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 WIRELESS CARRIER UNIVERSAL SERVICE FUND PRINCIPAL BRIEF

(DEFERRED APPENDIX APPEAL)

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United States Cellular Corporation

October 23, 2012

CORPORATE DISCLOSURE STATEMENT

Cellular South, Inc. d/b/a C Spire Wireless, is wholly owned by Telapex, Inc., which is not a publicly held corporation.

NTT DoCoMo, Inc., a publicly held corporation, indirectly owns 100% of the stock of petitioner, DOCOMO Pacific, Inc. Nippon Telegraph and Telephone Corporation, a publicly held corporation, owns more than 10% of the stock of NTT DoCoMo, Inc.

Leap Wireless International, Inc., a publicly held corporation, holds an indirect 19.86% interest in PR Wireless, LLC, which owns 100% of the stock of petitioner, PR Wireless, Inc.

United States Cellular Corporation is an 84%-owned subsidiary of Telephone and Data Systems, Inc., a publicly held corporation. No other publicly held corporation owns 10% or more of the stock of United States Cellular Corporation.

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Counsel is not aware of any prior or related appeals.

GLOSSARY

Act	Communications Act of 1934, as amended
APA	Administrative Procedure Act
BlueSky	AST Telecom, LLC d/b/a BlueSky Communications
Board	Federal-State Joint Board on Universal Service
Broadband	high-speed Internet access service
Broadband Plan	*Connecting America: The National Broadband Plan*
CAF	Connect America Fund
CAF II	CAF Phase II
CETC	competitive eligible telecommunications carrier
Choice	Choice Communications, LLC
DOCOMO	DOCOMO Pacific, Inc.
ETC	eligible telecommunications carrier
FCC	Federal Communications Commission
GC	general counsel
ICC	intercarrier compensation
ILEC	incumbent local exchange carrier

JA	Joint Appendix
Jt. Br.	Joint Preliminary Brief of the Petitioners
LEC	local exchange carrier
Mobility I	Mobility Fund Phase I
Mobility II	Mobility Fund Phase II
NPRM	notice of proposed rulemaking
1996 Act	Telecommunications Act of 1996
PR Wireless	PR Wireless, Inc.
RTC	rural telephone company
Sprint	Sprint Nextel Corporation
Telecom	telecommunications
Title I	Title I of the Act
Title II	Title II of the Act
T-Mobile	T-Mobile USA
USF	Universal Service Fund
Verizon	Verizon Wireless
WCB	FCC's Wireline Competition Bureau

INTRODUCTION

Both Congress and the FCC have classified "broadband" – the agency's euphemism for high-speed Internet access service – as an information service that is exempt from common-carrier regulation under Title II. The FCC has repeatedly and successfully defended its information-service classification of broadband before appeals courts including the Supreme Court. *See* Jt. Br. at 19-20. And it adheres to that classification today.

Compelled by its commitment to implement its *Broadband Plan*, the FCC has asserted Title II authority over broadband under the pretext of administering the USF support program for common-carrier telecom services. The FCC directed ETCs to use USF support to provide broadband service – an information service ineligible for support – as a "condition" to receiving funding. Accompanying that funding was a host of Title II regulations with which broadband/information service providers must comply.

If it had any statutory basis whatsoever to provide USF support to broadband, the FCC would have explicitly asserted that authority and provided specific support directly to broadband service providers. Tellingly, the FCC resorted to claiming that its

Title II authority to provide USF support to designated *telecom services* provided over dual-use networks empowered it to fund and regulate ineligible *information services* provided over those networks. The FCC simply used its Title II authority to administer the USF program as a bootstrap to regulate broadband services that it continues to exempt from Title II regulation.

Congress made the policy judgment in 1996 that Internet access services should be allowed to flourish unfettered by regulation. But no legislation has been enacted authorizing the FCC either to divert USF support to broadband Internet access services or to regulate those services.

The FCC has implemented its *Broadband Plan* for a broadband-centric USF program, fully aware that it is without express authority to do so. Its actions constitute a bald arrogation of power not conferred by Congress that will result in the annual misappropriation of $4.5 billion of consumer-provided USF support.

SUPPLEMENTAL STATEMENT OF FACTS

I. Statutory Background

The FCC's authority to administer the USF program comes from the 1996 Act. The statute was enacted to "promote

competition and reduce regulation" in order to lower prices and improve service for telecom consumers and to encourage the deployment of new telecom technologies.[1] The 1996 Act included two pro-competitive, deregulatory features that impact this case.

The 1996 Act added § 230 to Title II "in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." *Zeran v. AOL, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998). The provision sets forth the congressional policy "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). The term "interactive computer service" was defined to mean "any information service … that provides or enables computer access by multiple users to a computer server, including specifically a service … that provides access to the Internet." *Id.* § 230(f)(2).

By § 706 of the 1996 Act,[2] Congress gave the FCC and state commissions discretion to employ regulatory or deregulatory

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[1] 1996 Act, Pub. L. 104-104, Preamble, 110 Stat. 56, 56 (1996).

[2] *Id.*, Title VII, § 706; 47 U.S.C. § 1302.

"incentives" to encourage the timely deployment of "advanced telecommunications capability," *see Ad Hoc Telecom. Users Committee v. FCC*, 572 F.3d 903, 906 (D.C. Cir. 2009), or "high-speed, switched, broadband telecommunications capability." 47 U.S.C. § 1302(d)(1). Congress also directed that, if the FCC found that broadband telecom capability was not being deployed in a timely fashion, it must take "immediate action" to accelerate such deployment "by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." *Id.* § 1302(b).

II. *Comcast Corp. v. FCC*

In the aftermath of the *Comcast* decision,[3] the FCC's GC presented a paper to Congress on the "Comcast dilemma" that faced the FCC.[4] He opined that *Comcast* undermined the long-standing consensus reached by the FCC, Congress and the industry as to the agency's "light-touch" approach to Internet access services.[5] Under the "consensus" approach, the FCC did not regulate the Internet,

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[3] *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

[4] Austin Schlick, *A Third-Way Legal Framework for Addressing the Comcast Dilemma*, 2010 WL 1840579 (May 6, 2010).

