unsubsidized competitors serve the same area is unsupported by substantial evidence. It ignores that unsubsidized competitors can "take or leave" each

customer as they choose – they have no obligation either to continue providing voice or broadband service to existing customers or to serve new ones, much less any obligation to provide services that are reasonably comparable in quality and price to those enjoyed by urban consumers.

11. Section 254(c)(1) requires the FCC to consider four specific factors in establishing its definition of supported telecommunications services. Other than passing references to three of these, however, the *Order* arbitrarily fails to discuss how its new "voice telephony service" definition considers any of these factors.

12. The *Order* limits "incremental" USF support to areas with no current broadband services. Several states argued that this limitation would hamper their own plans for broadband deployment, which their carriers have begun to implement. The FCC's failure to address their objection was arbitrary.

13. Key provisions in the *Order* (1) implementing the ARC, (2) eliminating the price adjustment mechanism for exogenous events, (3) limiting its right of first refusal to price cap carriers and (4) establishing a dual process for revenue recovery for bill and keep for price cap carriers and rate-of-return carriers were not included in the proposed rule that preceded the *Order*. Because these aspects of the *Order* were not the "logical outgrowth" of the proposed rule, petitioners were deprived of the reasonable notice and opportunity to comment required by Section 553 of Administrative Procedure Act.

ARGUMENT

I. THE COMMISSION'S BROADBAND CONDITION EXCEEDED ITS SECTION 254 AUTHORITY.

A central feature of the *Order* is the condition placed on USF support recipients, that they provide broadband Internet access to consumers on reasonable request. The Commission's continued classification of broadband Internet access service as an "information service"[3] is fatal to this broadband condition in two respects. First, the Act expressly provides that USF support is to go exclusively to telecommunications carriers for the purpose of providing "telecommunications services."[4] But the *Order* unlawfully gives USF support to entities that are not telecommunications carriers to provide non-telecommunications services. Second, the statute also expressly dictates that supported services are limited to an "evolving level of *telecommunications services.*" But the *Order* unlawfully

[3] The Commission construes Internet access to be an "information service" under the Act. When Internet access is combined with a broadband telecommunications capability, the Commission treats the entire bundled service as an "information service" exempt from the common carrier obligations associated with "telecommunications service." *Time Warner Telecomm., Inc. v. FCC*, 507 F.3d 205, 214 (3d Cir. 2007). The distinctions between these services are discussed *infra*.

[4] "Telecommunications service" is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C.§153(53). "Information service" is defined, in relevant part, as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C.§153(24).

mandates that carriers provide non-supported information services to receive USF support. These points are discussed in more detail below.

A. Section 254 Unambiguously Bars The Commission From Conditioning USF Support On Recipients' Agreement To Provide Broadband Internet Access Services.

The range of services eligible for universal service support under the Act is neither fixed nor infinite. Section 254(c)(1) explicitly defines "universal service" as "an evolving level of *telecommunications services*" the Commission is to establish, "taking into account advances in telecommunications and information technologies and services." It requires that in deciding which telecommunications services should receive Federal universal service support, the FCC "shall consider the extent to which *such telecommunications services*" advance several statutory goals related to (a) protecting "education, public health or public safety," (b) whether the services are widely sought by residential customers, (c) whether the services are being deployed on "public telecommunications networks" and (d) are consistent with the public interest." Section 254(c)(1)(A-D). (Emphasis added). Critical here, and not in dispute, "telecommunications services" are common carrier services under Title II of the Act, distinct from "information services" defined in 47 U.S.C. §153(24), and the agency has declined to classify services such as Voice over Internet Protocol ("VoIP"), as telecommunications services.

Order, ¶63, ¶954.[5] The FCC further concedes that its "determinations that broadband services may be offered as information services have had the effect of removing such services from the scope of the explicit reference to 'universal service' in Section 254(c)." *Id*., ¶71.

Although the FCC acknowledges both that Section 254(c) gives it "express authority to support telecommunications services we have designated as eligible for support," *Order*, ¶62, and that it has declined to "add broadband to the list of supported services," *id.*, ¶65, it finds that consumers are increasingly obtaining voice services, not by using supported telecommunications services, but through services like VoIP. *Id*., ¶63. "[I]n this context," the FCC concludes, its "authority to promote universal service … does not depend on whether VoIP services are telecommunications services or information services." *Id*.[6] And, based on this conclusion, it lumps supported telecommunications services with VoIP to create a new "voice telephony service" classification (*id*., ¶62) and orders USF recipients to

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[5] What the FCC calls "interconnected VoIP services" allows real-time voice calls utilizing "packet-switched" broadband networks interconnected to traditional public switched telephone networks. *Id*., ¶63.

[6] Tellingly, the Commission earlier recognized that "[i]f [it] were to classify interconnected VoIP as a telecommunications service, this would enable the Commission to support networks used to provide interconnected VoIP including broadband networks." *Connect America Fund*, 26 F.C.C.R. 4554, ¶73 (2011) ("*NPRM*").

provide bundled broadband Internet access, an information service, “on reasonable request” as a condition of continued USF support. *Id*., ¶¶26, 1090.

The short answer to the agency’s position is that Section 254(c)(1)’s limits are unambiguous and deny the FCC the authority it claims. Having declined to define broadband Internet access or VoIP as telecommunications services,[7] the Commission is not then empowered to include them on the list of supported services simply because advancing the availability of broadband is a desirable goal. “Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law.’” *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 125 (2000) (rejecting argument that

[7] The Commission’s constraint is largely of its own making. Its determination that bundled broadband internet access is an “information service,” not a “telecommunications service” was upheld as a permissible *choice* under *Chevron*. *See Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs., Inc.*, 545 U.S. 967 (2005); *Time Warner Telecomm., Inc. v. FCC, supra*. Indeed, *Time Warner* upheld the agency's reversal of its prior interpretation that would have treated the telecommunications component of broadband internet access as a telecommunications service. Commission adherence to that interpretation not only undermines its broadband condition, but classifying bundled broadband Internet access and VoIP as federal “information services” may preempt state treatment of the bundled transmission component as an intrastate telecommunications service for purposes of state universal service funds.

the well-recognized health dangers of tobacco could give the FDA power to regulate it as a drug).

Any doubt on this score is dispelled by subsection (3) of Section 254(c). Assuming *Chevron* applies (*see* fn.1, *supra*), in applying *Chevron* to ascertain whether a statute is ambiguous (and thus whether the agency's interpretation is entitled to deference), courts first employ the traditional tools of judicial interpretation. *See General Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004). Section 254(c)(3) states that "[i]n *addition* to the services included in the definition of universal service under paragraph (1)," the FCC "may designate additional services for support mechanisms for schools, libraries and health care providers" to carry out the purposes of subsection (h) (related to service to schools, libraries and hospitals). 47 U.S.C. § 254(c)(3) (emphasis added). Interpreting the term "additional services," as the FCC has, to mean services in addition to telecommunications services,[8] leads, inescapably, to the conclusion that Section 254(c)(3) creates a limited "schools, libraries and hospitals" exception to the requirement that USF be used only to support "telecommunications services." Under the doctrine of *expressio unius est exclusio alterius* ("the express mention of one thing excludes all others"), the inclusion of this authorization in Section

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[8] *See, e.g., Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 440-41 (5th Cir. 1999).

254(c)(3) to support non-telecommunications services in specified circumstances precludes an interpretation authorizing the FCC to compel use of USF support to provide broadband Internet access, a non-telecommunication service, in others.

Finally, the Act's "aspirational language" in Section 254(b)(2)[9] that "access to advanced telecommunications and information services should be provided in all regions of the Nation," is a principle governing the FCC's exercise of powers granted to it elsewhere in the statute, not "a grant of plenary power overriding other portions of the Act."[10] It cannot reasonably be construed to grant the Commission substantive authority to condition the use of USF support on the recipient's agreement to offer broadband Internet access. Again employing traditional judicial tools of statutory interpretation, the specific governs the general. *Bloate v. United States*, 130 S.Ct. 1345, 1354 (2010). In this case the explicit limitation in Section 254(c) on using USF support solely to support telecommunications services overrides any general goal of promoting wider access to information services contained in Section 254(b).