[5] *See id.* at *1-*2.

but regulated dial-up Internet access service, and refrained from regulating broadband Internet access services "when possible."[6]

As its GC saw it, the FCC had three options. One option, which would put the FCC on a "strong jurisdictional footing," was for it to "reclassify" broadband Internet access services as telecom services and regulate them under Title II.[7] The option favored by the GC was for the FCC to regulate the transmission component of broadband service under Title II, while the information component would be subject to "whatever ancillary jurisdiction may exist under Title I."[8] The option that the GC disfavored was to "stay the course" under Title I, which he candidly described as follows:

> Some big cable and telephone companies suggest the agency should stick with the information service classification, try to adapt its policies to the new restrictions announced by the *Comcast* court, and see how it goes. This is a recipe for prolonged uncertainty. Any action the [FCC] might take in the broadband area … would be subject to challenge on jurisdictional grounds because the relevant provisions of the … Act would not specifically address broadband access services.[9]

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6 *See* Schlick, 2010 WL 1840579 at *1.

7 *Id.* at *3.

8 *Id.* at *4.

9 *Id.* at *2-*3.

III. Proceedings Below

In June 2010, the FCC asked for public comments on its options, *see Framework for Broadband Internet Service*, 25 F.C.C.R. 7866 (2010), querying whether it had statutory authority to reform its USF program to support broadband Internet service. *See id.* at 7880-83. Before answering that question, the FCC plowed ahead with its plan to implement USF reform measures recommended by the *Broadband Plan*. *See* Jt. Br. at 21-22.

Playing catch-up in November 2010, the Board responded to the *Broadband Plan* by gratuitously recommending that the FCC adopt the additional principle under § 254(b)(7) that USF support "should be directed where possible to networks that provide both broadband and voice services." *Federal-State Joint Bd. on Universal Service*, 25 F.C.C.R. 15598, 15599 (Jt. Bd. 2010). However, the Board "point[ed] out the obvious" by noting that broadband was not included in the definition of USF-supported services. *Id.* at 15624.

The FCC's rulemaking below was begun in February 2011 to implement the *Broadband Plan*. *See Connect America Fund,* 26 F.C.C.R. 4554 (2011) (JA). The FCC bypassed the Board in the rulemaking process, and relegated its state members to filing

comments on the plan's USF recommendations.[10]

The FCC ultimately modified its definition of USF-supported services, but its new definition did not include broadband. *See* Jt. Br. at 25, 26. In fact, it did not even include a definition of "broadband" among its many rule changes. *See Connect America Fund*, 26 F.C.C.R. 17633, 18168-69, 18179-81, 18191, 18198-99, 18224-25, 18227 (2011) ("*Order*") (JA).

The FCC stuck with its "information services classification." Rather than requiring ETCs to accept Title II regulatory obligations as a statutory condition to receiving the benefits of funding under a Title II program, the FCC required ETCs to deploy networks to provide information services, unfettered by Title II regulation, as a "condition" to receiving Title II funding. *See Order* ¶ 60 (JA).

The FCC claimed that its "express statutory authority" under § 254 to provide USF support to the *telecom services* provided over dual-use networks empowered it to regulate the *information services* provided over those networks. *See id.* ¶¶ 62-65 (JA). It required ETCs to provide broadband service subject to public interest

[10] *See Comment Dates Established for Comprehensive USF and ICC Reform NPRM*, 26 F.C.C.R. 2340, 2341 (WCB 2011).

obligations, including specific "broadband performance requirements." *Order* ¶ 19 (JA).

The FCC clearly did not adopt its GC's recommendation, opting instead to effectively "stay the course" and "see how it goes." As the GC predicted, this litigation ensued.

IV. Subsequent Developments

In May 2012, the WTB refused to postpone the Mobility I auction in light of the litigation surrounding the *Order*. *See Mobility Fund Phase I Auction*, 27 F.C.C.R. 4725, 4739 n.79 (WTB 2012). The FCC proceeded to auction $299,998,632 in Mobility Fund support to 33 winning bidders on September 27, 2012,[11] and it did so with knowledge that its jurisdiction was being challenged in this Court.

SUMMARY OF ARGUMENT

The USF portion of the *Order* must be vacated in its entirety, since the bulk of the FCC's actions to reform the USF exceeded its jurisdiction in three respects.

First, the Act unambiguously prohibits: (1) the FCC from

[11] *See Mobility I Auction,* 2012 WL 4712175, at *1 (WTB Oct. 1, 2012).

treating ETCs as common carriers under the Title II USF program when they are engaged in providing information services; and (2) ETCs from using support to offer information services. Because broadband service is classified as an information service, the FCC exceeded its Title II authority by requiring ETCs to deploy broadband facilities to be eligible to receive USF support, and by promulgating a rule requiring them to use the support for such deployment in violation of § 254(e).

Second, the FCC exceeded its authority by imposing Title II public interest obligations on broadband service providers without having first made the requisite jurisdictional determination that the service was being offered on a common carrier basis. *See Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1483 (D.C. Cir. 1994).

Third, the FCC used its rulemaking authority under § 254(a) to impose Title II regulation on broadband service without the express statutory authority necessary to do so. *See Comcast,* 600 F.3d at 652-54. The FCC's claim that it discovered its authority to provide USF support for broadband deployment in scattered subsections of § 254 and in § 706(b) of the 1996 Act falls prey to plain statutory

language and the common sense principle that Congress does not "hide elephants in mouseholes" by authorizing fundamental regulatory changes in ancillary provisions. *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 909-10 (2001).

Even if §§ 254 and 706(b) could be plausibly construed as an implied delegation of authority to fund broadband network deployment, the FCC did not claim Title II authority to regulate the broadband services provided over the deployed network. Lacking the requisite express delegation of Title II authority, *see Comcast*, 600 F.3d at 652-54, the FCC is guilty of using its Title II authority to provide USF support to designated telecom services as a "jurisdictional bootstrap" to regulate information services under Title II. *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459, 462 (D.C. Cir. 2005).