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[9] *Texas Office of Pub. Util. Counsel*, *supra*, 183 F.3d at 424.

[10] *Id*. at 422.

B. Section 254 Expressly Bars The Commission From Providing USF Support To Entities That Do Not Provide Telecommunications Services.

A "telecommunications carrier" is defined under the Act as "any provider of telecommunications services." 47 U.S.C. §153(51). Section 214(e)(1), in turn, specifically limits USF support to those telecommunications carriers designated as "eligible telecommunications carrier[s]" (ETCs) by state commissions under Section 214. Section 254(e), 47 U.S.C. § 254(e), contains a similar specific limitation; it provides that only "eligible telecommunications carriers," *i.e,* those telecommunications carriers designated under Section 214, "shall be eligible to receive specific Federal universal service support." To ensure that USF support is limited to telecommunications carriers providing telecommunications service, Section 254(e) continues, "[a] carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." These limitations are explicit and unambiguous.

The Commission's broadband condition is unlawful because it does not limit support to telecommunications carriers or require that USF be used for telecommunications services. Instead, it provides USF support for "voice telephony service," *Order*, ¶¶76-77, which it called "a technically neutral approach, allowing companies to provision voice service over any platform, including the PSTN and IP networks," and amends 47 C.F.R. §54.101 "to specify that the functionalities of eligible voice telephony services include voice grade access to the public switched network *or its functional equivalent[.]*" *Order*, ¶78 (emphasis added).

While recipients must provide "voice telephony service," *id.*, ¶62, they are not required to provide *telecommunications* service subject to common carrier regulation under Title II of the Communications Act. Instead, a recipient may provide voice telephony service as VoIP, which the FCC has declined to classify as a telecommunications service, although, under § 153(51), an ETC remains a telecommunications carrier "only to the extent that it is engaged in providing telecommunications services."

Because Congress made plain in Sections 214(e)(1) and 254(e) that only carriers providing telecommunications services are eligible for USF support and because the *Order* authorizes non-telecommunications carriers to use USF support for unregulated information services, the *Order* violates the statute. And because the Act makes these limitations plain, the FCC's contrary interpretation is not entitled to deference under *Chevron*. *Via Christi Med. Ctr. v. Leavitt*, 509 F.3d 1259, 1271 (10th Cir. 2007).

C. There Is No Statutory Ambiguity Entitling The Commission's New Interpretations Of Its Authority To *Chevron* Deference.

The FCC claimed it had statutory authority to impose its broadband condition, notwithstanding the provisions discussed in the previous sections, because of supposed ambiguities in the Act, which it interpreted to authorize it to direct USF support to non-telecommunications services and to compel recipients to provide non-telecommunications services.

This Court should approach the FCC's newfound claims that it has such authority with some skepticism. The FCC's USF restructuring efforts foundered for over a decade,[11] with no suggestion during that time that it could impose broadband conditions. It was not until issuance of the *National Broadband Plan* in 2010 that the FCC staff first proposed using "comprehensive reform" of USF to promote broadband deployment. 2010 WL 972375, at *117. That Plan was issued in response to provisions of the American Recovery and Reinvestment Act of 2009 ("ARRA"), *see* Prelim. Brief at 21, but ARRA itself gives the FCC no power to use USF support for broadband deployment. Tellingly, even after the *Broadband Plan*'s release, the FCC's Chairman acknowledged before Congress that *Comcast Corp. v. FCC*, 600 F.3d 642, 644-47, 651-61 (D.C. Cir. 2010), cast "serious doubt"

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[11] *See, e.g.*, *Qwest Commc'ns Int'l v FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001) ("*Qwest I*");*Qwest Commc'ns Int'l v FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005) ("*Qwest II*").

on the FCC's ability to implement the staff's *Broadband Plan* recommendations. *Reviewing the National Broadband Plan: Hearing before the Senate Comm. on Commerce, Science, and Transportation*, 111th Cong. 44, 49, 50, 69, 73, 95 (2010).

The FCC seeks to spin ambiguity out of references to "facilities" in Section 254(e) and to "removing barriers to infrastructure development" in Section 706(b) that would give it *Chevron* cover to impose the broadband mandate. The FCC, however, seeks to rely not on Section 254(e), but on its own, unreviewed prior decisions authorizing use of USF for building facilities dually capable of providing telecommunications and broadband services, as a bootstrap to support a broadband service mandate. And its new Section 706 interpretation not only departs from its long-held opposite view, but flies in the face of unambiguous statutory text.

1. The Commission cannot bootstrap its prior order authorizing carriers to use USF to build dual use facilities capable of supporting broadband as justification to mandate that USF recipients offer broadband information services.

The linchpin of the FCC's argument that Section 254 supports its broadband Internet access condition is that the statute allows it to support not only "voice telephony service" but also "the *facilities* over which it is offered." *Order*, ¶64 (emphasis added).[12] Specifically, the FCC relies on Section 254(c), which states that "[a] carrier that receives such [universal service] support shall use that support only for the provision, maintenance, and upgrading of *facilities* and services for which the support is intended." 47 U.S.C. §254(c) (emphasis added). Reading the statute's use of the terms "facilities" and "services" as distinct items for which federal USF may be used, it concludes that Congress granted it flexibility not only to designate the types of telecommunications services for which support would be provided, but also to encourage the deployment of the types of facilities to best achieve the universal service principles it adopted. *Id*.

In support of this new interpretation, the FCC engages in pure bootstrapping, citing its own prior order holding that USF recipients can use their funding to deploy facilities dually "capable of providing access to advanced services' as well as supported voice services." *Order*, ¶64 (citing *Federal-State Joint Board on Universal Service*, 16 F.C.C. R. 11244, 11322, ¶200 (2001)). From the conclusion that carriers *may* use USF support for dual capability facilities, the agency leaps to the conclusion that it can "*require* carriers receiving federal universal service

[12] To this end, the FCC adopted a new rule restating the Section 254(e) restriction that support be used "only for … facilities and services for which the support is intended," but added that support can be used for "investments in plant that can…provide access to advanced telecommunications and information services. *Id*. Appendix A (Section 54.77).

support to invest in modern broadband-capable networks" *Order,* ¶65 (emphasis added), apparently independent of whether the recipients have to use these facilities to offer supported telecommunications services. The *Order* cannot plausibly carry the statutory weight the FCC asks it to bear.

It is one thing to suggest, as the FCC has previously, that recipients can use USF support to build facilities dually capable of delivering broadband Internet access and supported telecommunications services. The statute, after all, defines "telecommunications services" in terms of functions performed, not the technology used to perform them, so the FCC may permit a *telecommunications carrier* to use USF support to install and operate broadband facilities that it uses to provide services properly classified as *telecommunications services* under Title II. It is quite another thing, however, and preposterous at that, to suggest that the recipient either need not use USF for telecommunications services at all or can be forced to use USF to provide non-telecommunications services.

The FCC's strained interpretation of Section 254(c) ignores that "facilities and services" is modified by the clause "for which the support is intended." USF support is expressly intended for an "evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services." Tellingly, the Commission itself notes that it defines "facilities" as "any physical components of the telecommunications network that are used in the transmission or routing of *services that are designated for support*." *Order*, ¶64 *n*.69 (emphasis added). Yet the FCC has classified broadband Internet access service as an information service, which does not fall within the class of "services that are designated for support."