If it reaches the second step of review under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court will find that the FCC's decision-making was arbitrary and capricious under *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), because three of the agency's actions were not based on a balancing of the § 254(b) principles, *see Qwest*

Communications International Inc. v. FCC, 398 F.3d 1222, 1234 (10th Cir. 2005) ("*Qwest II*"), or on achieving both the universal service and local competition goals of the 1996 Act. *See Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 615 (5th Cir. 2000).

First, the FCC's decision to reserve $1.8 billion in annual CAF II support for large price-cap ILECs is anticompetitive on its face and flouts the FCC's core principle of competitive neutrality.

Second, the FCC repealed its identical support rule in favor of a single-winner reverse auction for Mobility I support without providing a reasoned explanation of how the underlying policy of competitively-neutral funding was trumped by any of the § 254(b) principles. By employing the Mobility I auction to award support to a single wireless CETC in any FCC-designated area, the FCC exceeded its authority by preempting the States' primary jurisdiction over wireless CETC designations under § 214(e).

Third, the FCC did not make a reasoned decision that an annual budget of $500 million for Mobility II support for wireless CETCs was sufficient by applying the § 254(b) principles to findings of fact supported by record evidence.

The FCC violated notice-and-comment rulemaking requirements by inviting public comments on whether a separate USF support mechanism for insular areas should be established, and then failing to provide a reasoned response to the comments of wireless CETCs calling for such a mechanism.

ARGUMENT

I. THE FCC LACKS JURISDICTION TO REDIRECT USF SUPPORT TO BROADBAND OR TO REGULATE BROADBAND

A. The FCC Exceeded Its Authority by Requiring ETCs to Use USF Support for Broadband

Chevron teaches that a statute's silence or ambiguity on an issue presumably means that Congress left "a gap for the agency to fill," thus "likely delegating gap-filling power to the agency." *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843 (2012). On the other hand, "*Chevron* and other cases find in unambiguous language a clear sign that Congress did not delegate gap-filling authority to the agency." *Id.*

Using "traditional tools of statutory construction" as permitted under *Chevron* step one, 467 U.S. at 843 n.9, we will show that the Act unambiguously prohibits the use of USF support for information services. Therefore, Congress did not delegate gap-

filling authority to the FCC to redirect the USF to "support broadband networks, regardless of regulatory classification." *Order* ¶ 68 (JA).

Statutory construction focuses on "the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997). There is no ambiguity in the language of § 1 that mandates that the FCC "shall execute and enforce" the provisions of the Act. 47 U.S.C. § 151. And § 4(i) clearly limits the FCC's authority to taking actions "not inconsistent with [the Act], as may be necessary in the execution of its functions." *Id.* § 154(i).

When defining a telecom carrier under § 3(51), Congress included the "explicit specification" that such a "carrier should be 'treated' as a common carrier '*only to the extent that it is engaged in* providing telecommunications services.'" *Worldcom, Inc. v. FCC*, 246 F.3d 690, 694 (D.C. Cir. 2001) (emphasis in original). Such a directive in a § 3 definition places a statutory limitation on the FCC's jurisdiction to regulate. *See FCC v. Midwest Video Corp.*, 440 U.S. 689, 705 (1979) (enforcing the § 3(11) command that "a person engaged in … broadcasting shall not … be deemed a common

carrier"). And, for the purposes of statutory construction, the explicit § 3(51) definition must be followed. *See, e.g., Burgess v. United States*, 553 U.S. 124, 129-30 (2008).

Congress defined the terms "telecommunications service" and "information service" in the 1996 Act with the intent of adopting the FCC's *Computer II* regime,[12] under which telecom carriers were regulated as common carriers under Title II, but information service providers were exempt from such regulation. *See National Cable & Telecommunications Ass'n v. Brand X Internet Service*, 545 U.S. 967, 975-77 (2005). Because the statutory classifications of telecom service and information service are mutually exclusive, *see Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 219 (3rd Cir. 2007), and inasmuch as only the former is subject to "mandatory common-carrier regulation under Title II," *Brand X*, 545 U.S. at 976, Title I clearly prohibits the FCC from treating telecom carriers as common carriers under Title II when they are engaged in providing an information service. *See* 47 U.S.C. §§ 151, 153(24), (51) & (53).

Congress employed the defined term "information service," *see id.* § 153(24), when it defined "interactive computer service" to

[12] *See Second Computer Inquiry*, 77 F.C.C. 2d 385, 417-23 (1980).

include "any information service … that provides access to the Internet." *See supra* pp. 2-3. Thus, Congress classified Internet access service as an information service.[13]

Statutory construction must account for a statute's structure, as well as its full text and subject matter. *See United States Nat'l Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 455 (1993). When it established the USF program under Subtitle A ("Telecommunications Services") of the 1996 Act,[14] Congress expressed its intentions by codifying the program in Title II ("Common Carriers"),[15] where ETCs would fall subject to mandatory common-carrier regulation.[16] The USF eligibility requirements were inserted in the new Part I of Title II ("Common

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[13] Not only must the statutory definition be applied, but "[t]he normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986).

[14] *See* 1996 Act, Title I.

[15] Section headings enacted by Congress in conjunction with the statutory text have been considered to determine the meaning of the USF provisions of the Act. *See Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 441 & n.89 (5th Cir. 1999).

[16] *See* 1996 Act § 101.

Carrier Regulation"),[17] where Congress retained the "core provisions" of Title II. *Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921, 927 (D.C. Cir. 1999). Section 214(e)(1) provides:

> A common carrier designated as an eligible telecommunications carrier … shall be eligible to receive [USF] support in accordance with [§] 254 … and shall … offer the services that are supported by Federal universal service support mechanisms under [§] 254(c)….[18]

The term "common carrier" in § 214(e)(1) is not surplusage. By specifying that only a common carrier can be an ETC, Congress imposed the requirement that an ETC provide USF-supported telecom services on a common-carrier basis. *See Federal-State Joint Bd. on Universal Service*, 13 F.C.C.R. 5318, 5427 (1997). Thus, "a carrier that provides a service on a non-common carrier basis is not a 'telecommunications carrier' and hence is ineligible for [USF] support with respect to that service." *State of Iowa v. FCC*, 218 F.3d 756, 758 (D.C. Cir. 2000).