To the extent the Commission seeks refuge in the notion that it is only allowing use of USF for broadband-capable *facilities*, but is not ordering recipients to provide unsupported services, the *Order* cannot plausibly support that claim. The *Order* goes far beyond designating the facilities for which the support is intended. It requires USF recipients to offer broadband Internet access "on reasonable request," *Order,* ¶¶26, 1090, essentially forcing them to offer an information service as a common carrier service, even though the agency has asserted, successfully, that bundled broadband Internet access is an information service, so entities providing it do not have to offer it to all comers. *Time Warner Telecomm., Inc., supra*, 507 F.3d at 213-15; *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).[13] This is a classic example of an agency attempting improperly to do indirectly (through its broadband condition)

[13] The common carrier-like obligations imposed on USF recipients go beyond offering broadband Internet service on reasonable request; they are also required to offer the service at reasonably comparable rates and to meet performance standards. *Order*, ¶86.

what it cannot do directly. *New England Legal Found. v. Mass. Port Auth*., 883 F. 2d 157, 174 (1st Cir. 1989).

The FCC's legal authority under Section 254 is limited to supporting telecommunications services. In funding facilities used to provide supported services, the Commission may well thereby promote the deployment of broadband capabilities used in providing telecommunications services. But only a rewrite by Congress could allow the FCC to divert the federal USF from promoting the universal availability of telecommunications services to supporting a non-common carrier information service that is not even included within the definition of universal service.

2. As the FCC itself previously held, Section 706 is not an independent grant of agency authority to impose a broadband condition.

Two years after passage of the Act, in what the D.C. Circuit recently found was a "still-binding order," the Commission "ruled that Section 706 'does not constitute an independent grant of authority.'" *Comcast Corp. v. FCC*, *supra*, 600 F.3d at 658 (quoting *In re Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 F.C.C.R. 24,012, 24,047, ¶77 (1998)) ("*Wireline Deployment Order*"). The *Order* finds just the opposite, declaring, over Commissioner McDowell's dissent, that Section 706 *is* "independent authority

…to fund the deployment of broadband networks." *Order*, ¶66.[14] Conceding that Section 706(a) (which imposes only a general duty on the FCC to "encourage," not mandate, broadband development) gives it no such authority, *Order*, ¶70, the FCC claims to find shelter in Section 706(b).

"[W]e read Section 706(b)," it stated, "as conferring on the Commission the additional authority, beyond what the Commission possesses under Section 706(a) or elsewhere in the Act." *Id.* Subsection (b), it added, would be redundant "if it is not an independent source of statutory authority." *Id.*

Subsection (b), however, is not redundant at all, a conclusion that follows directly from the language of the Act. The *Order* properly recognized that subsection (a) "imposes a general duty," *id*., without mandating any specific action. Subsection (b) mandates "immediate action" if the FCC reaches a negative determination on "whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." Subsection (b)

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[14] The Commission's reversal of position was presaged by a more limited ruling in December, 2010 in which it first announced reversal of its long-held view. *In Preserving the Open Internet Broadband Industry Practices*, GN Docket No. 09-191 (rel. Dec. 23, 2010), *review pending sub nom Verizon v. FCC*, No.11-1355 (filed D.C. Cir. Sept. 30, 2011), it declared that, while bounded by the canon of construction that the specific governs the general, Section 706 did give it a specific, albeit "not unfettered" affirmative grant of authority to "encourage the deployment of advanced services" under subsection (a) (*id*., ¶¶118-21) and a similar affirmative grant under subsection (b) to take actions to accelerate broadband deployment by removing barriers to its development. *Id.,* ¶123.

describes that action as "removing barriers to infrastructure investment and … promoting competition in the telecommunications market."

This language tells the FCC to put the powers it has to "immediate action" but does not purport to grant any new powers. There are many "barriers to infrastructure investment," including those imposed by securities and banking regulators, but subsection (b) confers no power to remove them. Likewise, there are many ways of "promoting competition in the telecommunications market," but subsection (b) on its face adds nothing to the powers conferred elsewhere in the Act. Subsection (b) actually specifies the ways that the FCC is to consider to promote broadband deployment, *i.e.*, "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." All of the means expressly provided were within the agency's powers when the section was enacted in 1996. There is no mention of expanding the USF to include support for broadband information services.

One further point underscores the fallacy in the Commission's interpretation. Section 706 was part of the public law that became the 1996 Act,[15] but it was not codified until 2008 as 47 U.S.C. §1302 under the Broadband Data Improvement

[15] 1996 Act, Pub. L. No. 104-104, Title VII, §706(a), 110 Stat. 56, 153 (1996).

Act ("BDIA").[16]. This history does not make Section 706 fall outside the 1996Act, but even treating Section 706 as a subsequent and different enactment gets the agency nowhere.

Section 254 expressly limits the availability of USF support to telecommunications carriers and defines "telecommunications services" as the only services eligible for support. To construe Section 706(b) as overriding the Section 254 limitations violates two canons of construction. First, it ignores the canon that "[a] specific provision [*i.e*, the limitations in Section 254(c) and (e)] … controls one[] of more general application [*i.e*, Section 706(b)]." *Bloate, supra,* 130 S.Ct. at 1354. To construe Section 706(b) as overriding Section 254 limitations is also to imply a partial repeal of the latter. Again, however, employing the traditional tools of judicial construction to ascertain congressional intent to detect ambiguity, *General Dynamics Land Sys.*, 540 U.S. at 600, there is none. "The courts [and agencies] are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). There is no such conflict here, as the agency is free to continue to take actions to remove barriers to

[16] Pub. L. No. 110-385, 122 Stat. 4096 (2008).

deployment of broadband facilities without commandeering USF support for that purpose.

Even if Section 706 were ambiguous, the same rules of construction that make the statutory limitations of Section 706 clear also make the Commission's contrary interpretation unreasonable under the second prong of *Chevron*. In other words, the Commission has given no reason why, having disregarded the ordinary tools of statutory construction, its revised interpretation should be found reasonable.

Finally, the Commission suggests that the 2008 Farm Bill and the 2008 BDIA, which bestow no substantive powers on the agency[17] and which, by the FCC's own account simply "reaffirmed [Congress's] strong interest in ubiquitous deployment of "broadband communications networks," somehow provided additional and independent authority for its new rules. *Order*, ¶60. The short answer to this argument is that an agency derives no authority to act simply because it believes its action in the public interest. *Brown & Williamson, supra*, 529 U.S. at 161.

[17] The Senate Report's Section-by-Section Analysis of Section 6(k) of the BDIA, for example, states that it "does not grant public or private entities established or affected by this Act any regulatory jurisdiction or oversight authority over providers of broadband services or information technology." S. Rep. 110-204 at 1717.

II. THE COMMISSION'S USF CUTBACKS ARBITRARILY DISREGARDED MANDATORY CRITERIA.

A central feature of the *Order* is the requirement that rural telecommunications providers long dependent on universal service funds to provide basic voice services at affordable prices in high-cost areas now must also offer broadband Internet access to all comers "on reasonable request" or lose their access to those critical funds. *Order* , ¶¶26, 208, 589. Not only is the condition unlawful (as shown in Section I.A, *supra*), but the FCC's "reforms" impose this additional mandate in the face of a *net reduction* to USF and related intercarrier compensation revenues for rural carriers. This "do more with less" directive flies in the face of Congress's interrelated requirements under Section 254(b) that the FCC use USF to keep quality service "affordable," that consumers in high cost areas receive services comparable to those available to their urban counterparts at "reasonably comparable" rates, that USF support mechanisms be "predictable and sufficient" to preserve and advance universal service, and that telecommunications service providers contribute equitably to achieve that objective. 47 U.S.C. §§254(b)(1),(3),(5). As this Court has held, and as the FCC has effectively acknowledged, the inherent difficulty of carrying out these mandates does not relieve the agency of the obligation to try; it must "take[ ] into account the full range of principles." *Qwest II, supra,* 398 F.3d at 1234. "[T]he FCC may exercise its discretion to balance the [universal service] principles against one another when they conflict, but may not depart from them altogether to achieve some other goal." *Qwest I, supra,* 258 F.3d at 1200.

The *Order,* however, variously caps, reduces or eliminates high cost support previously afforded rural carriers in ways discussed in the preliminary brief (pp. 26-31), and reduces their ICC revenues, without ever quantifying the substantial added cost of satisfying the broadband condition. Whether it is the fixed budget for support tied to historic levels or the various reductions to specific forms of high cost support – HCL, LSS, ICLS, or SNA – the FCC's imposition of all of these adjustments suffers from the same infirmity. The agency made no attempt to measure whether reduced support, coupled with the added costs of the broadband obligation, will allow carriers to meet the universal service objectives of Section 254(b). *Qwest II,* 398 F.3d at 1237.

A. The *Order* Does Not Ensure USF Support Sufficient To Preserve And Advance Universal Service.

At the heart of Section 254(b) is the requirement that USF provide "sufficient" support to achieve Congress's goals. Congress considered this important enough to include "sufficient" support as a "direct statutory command" in Section 254(e). *Texas Office of Pub. Util. Counsel, supra,* 183 F.3d at 412. The FCC failed to heed this command. Its attempted justification of its fixed budget simply ignored whether the resulting support would be sufficient to meet the statutory goals; instead, it explained that the cap served to "address long-standing inefficiencies and wasteful spending." *Order*, ¶125. It similarly reasoned that other "limits on recovery," such as HCLS, would provide "incentives for carriers to invest prudently and operate efficiently." *Id*., ¶219. These reforms, it stated, would "eliminat[e] inefficiencies and clos[e] gaps in our system, not [make] indiscriminate industry-wide reductions." *Id*., ¶287. The flaws in this explanation are multifold.

The overarching problem is that the Commission improperly limited its analysis to whether, without reform, USF support would be *excessive*. *Id.*, ¶194 *n*.315 (emphasis added). Certainly, consideration of sufficiency "*includes* the decision … to avoid excessive expenditures[.]" *Alenco Commc'ns, Inc. v FCC*, 201 F.3d 608, 620 (5th Cir. 2000) (emphasis supplied). But Section 254's sufficiency test must also consider whether *too little* support is being provided. The Act, in other words, intended "a reasonable balance between the Commission's mandate to ensure sufficient support for universal service and the need to combat wasteful spending." *Id*. The FCC, irrationally, only considered one side of this equation.

The *Order* leaves unanalyzed whether reduced USF support will be sufficient to preserve and enhance traditional voice services. It claims support reductions will "root[] out inefficiencies[,]" *Order*, ¶289, but has shown no correlation, much less a direct relationship, between its *Order* and the alleged inefficiencies it seeks to root out. Instead, even if some carriers were inefficient, the cuts fall indiscriminately on most high-cost carriers, untethered to evidence that any particular company's support level was actually due to inefficiency rather than the intrinsically high cost of serving particular areas.

Compounding this error, the FCC disregards the substantial additional costs of complying with the new obligation that, to receive USF support, rural carriers must provide minimum broadband capability of 4 Mbps download and 1 Mbps upload speeds (*i.e*. "4/1"). *See, e.g., id.,* ¶206. Yet NTCA estimates that in 2010 more than 75% of its rural carrier members provided Internet access service at speeds of only 1.5 to 3.0 Mbps down. *NPRM*, ¶170. Since these services mostly utilize DSL technology, which cannot reach the mandated speeds over longer rural loops, NTCA members must make significant new investments to satisfy the broadband condition. Even assuming *arguendo* that USF cutbacks were justified by inefficiencies in delivering *voice* services, the *Order* makes no effort to quantify whether the resulting USF support can cover the "efficient" cost of providing voice service *plus* the added cost of satisfying the broadband mandate. That failure of analysis alone is fatal. *Qwest II*, 398 F.3d at 1235.

The FCC's further justifications that only 10 %of support recipients will see their support drop by more than 20%, *id.,* ¶290, and that adversely affected carriers can seek waiver, *Order*, ¶293, do nothing to demonstrate that those recipients will receive "sufficient" support in the future. The Act "does not say 'a little unlawfulness is permitted,'" *FPC v. Texaco, Inc.*, 417 U.S. 380, 399 (1974), nor can a waiver justify an otherwise unreasonable rule. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50-51 (D.C. Cir. 1977).

Finally, even where the agency recognized that the overhead expense component of its HCLS cost formula was outdated, did not reflect the "ongoing evolution of the voice network into a broadband network[,]" and should be revised to reflect more recent cost data, *Order,* ¶230, it incongruously used only voice services cost data to update this formula. Its conclusion thus reflected an arbitrary disconnect between the facts found and the choice made by the agency. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

In short, the FCC has failed even to address, much less quantify or explain, how its decision would provide support needed both to preserve and advance universal service.

B. The *Order* Does Not Ensure Service And Rate Comparability Between Rural And Urban Areas.

The Commission acknowledges it has not investigated what broadband service or rate levels are offered in either rural *or* urban areas. *Order*, ¶113. This information gap is a critical flaw; the Commission cannot possibly confirm that its policies enable rural carriers to provide broadband service "at rates reasonably comparable to rates charged for similar services in urban areas," Section 254(b)(3), if it has failed to determine the urban rate and service levels to which rural rates and service are to be compared.

This is more than an academic concern. As previously noted, rural carriers will have to make significant new investments to satisfy the broadband condition. But, because they do not know – nor does the FCC – at what speeds or rates their urban counterparts offer broadband, the FCC, by definition, cannot know what level of USF support is needed to give Section 254(b)(3) effect. *Qwest II*, 398 F.3d at 1237.

C. The *Order's* Establishment Of A Budget Cap Without Widening The Contribution Base Neither Protects Affordability Nor Ensures Equitable Fund Contributions.

The FCC maintains that capping the USF budget promotes "affordability" under Section 254(b)(1) by "ensur[ing] that individual consumers will not pay more in contributions due to the reforms we adopt today." *Order*, ¶124. Without widening the contribution base, however, a budget cap will do nothing to ensure affordability. It is a truism, but utterly irrelevant, that consumers, in total, "will not pay more in contributions" with a fixed budget cap. The problem is that telecommunications voice revenues are declining. *USF Contribution Further Notice of Proposed Rulemaking*, WC Docket No. 06-122, 27 F.C.C. R. 5357, ¶20 (2012)("Contribution FNPRM"). Even a fixed budget will have to be recovered from fewer customers, whose individual charges will *go up* (become *less* affordable), unless the contribution base is widened. In rejecting or deferring proposals to do that, the FCC not only failed in its responsibility to adopt a universal service mechanism that would preserve affordability, but ignored its responsibilities under Section 254(b)(4) as well.

Section 254(b)(4) demands that telecommunications providers contribute *equitably* to universal service support. Assuming *arguendo* that the Commission has authority to mandate that universal service funds be used to support broadband,[18] it is inequitable to exempt telecommunications providers who also offer broadband from being required to contribute to universal service from the revenues they receive for such services, particularly since rural carriers assuming a broadband obligation will incur added costs. Limiting the contribution base in the face of added broadband costs would harm, not promote affordability.

It is no answer to this concern, moreover, that the Commission promised to decide at some unspecified future date in another proceeding whether to expand its contribution base.[19] Its "we'll deal with it later" approach ignores comments that this issue *could not* logically be dealt with later. Imposing broadband obligations on ETCs while delaying consideration of additional contribution sources to fund

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[18] As discussed in Section I, *supra*, the Commission lacks that authority.

[19] *See* Contribution FNPRM.

the added costs of that obligation (and to keep contribution levels of individual customers affordable), as the Montana Public Service Commission put it, was "incomprehensible." (Montana PSC Reply Comments, WC Docket No. 10-*90 et al.,* at 6 (filed May 23, 2011). *See also* Comments of RICA, WC Docket No. 10-90, *et al*., 7-8 (filed Apr. 18, 2001), and Google, WC Docket No. 10-90, *et al*., at 27 (filed Aug. 24, 2011). "While there may well be circumstances where a particular objection is more properly deferred to a later proceeding, that is assuredly not the case where the objection goes to the heart of the public interest determination immediately to be made." *Maryland Peoples' Counsel v. FERC*, 761 F.2d 768, 778 (D.C. Cir. 1985) (internal citation omitted).