Sections 214(e)(1) and 254 are *in pari materia* and must be construed together, insofar as each provision explicitly refers to the other and both address USF support eligibility employing identical

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[17] *See* 1996 Act §§ 101(b), 102.

[18] 47 U.S.C. § 214(e)(1)(A).

terminology.[19] For example, § 254(e) provides that "only an [ETC] designated under [§] 214(e) … shall be eligible to receive specific Federal universal service support." 47 U.S.C. § 254(e). When construed with § 214(e)(1)(A), and the § 3(51) proviso is applied, § 254(e) clearly means that a common-carrier ETC shall be eligible to receive USF support only to the extent it is engaged in providing telecom services on a common-carrier basis. *See id.* § 153(51).

Significantly, § 254(e) also mandates that an ETC that "receives [USF] support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which that support is intended." *Id.* § 254(e). Given Congress' unambiguously expressed intent that an ETC receive USF support only to the extent it is providing telecom services, § 254(e) provides that an ETC must use that support only for the provision of facilities and *telecom* services.

The plain language of § 254(c) confirms that telecom services are those "for which [USF] support is intended." There, Congress defined "universal service" as "an evolving level of

[19] "Statutory provisions *in pari materia* normally are construed together to discern their meaning." *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2003) ("*MPAA*").

telecommunications services that the [FCC] shall establish periodically under this section." 47 U.S.C. § 254(c)(1). When establishing the definition of USF-supported services, Congress specified that the FCC "shall consider the extent to which such telecommunications services … are being deployed in public telecommunications networks by telecommunications carriers." *Id.* § 254(c)(1)(C). Thus, Congress intended that USF support be directed to telecom services being extensively deployed by telecom carriers on their telecom networks.

The FCC defines "facilities" in § 254(e) to mean "any physical components of the telecommunications network that are used in the transmission or routing of the services that are designated for support." *Order* ¶ 64 n.69 (JA). Construing the language of § 254(e) that requires USF support for "facilities and services for which the support is intended" *in pari materia* with § 254(c) reveals the intent of Congress to limit ETCs to using support only to provide the telecom services that are designated for support, as well as for any network components used for the provision of such services.

When the statutory definitions in § 3(24), (51) and (52) are

followed, and the text of §§ 214(e)(1) and 254 is construed harmoniously in the context of the structure of the Act, the intent of Congress to prohibit the use of USF support for unregulated information services becomes clear. That resolves the matter of the FCC's gap-filling authority under *Chevron* step one, *see* 467 U.S. at 842-43, for the agency was obliged by § 1 to "give effect to the unambiguously expressed intent of Congress." *Id.*

The FCC has repeatedly classified broadband services as information services and has repeatedly defended its classification before the courts. *See* Jt. Br. at 19-20. The *Order* did not disturb that classification. Consequently, by requiring ETCs to deploy broadband facilities to be eligible to receive USF support, *see Order* ¶ 60 (JA), and by promulgating a rule requiring them to use USF support to deploy broadband facilities, *see* 47 C.F.R. § 54.7(b), the FCC exceeded its authority by taking actions prohibited by, or inconsistent with, §§ 214(e)(1) and 254(e). The Court should hold unlawful and vacate the FCC's actions. *See* 5 U.S.C. § 706(2)(C) (the reviewing court "shall hold unlawful and set aside agency action … in excess of statutory jurisdiction [and] authority").

B. The FCC Cannot Regulate Broadband under Title II Having Not Determined that It Is Being Offered on a Common Carrier Basis

The FCC "literally has no power to act … unless and until Congress confers power upon it." *Louisiana PSC v. FCC*, 476 U.S. 355, 374 (1986). Hence, its "power to promulgate legislative regulations is limited to the scope of the authority Congress has delegated to it." *American Library Ass'n v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005). If a regulation was promulgated without delegated authority from Congress, a reviewing court must vacate the regulation and "have no occasion to proceed to *Chevron's* deferential second step." *Columbia Gas*, 404 F.3d at 461.

The FCC reformed its Title II program not only by redirecting USF support to ineligible broadband services, but also by foisting a slew of Title II public interest obligations and broadband performance requirements on broadband service providers. *See Order* ¶¶ 74-114 (JA). However, "only common carrier activity falls within the [FCC's] regulatory powers under [T]itle II." *Southwestern Bell*, 19 F.3d at 1483. Thus, common carrier services are the Title II "regulation-triggering services." *Worldcom*, 246 F.3d at 694. Consequently, the FCC cannot regulate broadband under Title II

without first making the "determination whether the service is being offered on a common carrier basis." *Southwestern Bell*, 19 F.3d at at 1484.

As a prerequisite to broadband Title II regulation, the FCC was required to determine whether the service providers: (1) hold themselves out "to serve indifferently all potential users"; and (2) allow "customers to transmit intelligence of their own design and choosing." *See, e.g., United States Telecom Ass'n v. FCC*, 295 F.3d 1326, 1329 (D.C. Cir. 2002) (determining "common carrier" status for USF eligibility under § 254(h)(1)). Although the statutory classification of Internet access service as an information service precludes the jurisdictional determination that broadband is common carriage, *see supra* p. 15, the FCC made no attempt to find that any form of broadband meets the two-prong test for common carriage. Moreover, the FCC's steadfast refusal to reclassify broadband as a telecom service is tantamount to a refusal to classify broadband as a common carrier service, because it treats telecom service and common carrier service as one and the same.[20]

[20] The FCC determined that the legislative history of the 1996 Act "indicates that the definition of telecommunications service is

The FCC is not permitted "to augment its regulatory domain" by regulating an activity under Title II without first making a reasoned determination that the activity constitutes common carriage. *Southwestern Bell,* 19 F.3d at 1484. The FCC's failure to make the prerequisite jurisdictional determination with respect to broadband necessitates that the *Order* be remanded and "suspended pending completion of the proceedings on remand." *Id.*

C. The FCC Was Not Delegated Title II Authority to Regulate Broadband

In *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), the Court noted the jurisdictional distinction between a case like *Louisiana PSC*, which "involved the [FCC's] attempt to regulate services over which it had not been explicitly given rulemaking authority," and one involving "its attempt to regulate services over which it *has* explicitly been given rulemaking authority." 525 U.S. at 381 n.7 (emphasis in original). This case is one of the former, insofar as the FCC is admittedly without "express statutory

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intended to clarify that telecommunications services are common carrier services." *Cable & Wireless, PLC*, 12 F.C.C.R. 8516, 8521 (1997).

authority" over broadband services, *Comcast*, 600 F.3d at 644, but nevertheless used its § 254(a) rulemaking authority to impose Title II regulations on broadband service providers. *See supra* p. 20.