D. The Agency's "Regression Rule" Is Vague And Unbounded, And Thus Violates Section 254's predictability criterion.

The Section 254(b)(5) mandate that universal service support be "predictable" is intended to promote investment in networks that provide services supported by universal service policies, *Order*, ¶858, ensuring that consumers have access to affordable supported services. The mandate, as this Court has held, is one the agency is not free to ignore. *Qwest I, supra,* 258 F.3d at 1199-1200. The *Order's* regression rule, however, contravenes this mandate in three respects: (1) it delegates authority to devise a rule limiting USF support to its Wireline Competition Bureau ("WCB") in violation of its own rules and then compounds the uncertainty thereby created by (2) leaving the WCB unbounded discretion to

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devise the rule and subsequently (3) to revise it without abiding by APA notice and comment procedures.

"Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures." *Colorado Springs. v. Solis,* 589 F.3d 1121, 1132 (10th Cir. 2009). In this case, however, the Commission has delegated to the WCB the authority to finalize the methodology for setting USF reimbursements. Since WCB's actions will have general applicability and future effect they amount to a rulemaking, 5 U.S.C. §551(4). The delegation, therefore, is in violation of 47 C.F.R. §0.291(2)(e), which expressly prohibits rulemaking by the WCB.

The FCC does not even acknowledge the impropriety of its delegation and the resulting dubious validity of the WCB process creates substantial uncertainty about the applicability of any future regression rule it may produce.

This predictability problem is compounded by the nature of the delegation itself. The formula for determining the interstate expense adjustment is spelled out in detail, 47 C.F.R. §36.631, but the new rule states, in its entirety, that "[s]tudy area unseparated loop cost may be limited annually pursuant to a schedule announced by the Wireline Competition Bureau." 47 C.F.R. §36.621(a)(5).[20] The WCB is given no substantive limitation on how it is to adjust support amounts, what procedures to use, or how companies are expected to know what the limitations will be before they are adopted and implemented. It is instructed to develop mathematical formulas for maximum allowable costs using coefficients that will be recalculated frequently, resulting in unpredictable changes in the results of the computations. Under this vague rule, a carrier simply cannot know from year to year which investment or expenses will be supported and which will not. As a consequence, a carrier is at a loss as to how to make business plans for the future.[21] The Commission's response to this objection is that USF caps imposed under the prior rules likewise created some uncertainty. *Order*, ¶220. Putting aside the far greater uncertainty the new rule poses, this amounts to the defense that "two wrongs make a right."

Finally, the *Order* exacerbates unpredictability by allowing WCB to modify its regression methodology annually (47 C.F.R. §36.621(a)(5)) – effectively to

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20 The WCB published its first annual exclusions pursuant to the "regression rule" in *Connect America Fund*, WC Docket No. 10-90, DA 12-646 (WCB, rel. Apr. 25, 2012) ("*Benchmark Order*"), *application for rev. pending*.

21 Petitioners recognize WCB's implementation methods are under FCC review. What is at issue here is the rule itself and its conformity to section 254's "predictability" principle.

change the regression rule itself, without following the notice and comment procedures required for proposed rule changes under the APA. *See, e.g., U.S. Telecomm. Ass'n v. FCC,* 400 F.3d 29, 34 (D.C. Cir. 2005).

Because it is vague, open-ended, and subject to change without required notice, the regression rule violates the "predictability" prong of Section 254.

III. THE FCC'S USE OF AUCTIONS TO DISTRIBUTE USF VIOLATES SECTION 214(e), WHICH LEAVES EXCLUSIVELY TO STATES DETERMINATION OF WHO SHOULD RECEIVE USF SUPPORT.

Section 214(e) of the Act, 47 U.S.C. §214(e), provides that only ETCs may receive USF support and that, with narrow exceptions,[22] only states may designate ETCs and their service areas. Once an ETC is designated by a state commission to serve a particular service area under Section 214(e)(2), it is eligible to receive funding and must offer and advertise the supported services throughout its service area. 47 U.S.C. §214(e)(1).

The *Order* contravenes this express statutory scheme in two respects. First, it adopted various competitive bidding mechanisms to distribute USF support,

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[22] There are two limited exceptions to State commission designation of ETCs. First, for unserved areas where no common carrier will provide supported services, the FCC may designate an ETC *with respect to interstate services*. The state commission would then be responsible for ETC designations only with respect to intrastate services. 47 U.S.C. §214(e)(3). Second, carriers not subject to a state commission's jurisdiction may seek designation as an ETC for a service area designated by the FCC "in accordance with applicable Federal and State law." 47 U.S.C. §214(e)(6).

Preliminary Br. at 27 *n.*11, 30; *Order*, ¶¶166, 1189-90, and provided that the Commission will define the geographic service areas to be auctioned off. *Order,* ¶179. Second, the FCC created an entirely new "conditional designation," nowhere mentioned in the statute, that will require state commissions to conditionally designate "ETCs" before auctions to distribute Mobility Fund support are concluded. *Order*, ¶439. Since Congress expressly gave State commissions the job of deciding *who* would receive universal service support and *where* supported services would be advertised and provided by the carrier, the use of federal auction processes to distribute the funds usurps the role expressly reserved to the states. The conditional designation process is similarly at odds with Section 214(e) because state commissions will designate "conditional ETCs" that will never provide supported services. Section 214 unambiguously places the job of determining which carriers are eligible for universal service funds squarely in the hands of state commissions. The Commission's auction process unlawfully strips them of that role.

IV. THE DECISION TO REDUCE USF SUPPORT IN AREAS WITH "ARTIFICIALLY LOW" END USER RATES WAS BOTH UNLAWFUL AND ARBITRARY.

Putatively to prevent giving support unneeded to keep rural basic residential rates reasonably comparable to urban ones and hence placing an "undue burden" on the universal service fund (*Order*, ¶237), the *Order* reduces HCL support to

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both rural price cap and rate of return LECs if their basic residential rates are below benchmark levels of "reasonableness" (*Order*, ¶235), currently $10.00, but to be set in the future by nationwide survey. *Order*, ¶239. Essentially, the *Order* establishes an annual national floor on what it termed "artificially low end user rates," *Order*, ¶859, – rates typically regulated by the states. If a carrier's rates are set by state regulators below the floor in any given year, there will be an offsetting reduction of federal USF support. *Order*, ¶¶234 – 247. Although not directly setting local rates, that is the de facto effect of the *Order*. And, since local rate setting is exclusively the province of state commissions under the Act, 47 U.S.C. §152(b), the *Order* unlawfully usurps a power reserved to the states.

The Commission's interference with state regulation of local rates is a function of its national benchmark mechanism, which disregards whether "low" rate levels in particular areas may be reflective of lower costs or small service areas. The only evidence the FCC apparently relied was data which showed that "there are a number of carriers with local rates that are significantly lower than rates that urban consumers pay. *Order* at ¶235 (footnote omitted). The perverse result of the *Order* is that to avoid depriving rural carriers of needed USF support, states must raise some local rates above levels they would have deemed reasonable. The coercive effect of *Order* is to set floors for local rates that should be determined by the states.

The "low rate" floor is also arbitrary and capricious in two respects. The *Order* fails to give adequate consideration to (1) comments explaining that the rural and urban basic services at issue may not be comparable (*e.g.*, the rural rates may be "low" because the local calling areas are much smaller than in urban areas), Missouri Small Telephone Group Comments at 10, April 18, 2011, and (2) the fact that rate may have been kept low by state funds, placing *no* burden on the federal USF fund.[23] The FCC's rate benchmark will penalize these LECs for complying with state law. The failure to address these concerns was a fatal defect in the *Order*. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*").