The FCC claimed to have found its jurisdiction to regulate broadband in subsections (b)(1)-(3), (b)(7) and (e) of § 254, *see Order* ¶¶ 60-65 (JA), and to a "limited extent" in § 706 of the 1996 Act, *id.* ¶ 73 (JA), where it had previously gone unnoticed by the agency for 15 years. In evaluating whether Congress impliedly empowered the FCC to regulate the Internet – "arguably the most important innovation in communications in a generation," *Comcast,* 600 F.3d at 661 – in scattered subsections of § 254 and in a note to § 7, *see* Jt. Br. at 14, the Court "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

To assess the FCC's claim, we will employ the "readily administrable bright line" test that the Supreme Court has fashioned to distinguish jurisdictional from non-jurisdictional statutory provisions. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515

(2006). Under that test, a jurisdiction-conferring provision of the Act would speak to the FCC's "power to regulate an activity." *ACLU v. FCC,* 823 F.2d 1554, 1567 n.32 (D.C. Cir.1987), *cert. denied*, 485 U.S. 959 (1988), thereby constituting an "express delegation of regulatory authority." *Comcast*, 600 F.3d at 655. To confer Title II jurisdiction, a provision must speak to the FCC's power to regulate common carrier activities, since they constitute the Title II "regulation-triggering services." *See supra* p. 21.

The only jurisdiction-conferring provisions of § 254 are subsections (a), (c)(3) and (h)(2). Subsection (a) empowers the FCC to adopt regulations to implement §§ 214(e) and 254, including a rule defining the USF-supported services. *See* 47 U.S.C. § 254(a). Subsection (c)(3) speaks to the FCC's power to designate the "special services" that telecom carriers must provide at USF-supported discounted rates to schools, libraries, and health care providers or "public institutional telecommunications users" under subsection (h). *See* 47 U.S.C. § 254(c)(3), (h)(1), (h)(7)(C). Finally, subsection (h)(2) expressly empowers the FCC to adopt:

> competitively neutral rules … to enhance … access to *advanced telecommunications and information services* for all [public institutional telecommunications users] and …

> to define the circumstances under which a telecommunications carrier may be required to connect its network to such … users.[21]

For its jurisdiction, the FCC relies on § 254(b)(1)-(3), which are clearly not jurisdiction-conferring provisions. Subsection (b) itself imposes a "mandatory duty" on the FCC to base its policies for the preservation and advancement of universal service on the principles listed in subsections (b)(1)-(7). *See Qwest Corp. v. FCC,* 258 F.3d 1191, 1200 (10th Cir. 2001) ("*Qwest I*"). But subsections (b)(1)-(3) themselves simply set forth three of the principles on which the FCC "should" base its policies, and the use of the term "should" indicates "a recommended course of action." *Id.* at 1200. Thus, they are but three "of seven principles identified by Congress to guide the [FCC] in drafting policies to preserve and advance universal service." *Qwest II*, 398 F.3d at 1234.

Congress spoke clearly to policies in § 254(b)(1)-(3), but "[p]olicy statements are just that – statements of policy. They are not delegations of regulatory authority." *Comcast,* 600 F.3d at 654. Therefore, Congress conferred no jurisdiction by its references to "advanced telecommunications and information services" in §

[21] 47 U.S.C. § 254(h)(2) (emphasis added).

254(b)(2) and (b)(3). *See Order* ¶ 72 (JA). It merely stated principles to guide the FCC in exercising its authority under § 254(c)(2) and (h)(2) to ensure that public institutional telecom users have access to information services. *See supra* pp. 24-25.

The FCC acquired no regulatory authority by adopting the Board's recommendation that "support for advanced services" should become a § 254(b) principle. *See Order* ¶¶ 45, 65 (JA). A principle added by the FCC under § 254(b)(7) is further from a congressional delegation of authority than those listed in § 254(b)(1)-(6). Regardless, an FCC-added principle can confer no regulatory authority, insofar as the FCC "may not confer power upon itself." *Louisiana PSC*, 476 U.S. at 374.

The FCC appeared to rely most on its interpretation of the phrase "*facilities* and *services* for which the support is intended" that it excerpted from § 254(e). *Order* ¶ 64 (JA) (emphasis in original). The FCC first read the excerpt as referring to facilities and services as "distinct items" for which USF support may be used. *Id.* From that single reference, the FCC inferred that Congress authorized it to "encourage" the types of facilities that will best achieve the § 254(b) principles. *Order* ¶ 64 (JA). Even if the FCC's

interpretation of the phrase "facilities and services" were plausible, a delegation of authority to encourage broadband deployment is not a delegation of authority to regulate broadband services.

Obviously, if it intended that "facilities" be a distinct item for USF support from "services," Congress would have used the disjunctive word "or" and the phrase "facilities or services for which support is intended."[22] More important, the phrase relied on by the FCC is excerpted from a sentence that limits the use of USF support by ETCs; it bestows no regulatory authority on the FCC. *See* 47 U.S.C. § 254(e). It is not a jurisdiction-conferring provision.

Finally, the FCC's search for jurisdiction took it outside the confines of the Act to § 706(b) of the 1996 Act, *see Order* ¶¶ 66-70 (JA), where it found an "alternative basis" for authority to fund the deployment of broadband networks. *Id.* ¶ 73 (JA). There, Congress expressly delegated authority to the FCC to take immediate action, if necessary, to accelerate the deployment of

[22] *See United States v. O'Driscoll,* 761 F.2d 589, 597 (10th Cir. 1985) ("When the term 'or' is used, it is presumed to be used in the disjunctive sense unless the legislative intent is clearly contrary"). Congress used the conjunctive "and" in the phrase "facilities and services." *See Qwest II*, 398 F.3d at 1236 (use of conjunctive "and" indicates concurrent duties).

broadband telecom capability – not by an infusion of USF support – but by removing barriers to investment and by promoting telecom competition. *See supra* p. 4. But § 706(b) conferred no Title II regulatory authority over the services to be provided by the deployed broadband telecom capability. The FCC does not claim otherwise. *See Order* ¶¶ 66-73 (JA).

As the FCC once acknowledged, § 706 grants it "no regulatory authority." *Comcast,* 600 F.3d at 659. Now that it is grasping for jurisdictional straws, the FCC interprets § 706(b) as overriding the § 230 policy that any information service that provides Internet access should remain unregulated. *See supra* p. 3. The FCC's theory is belied by the manner in which Congress enacted §§ 230 and 706.

Congress expressly directed that § 230 be inserted into Title II, and thus subject to the FCC's § 201(b) rulemaking authority. *See Iowa Utilities Bd.*, 525 U.S. at 377-78. In contrast, it relegated § 706 to the notes accompanying the new technologies provisions of Title I. *See* Jt. Br. at 14. If it intended § 706 as a grant of Title II regulatory authority, Congress would have included it somewhere in the Act, most obviously in Title II.

It defies common sense to think that Congress classified Internet access service as an unregulated information service under § 230 and, at the same time, empowered the FCC to decide whether to regulate that service under Title II by such a "subtle device" as authorizing the agency to incentivize the deployment of advanced telecom capability. *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1984). A responsible Congress simply would not implicitly delegate such power to the FCC. *See ACLU*, 823 F.2d at 1567 n.32.

It is implausible that Congress would authorize the FCC to decide whether to "regulate an industry constituting a significant portion of the American economy," *Brown & Williamson,* 529 U.S. at 159, by referring conjunctively to "facilities and services" in a non-jurisdiction conferring provision of § 254. The textual commitment of authority to the FCC to regulate broadband Internet access services would have to be clear, because Congress does not "hide elephants in mouseholes" by altering "the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman*, 531 U.S. at 909-10.

The textual commitment of authority necessary for the FCC to

regulate broadband can be nothing less than an express delegation of authority in Title II. *See Comcast*, 600 F.3d at 654 (Titles II, III and VI "do the delegating" of express regulatory authority to the FCC). The FCC could not possibly find an express delegation of Title II authority to regulate information services that Congress has exempted from Title II regulation.

The Court must conclude that the FCC simply used its Title II authority to provide USF support to designated telecom services as a "jurisdictional bootstrap" to regulate information services. *Columbia Gas*, 404 F.3d at 462. That was improper. "Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'" *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990) (quoting *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)). The Court should categorically reject the FCC's implicit claim that "it possesses *plenary* authority to act" in the area of universal service, "simply because Congress has endowed it with *some* authority to act in that area." *Railway Labor Executives' Ass'n v. National Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994)

(*en banc*) (emphasis in original).

II. THE USF PORTION OF THE *ORDER* MUST BE VACATED

Actions taken by the FCC in excess of its statutory jurisdiction or authority must be vacated. *See Comcast*, 600 F.3d at 661; *American Library*, 406 F.3d at 708; *MPPA*, 309 F.3d at 807. Thus, the portions of §§ IV, VI, VII and VIII of the *Order* that direct USF support to, and impose regulatory requirements on, broadband, as well as the FCC's implementing rules, must be vacated.[23]

An agency's order or regulation is severable into valid and invalid parts only "if the severed parts 'operate entirely independently of one another,' and the circumstances indicate the agency would have adopted the regulation even without the faulty provision." *Arizona PSC v. EPA*, 562 F.3d 1116, 1122 (10th Cir. 2009) (quoting *Davis County Solid Waste Management v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997)). All of the FCC's USF reform measures were predicated on the use of support for broadband in

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[23] *See Order* ¶ 48 (performance goals) (JA), ¶¶ 86-114 (public interest obligations) (JA), ¶¶ 115-538, 545-567 (providing USF support to broadband), ¶¶ 573-606, 616-629 (reporting requirements and enforcement) (JA).

violation of § 254(e). Moreover, since the invalid regulations constitute the bulk of the USF portions of the *Order*, it is inconceivable that the FCC would have adopted any change to its USF regulatory regime absent its *ultra vires* actions. Consequently, the Court should vacate the USF portion of the *Order* in its entirety.

III. THE EXCLUSIVE RESERVATION OF CAF II SUPPORT FOR ILECS WAS ARBITRARY AND CAPRICIOUS

If it reaches *Chevron* step two, the Court must determine whether the FCC actions were based on a permissible construction of the USF provisions of §§ 214(e) and 254. *See* 467 U.S. at 843. However, the FCC's authority to act based on its construction of those provisions was circumscribed by Congress, which mandated that the FCC's USF decision-making be based on the seven principles listed in § 254(b)(1)-(7). *See, e.g., Qwest II,* 398 F.3d at 1234. Hence, the § 254(b) principles are factors to be considered when the Court determines whether the FCC "relied on factors which Congress has not intended it to consider" or if it "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs.,* 463 U.S. at 43.

Although it must base its USF policies on the § 254(b)

principles, the FCC may "balance the principles against one another when they conflict, but may not depart from them altogether to achieve some other goal." *Qwest I*, 258 F.3d at 1200. It "must demonstrate that its balancing calculus [took] into account the full range of principles Congress dictated to guide [it] in its actions." *Qwest II,* 398 F.3d at 1234.

Alongside the universal service mandate of the 1996 Act is the directive that local telecom markets be opened to competition. *See Alenco*, 201 F.3d at 615. The FCC "must see to it that *both* universal service and local competition are realized." *Id.* (emphasis in original). With that in mind, we turn to the FCC's decision to make its CAF II support program the virtual preserve of the big ILEC price-cap carriers. *See* Jt. Br. at 5 n.2.

The FCC decided that, in exchange for making a state-level broadband deployment commitment, the price-cap ILEC would be the "presumptive recipient" of USF support for the five-year CAF II period. *Order* ¶ 171 (JA). This reservation of $1.8 billion in annual support, *see id.* ¶ 156 (JA), is anticompetitive on its face and flouts the FCC's longstanding core principle of competitive neutrality. *See* Jt. Br. at 18.