V. THE RULES UNLAWFULLY DEPRIVE RURAL CARRIERS OF A REASONABLE OPPORTUNITY TO RECOVER THEIR PRUDENTLY-INCURRED COSTS.

"The traditional regulatory notion of the 'just and reasonable' rate was aimed at navigating the straits between gouging utility customers and confiscating utility property." *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 481 (2002). While carriers are not guaranteed they will recover their prudently-incurred costs, *FPC v. Hope Natural Gas Co.,* 320 U.S. 591, 603 (1944), just and reasonable rates set by

[23] Comments of Consolidated Communications Holdings, WC Docket No. 10-90 *et al.,* at 14 (filed Aug. 24, 2011). The State of Texas, for example, uses its state-generated funds to hold down the local rates of small LECs. Texas Utility Code Annotated, Sec. 56.021.

the Commission must not deprive them of a reasonable *opportunity* to do so. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-8 (1989). This opportunity must be afforded regardless of whether carriers are subject to rate of return or price cap regulation or operate as CLECs. *Verizon, supra*, 535 U.S. at 486-89.

Universal service policy is intended to protect costly-to-serve rural consumers from prices that are not reasonably comparable to urban rates for similar services by spreading cost recovery among all network users. By limiting support and prohibiting rate increases in other areas, the same rules that deprive carriers of revenues needed to satisfy the sufficiency, predictability and comparability standards of Section 254 also deny them the reasonable opportunity to recover their costs.

That rural carriers cannot recover their costs under the *Order* is not subject to serious dispute. As noted earlier, they are required to continue to provide current services and, at considerable additional expense, to provide broadband service as well. At the same time, their ICC revenue streams are being narrowed and their USF support will be capped, reduced or eliminated outright (depending on their regulatory status).

As an example of this problem, FCC rules currently assign certain "common line" costs to the interstate jurisdiction for recovery from end users and the Interstate Common Line Support ("ICLS") mechanism. 47 C.F.R. §§54.901et seq.

The Commission's rules have long limited end user charges, *see*, *e.g.*, 47 C.F.R. §69.104, and the *Order* imposes new limits on ICLS. *Order*, ¶229. ILECs are thus required under Commission rules to allocate costs to specific rate elements, and simultaneously prohibited from recovering those costs from available sources. *See generally,* Joint ICC Brief Section II. The *Order*, therefore, as the evidence shows, places rural carriers' financial viability at serious risk. *See* Comments of Rural Associations, WC Docket No. 10-90 *et al.*, at 35 (filed Apr. 18, 2011); Comments of CenturyLink, WC Docket No. 10-90 *et al.*, at 19-21 (filed Apr. 18, 2011); Comments of ITTA, WC Docket No. 10-90 *et al.*, at 8-13 (filed Apr. 18, 2011); Comments of TDS, WC Docket No. 10-90 *et al.*, at 4-8 (filed Apr. 18, 2011).

It would be one thing if the agency had tied the reductions in USF support to a determination that the individual carriers had imprudently incurred costs, or that they were recovering the costs of investments not "used and useful" in delivering regulated services, or that these costs could somehow be recovered from end users without violating the statutory universal service principle calling for rural service rates to be reasonably comparable with those in urban areas. *See* Petitioners' Joint Intercarrier Compensation Brief, Section II. But the FCC made none of these findings.

Nor is it an answer to rural carriers' objections that carriers believing themselves undercompensated for their legitimate costs can seek waiver. *Order*,

¶294. An agency can set uniform rates based on average industry costs, providing those in need of *exceptions* with "special relief" waivers. *Permian Basin Area Rate Cases*, 390 U.S. 747, 764, 770 (1968). But the *Order* generally places rural carriers in financial jeopardy and thus cannot be salvaged by a waiver provision. *See U.S. Telecomm. Ass'n v. FCC*, 359 F.3d 554, 571 (D.C. Cir. 2004) ("[T]he mere existence of a safety valve does not cure an irrational rule.")

Finally, the waiver provision itself does not prevent confiscation even where the applicant can demonstrate that it will be unable to recover its prudently incurred expenses. On the contrary, the *Order* makes waivers available "only in those circumstances in which the petitioner can demonstrate that the reduction in existing high-cost support would put consumers at risk of losing voice services, with no alternative terrestrial providers available …." *Order*, ¶540. The constitutional test is whether the carrier has been afforded a reasonable opportunity to recover its costs, not whether consumers may be able to obtain service elsewhere.

VI. THE RULES HAVE UNLAWFUL RETROACTIVE EFFECTS.

In addition, by limiting recovery of costs lawfully incurred pursuant to federal and state law before the *Order* was adopted, the FCC's regression and SNA rules violate the strong judicial presumption against retroactive rulemaking. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988). Absent express statutory authorization for an agency to promulgate retroactive rules, fairness dictates that entities be able to conform their conduct to known law and that settled expectations not be lightly disrupted. *Langraf v. USI Film Products et al*, 511 U.S. 244, 265 (1994).

Nothing in Section 254 or elsewhere in the Act gives the FCC express authority to adopt a regression mechanism that retroactively precludes carriers from recovering reasonable and prudent capital and operating expenses[24] they previously made to comply with the ETC provisions of Section 214(e) of the Act, Rural Utilities Service ("RUS") loan covenants and/or state Carrier of Last Resort ("COLR") requirements. *See Letter from Rural Utils. Serv. to FCC*, WC Docket No. 10-90, Attachment, at 14 (Aug. 1, 2011). Likewise, the FCC's retroactive elimination of SNA for investments made after 2009 destroys the reasonable expectations and business plans of carriers that applied for and received stimulus loan-grants from the RUS Broadband Initiatives Program ("BIP") for construction to begin in 2010.

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[24] The federal High Cost Loop Support ("HCLS") program limited by the regression model provides federal support for high operating expenses incurred two years previously and for high depreciation expenses arising from capital expenditures made two or more years previously. 47 CFR § 36.611 requires carriers to report to NECA on July 31st of each year their cost data as of the preceding December 31st. That data is the basis for support received beginning the following January 1st, meaning there is as much as two years between expenditure and recovery.

The regression and SNA rules violate the presumption against retroactive rulemaking because each "takes away or impairs vested rights" or "attaches new legal consequences to events completed before its enactment." *Arkema, Inc. v. EPA*, 618 F.3d 1, 16 (D.C. Cir. 2010). However, even if reasonable and prudent expenditures made pursuant to federal and state law are not deemed to entail a vested right to federal support, they render the regression and SNA rules invalid as arbitrary and capricious under the "secondary retroactivity" standard discussed in *Bowen* because they "alter[] future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule." *Bowen, supra*, 488 U.S. at 220 (Scalia, concurring). *See also, Direct TV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir, 1997).

Secondary retroactivity is inconsistent with reasoned decision making; the FCC may not abruptly change direction from its previous rules, policies and/or pronouncements without providing a reasoned explanation for the change. *State Farm, supra*, 463 U.S. at 42. In the case of HCLS support, the FCC has been allowing interstate access tariffs to become effective and providing high-cost support for many years[25] without questioning the reasonable and prudent nature of

[25] The HCLS was established in 1997 during the implementation of the 1996 Act and was substantially similar to the Universal Service Fund established during the 1980s.

the investments and expenses upon which they were based. The FCC has not reasonably explained why, suddenly in 2012, the pre-2011 capital expenditures and/or 2010 operating expenses of approximately 10% of rate-of-return RLECs are no longer reasonable and prudent. The *Order* made no attempt to consider whether these prior investments and expenses were reasonable and prudent responses to investment cycles, customer needs, terrain, climate and other factors that affect costs. Likewise, the *Order* made no attempt to explain why a program intended to provide additional support for carriers making substantial network upgrades should be terminated just before carriers that relied upon SNA support when participating in the BIP program would become eligible for SNA support.

VII. THE COMMISSION DISREGARDED EVIDENCE THAT ALLOCATING USF TO RURAL PRICE CAP CARRIERS BY COMPETITIVE BIDDING WOULD REDUCE SERVICE QUALITY BECAUSE CARRIERS WOULD BID ONLY TO MEET FCC MINIMUM QUALITY STANDARDS INADEQUATE TO ENSURE SYSTEM UPGRADEABILITY.

Following a five year phase out period,[26] USF support to any provider in price cap study areas will be awarded by competitive bidding. *Order*, ¶179. In adopting an auction mechanism, the FCC has arbitrarily either ignored entirely or

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[26] Prior to the phase out, price cap carriers have a "right of first refusal" to USF support that would exclude competing ETCs, the reasonableness of which is an issue addressed in Additional Universal Service Fund Issues Principal Brief to be filed October 23, 2012. *See also* Section XII, *infra*.

failed adequately to address arguments and evidence that the auction approach would result in a "race to the bottom," where bidders need only meet minimum service standards inadequate to ensure satisfy future customer needs.

Bidders in an auction system will face significant cost pressure to construct facilities meeting minimal performance specifications, without regard to the long term effect on carrier reliability, or their ability to upgrade rudimentary systems to meet increased demand or regulatory requirements. (RICA Comments, WC Docket No. 05-337 at 4 (Oct. 10, 2006)). Commenters also warned that an auction system would unduly favor large carriers over smaller carriers the Commission had professed a desire to protect. *Order*, ¶326.

The Commission twice *recounted* these arguments (*Order*, ¶¶179, 325-26), but never *tackled* them.

Its terse one sentence "explanation" that assigning CAF funds by auction "should enable us to identify those providers that will make most effective use of the budget funds, thereby extending services to as many consumers as possible," *Order*, ¶179, is only a restatement of the agency's conclusion, not a reasoned response to objections. It does not even claim to grapple with the well-documented concerns discussed above, a hallmark of arbitrary agency action. *See State Farm, supra*, 463 U.S. at 43.

Its response to concerns that auctions would push carriers to skimp on service quality, that it has adopted or will adopt and enforce "clear performance standards," *Order*, ¶325, is equally deficient. Making performance standards "clear" – even assuming perfect compliance – does not ensure the standards are *adequate* to protect either service reliability or system upgradability. The Commission identified three putatively "clear standards" – that bidders (1) offer minimum 4 Mbps speeds, (2) assure latency low enough for real-time applications such as VoIP, and (3) offer capacity usage limits reasonably comparable to usage limits for comparable broadband offerings in urban areas. *Order*, ¶¶90, 96, 98. But it ignored record evidence that these standards did not ensure system upgradability and that rational communications network buyers would demand specifications far more comprehensive than these minimal standards. *See* RICA Comments, WC Docket. No. 05-337, at 3-5 (filed Oct. 10, 2006). It also ignored evidence that the standards do *not* clearly define comparability. The FCC, for example, did not find that the 4/1 Mbps speed standard was "reasonably comparable to those services provided in urban areas," only that it would enable rural and urban subscribers to "use" broadband comparably. *Order*, ¶94. But the statute references services "provided," and urban subscribers are provided much greater speed. *National Broadband Plan*, pp 20-23. The capacity standard is no standard at all; the

Commission expressly declined to determine what capacity is offered urban subscribers.

The FCC's assertion that the one-time auction payment of Phase I of the Mobility Fund satisfies the "sufficiency" test under Section 254(b) (*Order*, ¶311) is equally non-responsive to petitioners' objections with respect to Phase II of the CAF. It ignores the concern that auctions will not produce support "sufficient" to ensure long term reliability, upgradability, *etc*. The FCC's silence in the face of that concern is fatal.

Finally, the *Order* acknowledges that auctions can and have favored larger carriers, but says that the "natural advantages of carriers with existing investments in networks in rural areas should provide opportunities for smaller providers to compete effectively at auction," *Order*, ¶326. This overlooks the obvious. If a carrier with "existing networks in rural areas" is a large one, then *that* carrier, by the FCC's definition, will have the "natural advantages." *Id*. As to the conceded large bidder bias posed by reverse auctions, the FCC says only that it can be avoided *if* the reverse auction is "well-designed and executed." *Id*., ¶326. Since such an auction was not part of the *Order*, it is not susceptible to judicial review and cannot form a basis to sustain the *Order*. *See SEC v. Chenery*, 332 U.S. 194, 196 (1947) (an agency's order can only be sustained on the basis of explanations offered in the order itself).

VIII. ELIMINATING UNIVERSAL SERVICE SUPPORT FOR THE HIGHEST-COST AREAS DEFEATS THE VERY PURPOSE OF UNIVERSAL SERVICE.

Citing a need to stay within its budget, *Order*, ¶169, the Commission mandated an "extremely high-cost" threshold above which no support will be paid, pending further rulemaking to determine how to deploy $100,000,000 in CAF funds to high-cost areas. *Order*, ¶168. By denying support indefinitely to service areas that are, by definition, in greatest need of it, the Commission has not merely acted arbitrarily, it has taken action antithetical to the stated purpose of the *Order*, to advance affordable universal service.

Congress has directed that "[c]onsumers in *all* regions of the Nation ... should have access to telecommunications and information services …." 47 U.S.C. §254(b)(3) (emphasis added). The *Order*, however, denies support, not because the carrier's costs are excessive, but simply because costs in a particular region are "extremely high." But the very premise for universal service support is that rural and remote areas are typically more costly to serve, *Order*, ¶2, and that customers in "all regions" should have access to affordable service. The *Order* arbitrarily disregards all legitimate reasons why service costs in a particular region are "extremely high," ignores alternative proposals[27] and denies customers in those regions any chance at obtaining "reasonably comparable" services.

It is no answer to these concerns that the Commission *may*, at some future date, design a Remote Areas Fund. *Order*, ¶534. Nor can support to extremely high cost areas be denied simply because the budget for universal service must be limited. On the contrary, it makes no sense to cut off USF support to the regions *most* in need of support. The Commission's failure to consider that point was self-evidently arbitrary.

IX. ELIMINATING SUPPORT TO AREAS WHERE AN UNSUBSIDIZED COMPETITOR OFFERS VOICE AND BROADBAND ARBITRARILY IGNORES THAT ONCE THE INCUMBENT CARRIER LOSES USF SUPPORT, THE UNSUBSIDIZED CARRIER HAS NO OBLIGATION TO CONTINUE OFFERING SERVICES.

The *Order's* directive that high cost support to RLECs be phased out as unnecessary where unsubsidized competitors offer voice and broadband to all of an RLEC's residential and business customers in the same study area is unlawful and unsupported by substantial evidence. The Commission's rationale is that it is inefficient to provide USF support "in areas of the country where another voice and broadband provider is offering high-quality service without government

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[27] Comments of Consolidated Communications Holdings, WC Docket No. 10-90 et al., at 15-16 (filed Aug. 24, 2011).

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assistance ….” *Order*, ¶281. But this explanation ignores both Section 254(b) and the Commission's own finding that incumbent carriers are "in a unique position to deploy broadband networks rapidly and efficiently" and that most have "a preexisting obligation to ensure service to customers who request it." *Id.*, ¶177 and n.290. By contrast, unsubsidized competitors have no obligation either to continue providing voice or broadband service to existing customers or to serve new ones once the RLEC's support is eliminated, much less an obligation to provide services comparable in quality and prices to those enjoyed by customers of urban telecommunications carriers.

Consistent with the statutory principle requiring "reasonably comparable" service in rural areas, the Commission requires ETCs to offer voice telephony service "on a standalone basis, at rates that are reasonably comparable to urban rates."[28] As common carriers, moreover, ETCs have a number of other affirmative obligations intended to protect service to existing and new customers, including low income customers.[29] These obligations on ETCs significantly increase their

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[28] *Order*, ¶81.