Effectively conceding that offering CAF II support exclusively to ILECs implicates competitive neutrality, *see Order* ¶ 176 (JA), the FCC contended that the principle works only to prevent it from "treating competitors differently in 'unfair' ways." *Id.* (quoting *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1104 (D.C. Cir. 2009)). But if fairness is the new test, the FCC did not explain how it was fair to disadvantage CETCs by denying them access to CAF II support, and reserving this support for large ILECs against whom CETCs must compete.

The FCC claimed that competitive neutrality was trumped by the § 254(b)(2) and (b)(3) principles that consumers have access to comparable "advanced telecommunications and information services." *See id.* ¶ 177 (JA). However, the (b)(2) and (b)(3) principles only apply when the FCC exercises its authority under § 254(c)(2) and (h)(2) to provide public institutional telecom users access to "advanced telecommunications and information services." *See supra* p. 26. Moreover, the FCC cannot consider access to information services that are ineligible for USF support, when deciding how to disburse USF support to common carrier ETCs. *See supra* p. 19. By relying on factors which Congress did not

intend it to consider, the FCC acted arbitrarily and capriciously. *See Motor Vehicle Mfrs.*, 463 U.S. at 43.

The FCC entirely failed to consider that making CAF II support available only to ILECs would not aid in opening local telecom markets to effective competition, which was the principal goal of the 1996 Act. *See Time Warner*, 507 F.3d at 212. Indeed, "Title II was expanded to include additional requirements intended to break up the dominance of a small number of LECs over the telecommunications market." *Id.* Abandoning competitive neutrality in favor of making CAF II support accessible only to the largest LECs will serve only to preserve and advance their dominance in the local telecom market. The FCC's failure to consider the principal goal of the 1996 Act renders its decision to make USF support available only to ILECs arbitrary and capricious. *See Motor Vehicle Mfrs.*, 463 U.S. at 43.

IV. THE REPEAL OF THE IDENTICAL SUPPORT RULE AND THE ADOPTION OF A SINGLE-WINNER REVERSE AUCTION EXCEEDED THE FCC'S AUTHORITY AND WERE OTHERWISE ARBITRARY AND CAPRICIOUS

A. The FCC Failed to Provide a Reasoned Explanation for Repealing Its Rule

Abandoning its practice of providing USF support to multiple

CETCs in an area, the FCC decided to disburse Mobility I support to only one CETC per area, the winning bidder in a reverse auction. *See* Jt. Br. at 30. Having opted to distribute support to CETCs by a single-winner auction, the FCC repealed its "identical support rule" based on its finding that the "rule is no longer necessary or in the public interest." *Id.* at 31. Considering the FCC's long-standing antipathy for its rule,[24] the Court should subject its repeal to particularly close scrutiny.

When it repeals a rule, the FCC must provide a reasoned explanation for its rule change. *Fox Television*, 556 U.S. at 502. A detailed justification for a rule change is necessary when, for example, the FCC's "new policy rests upon factual findings that contradict those which underlay its prior policy." *Id.* at 515. The repeal of the identical support rule warranted such a justification, because the rule was prescribed to meet the mandate that "sufficient and competitively-neutral funding" be provided to enable

[24] An agency may not "simply disregard rules that are still on the books." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Nevertheless, the FCC disregarded the identical support rule since 2008, when it imposed an interim cap on support to CETCs, thereby ensuring that they would not receive identical support to that provided ILECs. *See High-Cost Universal Service Support*, 23 F.C.C.R. 8834, 8837-40 (2008).

all customers to receive basic telecom services. *Alenco*, 201 F.3d at 620.

The FCC found that to ensure competitive neutrality, a CETC that "wins a high-cost customer from an [ILEC] should be entitled to the same amount of support that the incumbent would have received for the line." *Federal-State Joint Bd. on Universal Service*, 14 F.C.C.R. 20432, 20480 (1999). The FCC stressed that unequal USF funding "could discourage competitive entry in high-cost areas and stifle a competitor's ability to provide service at rates competitive to those of the incumbent." *Id.*

When it repealed the identical support rule, the FCC ignored its prior policy choice of ensuring competitively-neutral funding. *See Order* ¶¶ 502-511 (JA). Instead, the FCC found that the rule did not "effectively serve" its goal of providing "appropriate levels of support for the efficient deployment of mobile services in areas that do not support a private business case for mobile voice and broadband." *Id.* ¶¶ 502, 511 (JA). The FCC did not explain how its goal was based on any of the § 254(b) principles insofar as broadband services are ineligible for USF support.

The FCC was obliged to provide a detailed explanation of how

its "balancing calculus" of the statutory principles led it to replace the rule with the Mobility I auction. The FCC's calculus is hardly self-evident, considering that no USF support will be provided to some areas, *see Order* ¶ 509 (JA), and that the auction would favor larger CETCs, *see id.* ¶ 326 (JA), while distributing USF support "to at most one bidder in an area." *Id.* ¶ 328 (JA). Because the FCC did not provide the requisite explanation, the Court should vacate the repeal of the rule and remand the matter to the FCC. *See Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1, 9 (D.C. Cir. 2000).

B. The Adoption of the Mobility I Auction Exceeded the FCC's Authority

The 1996 Act established a dual, federal-state telecom regulatory scheme that was dubbed "cooperative federalism." *See BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439, 448 (4th Cir. 2007). With respect to universal service, the 1996 Act "plainly contemplates a partnership between federal and state governments," *Qwest I*, 258 F.3d at 1203, under which "the States, subject to boundaries set by Congress and federal regulators, are called upon to apply their expertise and judgment and have the

freedom to do so." *BellSouth*, 494 F.3d at 448.

Within the boundary set by § 214(e)(2), States are free to designate at least one ETC for a service area. *See* Jt. Br. at 11-12. Service areas are by definition established by the States, *see* 47 U.S.C. § 214(e)(5), except that an RTC's service area is defined by its "study area" and cannot be redefined by the FCC without State concurrence after considering the Board's recommendation. *See* Jt. Br. at 12. Thus, States have the "primary responsibility for deciding which carriers qualify as ETCs to be eligible" for USF support, *WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262, 1271 (10th Cir. 2007), and the "primary jurisdiction" for setting the service areas for the ETCs that they designate. *Order* ¶¶ 390 n.662, 1090 & n.2214 (JA).