[29] Section 214(e)(1)(B) requires ETCs to advertise the availability of all supported services throughout their service areas (*NPRM*, ¶88) and to seek FCC authorization before discontinuing service (*id.*, ¶73); ETCs, *inter alia*, must demonstrate the ability to remain functional in emergencies, meet service quality standards (*id.*, ¶71) and state carrier of last resort obligations (*id.*, ¶90-91); offer service to low

costs.[30] By contrast, an unsubsidized competitor that triggers the cut-off of the ETC's USF support is not required to be a common carrier and is not required to provide telecommunications service or broadband at all, much less to serve all comers on a continuing basis; nor to provide these services at rates reasonably comparable to those of its urban counterparts.

The *Order* disregards entirely evidence that the moment the rural carrier loses its USF support (because there is an unsubsidized competitor offering to serve all its customers), consumers are at risk. They become increasingly dependent on a competing carrier with no obligation to continue serving them or to incur the additional costs associated with meeting ETC obligations. Meanwhile, the incumbent may very well continue to bear carrier of last resort obligations without any support available for doing so. Far from promoting efficient use of USF support, the *Order* puts universal service at risk. The Commission's failure to consider the evidence documenting this concern with its rules renders the *Order* arbitrary.

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income customers (*id.*, ¶94) and offer standalone voice service at affordable rates (*id.* ¶99).

[30] *See, e.g.*, *NPRM*, ¶94; Comments of Rural Independent Competitive Alliance, RM-11584, at 3 (filed Jan. 7, 2010); Rural ILEC Associations Comments at 10; Joint Comments of NECA/NTCA/OPASTCO/WTA/Rural Alliance, WC Docket No. 10-90, at 31 (filed July 12, 2010).

X. THE COMMISSION ARBITRARILY FAILED TO EXPLAIN HOW ITS NEW DEFINITION OF SUPPORTED INFORMATION SERVICES TOOK INTO ACCOUNT THE FOUR FACTORS IT WAS REQUIRED TO CONSIDER UNDER SECTION 254(c)(1).

Section 254(c)(1) of the Act requires the FCC, in consultation with the Joint Board, to consider four specific factors in establishing its definition of supported telecommunications services, namely the extent to which such telecommunications services (a) are essential to education, public health, or safety, (b) have been freely purchased by a substantial majority of residential customers, (c) are actually being publicly deployed by telecommunications carriers and (d) are in the public interest. But, with the exception of brief *references* at ¶¶14, 39 and 74 to the first, third and fourth factors, the *Order* fails to discuss how its new "voice telephony service" definition takes any of these factors into account. That failure was arbitrary.

XI. THE FCC ARBITRARILY DISREGARDED COMMENTS THAT THE *ORDER'S* INCREMENTAL USF SUPPORT PROVISIONS WOULD DUPLICATE OR UNDERMINE STATE-INITIATED PLANS FOR BROADBAND DEPLOYMENT.

Several states have enacted laws promoting broadband deployment. Some of the requirements under these laws may differ from the broadband deployment criteria that must be met by USF recipients under the *Order*, such as the 4 and 1 Mbps downstream and upstream bandwidth requirements. Pennsylvania, for example, requires 128 Mbps upstream and 1.5 Mbps downstream broadband. 66 Pa.C.S. § 3010, *et seq.* Many carriers serving high-cost areas have already made, or completed, broadband commitments under these laws. But the *Order* precludes such price cap carriers from receiving incremental Phase I USF support, which it confines to areas not currently served by broadband. *Order*, ¶136-7.

Assuming *arguendo* that requiring carriers to provide broadband Internet access as a condition of USF support were within the FCC's authority (which it is not), it cannot implement that condition arbitrarily. Petitioners argued below that it was arbitrary and discriminatory to distribute USF support only to carriers in states who did nothing to promote broadband, while carriers in states with extensive broadband development commitments (in Pennsylvania's case about $1B dollars) get nothing to upgrade what they have done. The Commission, however, arbitrarily failed to consider this argument. *PSEG Energy Res. & Trade LLC, et al. v FERC*, 665 F.2d 203 (D.C. Cir. 2011).

XII. THE *ORDER* UNLAWFULLY MADE CHANGES NOT CONTAINED IN ITS PROPOSED RULE THAT COULD NOT REASONABLY HAVE BEEN ANTICIPATED BY COMMENTERS.

Key provisions in the *Order* were not part of the proposed rule. As discussed below, because Petitioners had no reasonable opportunity to comment on these rule changes the *Order* violated Sections 553(b) and (c) of the APA.[31]

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[31] *See Prometheus Radio Project v FCC*, 652 F.3d 431, 449,450 (3d Cir. 2011); *Council Tree Commc'ns, Inc. v FCC*, 619 F.3d 235, 250 (3d Cir. 2010).

The APA requires agencies to provide notice of a proposed rulemaking that contains either the express terms or substance of the proposed rule or a description of the subjects and issues involved. 5 U.S.C. § 553(b). While a final rule obviously need not be identical to the proposed one, it must be a "logical outgrowth" of the proposed rule. If it is not, affected parties have been denied the reasonable opportunity to comment guaranteed under the APA. *City of Waukesha v. EPA*, 320 F.3d 228, 245 (D.C. Cir. 2003). None of the rule changes discussed below, however, were the "logical outgrowth" of the FCC's proposed rule.

Take first the ARC rules (*Order*, Appendix A, Final Rule 51.915 at 517-530 (price cap carriers); *id.,* Final Rule 51.917 at 530-537 (rate-of-return carriers), which were neither discussed nor foreshadowed by the *NPRM*. The failure to provide notice that those rules, or something like them, might be part of the final rule violated the APA.

Under FCC price cap rules in existence prior to the *Order*, adjustments to access rates were permitted to reflect changes resulting from exogenous events. 47 C.F.R. §§ 69.3 and 61.45. The *Order* announced for the first time, without any opportunity for comment by affected parties, that it was eliminating these adjustments because their adjudication would be burdensome. *Order*, ¶890.

The *Order* also established a dual process for ICC revenue recovery for price cap carriers and rate-of-return carriers. *Order*, ¶¶891-983 and 900-904. This, too was not presaged by the proposed rule as required by the APA. While the Commission sought comment on proposals addressing universal service, and ICC issues (FCC Public Notice, DA-11-1348 (Aug. 3, 2011), it did not address a dual process for ICC revenue recovery.

Finally, the *Order* gives price cap carriers an exclusive right of first refusal ("ROFR") to receive $300 million in CAF Phase I funding for unserved areas. But the ROFR was originally proposed as an alternative to using reverse auctions in CAF Phase I for all carriers of last resort. *NPRM*, ¶¶287,288. The limitation was not reasonably foreseeable from the proposed rule and parties, therefore, were arbitrarily deprived of an opportunity to comment.

CONCLUSION

As discussed above, the *Order* contravenes Sections 214, 253 and 254 of the Telecommunications Act and Section 553 of the APA and should be vacated in its entirety. Further, the FCC's failures of reasoned decisionmaking are significant enough that the *Order*, if not reversed as in violation of the Telecommunications Act, should be vacated in its entirety and remanded to the agency.

Respectfully submitted,

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On behalf of the Joint Petitioners
Listed on the cover of this filing[32]

October 23, 2012

[32] Consolidated Communications, NTCA, RICA, Rural Telephone, *et al*. and the Vermont Public Service Board do not join in Section XII of this brief. NASUCA does not join in Sections III, V, VII, VIII and XI. Gila River Indian Community and Gila River Telecommunications, Inc. do not join in Sections I, III, IV.A-B or XI.

CERTIFICATE OF COMPLIANCE

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/s/ *Harvey L. Reiter*

October 23, 2012

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I hereby certify that, on October 23, 2012, per the Court's order of October 17, 2012, I caused the foregoing document to be electronically filed with the Court via e-mail. I also certify this document was furnished through ECF electronic service to all parties in this case through a registered CM/ECF user. This document is available for viewing and downloading on the CM/ECF system.

/s/ *Harvey L. Reiter*

October 23, 2012