By virtue of the FCC's decision "not to subsidize competition," *id.* ¶ 319 (JA), and its adoption of a single-winner Mobility I auction, States were deprived of their § 214(e)(2) authority to designate more than one CETC in a given area. By unilaterally deciding that it would define the areas throughout which CETCs would provide USF-supported services based on census blocks, *see Order* ¶¶ 332, 346 (JA), the FCC preempted the primary

jurisdiction of the States to establish such areas. *See id.* ¶ 1090 (JA).

The FCC could not articulate a cogent legal theory justifying its preemption of State authority, as demonstrated by the following:

> As Verizon notes, the statute's goal is to expand availability of service to users. It is certainly true that [§] 214(e) allows the states to designate more than one provider as an [ETC] in any given area. But nothing in the statute compels the states … to do so; rather the states … must determine whether that is in the public interest. Likewise, nothing in the statute compels that every party eligible for support actually receive it.[25]

Contrary to Verizon's view, the recognized goal of the 1996 Act was to promote "local competition while preserving universal service." *AT&T, Inc. v. United States*, 629 F.3d 505, 508 (5th Cir. 2011). More to the point, § 214(e)(2) conferred on the States the authority "to designate more than one … ETC in a given area" and to "determine whether that is in the public interest." That conferral of authority necessarily deprived the FCC of authority to limit Mobility I support to one CETC in any FCC-designated, census block-based service area.

The 1996 Act did not remove the power to designate ETCs and

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[25] *Order* ¶ 318 (JA) (footnotes omitted).

establish USF service areas from the States' "exclusive control" under § 2(b) of Act, 47 U.S.C. § 152(b). *Iowa Utilities Bd.*, 525 U.S. at 381 n.8. Because § 2(b) constitutes "a congressional denial of power to the FCC," *Louisiana PSC*, 476 U.S. at 1901-02, the FCC was without jurisdiction to preempt State authority by the use of the Mobility I auction. *See WWC Holding*, 488 F.3d at 1270-71 (the § 2(b) jurisdictional limitation and *Louisiana PSC* survived the 1996 Act to preclude federal preemption of State authority over wireless CETC designations). Because the FCC's actions exceeded its jurisdiction, the Court should vacate the *Order* insofar as it established the single-winner Mobility I reverse auction. *See, e.g., American Library*, 406 F.3d at 708.

VI. THE $500 MILLION ANNUAL MOBILITY II BUDGET WAS ARBITRARILY AND CAPRICIOUSLY SET

The overarching policy goal of § 254 is the "preservation and advancement of universal service." 47 U.S.C. § 254(b). Thus, the FCC must establish "specific, predictable, and sufficient" support mechanisms to "preserve and advance universal service." *Id.* § 254(b)(5), (d). To provide "sufficient" support, the FCC must ensure that "there is sufficient and competitively-neutral funding to enable

all customers to receive basic telecommunications services." *Alenco*, 201 F.3d at 620. The FCC's rulemaking obligation in this regard was spelled out by the *Qwest II* Court:

> [T]he FCC must … craft a support mechanism taking into account all the factors that Congress identified in drafting the Act and its statutory obligation to preserve *and* advance universal service. No less important, the FCC must fully support its final decision on the basis of the record before it.[26]

The FCC did not meet the *Qwest II* standard when it set the annual budget for Mobility II support for CETCs at $500 million, compared to a $4 billion annual budget for ILECs. *Order* ¶ 126 (JA); *see* Jt. Br. at 26, 30. The FCC concluded that the Mobility II budget would "be sufficient to sustain and expand the availability of mobile broadband." *Order* ¶ 495 (JA). But it failed to supply a nexus between any record findings and its conclusion.

The FCC found that wireless CETCs (other than Verizon and Sprint) received $921 million in high-cost support in 2010, of which $579 million flowed to "carriers other than the four nationwide providers." *Id.* Assuming that AT&T and T-Mobile would forego USF support, and that the four national carriers would not reduce

[26] 398 F.3d at 1237 (emphasis in original).

their "coverage footprints" in the absence of support, the FCC leaped to the conclusion that support to regional and small wireless CETCs could be reduced from the 2010 level of $579 million to $500 million and still be sufficient. *See Order* ¶ 495 (JA).

The FCC's critical assumptions have no basis in the record. The FCC did not cite to any record representation by Verizon, Sprint, AT&T or T-Mobile that it would maintain current coverage if its USF support is phased out. Neither AT&T nor T-Mobile made a record commitment that it would forego Mobility II support going forward.[27] The FCC made no findings supporting its conclusions that $579 million was sufficient support for regional and small wireless CETCs in 2010 and that $500 million in annual support would be sufficient for them in the future. Finally, no findings supported the FCC's conclusion that providing 800 percent more USF funding to large ILECs than to wireless CETCs would constitute competitively-neutral funding.

Contrary to *Qwest II*, the FCC did not attempt to demonstrate

[27] AT&T received $289 million in USF support in 2010. *Order* ¶ 501 (JA). If either AT&T or T-Mobile were to receive any portion of the $500 million budgeted for Mobility II, support available to regional and small carriers would be reduced far below the 2010 level.

that it considered the § 254(b) principles when it set the Mobility II budget at $500 million. Nor did it explain how a 46 percent reduction in 2010 support to wireless CETCs would be sufficient from the consumers' perspective to preserve, much less advance, universal service.

The FCC provided neither assurance that it considered all the § 254(b) principles nor a "discernible path" from its findings to its conclusion that a $500 million annual budget would meet the *Alenco* sufficiency standard. *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 241 (D.C. Cir. 2008). Because the FCC's conclusory explanation is insufficient to enable appellate review of the sufficiency of the Mobility II support mechanism, the matter must be remanded to the FCC for further proceedings. *See Qwest II*, 398 F.3d at 1239; *Qwest I*, 258 F.3d at 1205.

VII. THE FCC DID NOT RESPOND TO COMMENTS CALLING FOR A SEPARATE MOBILITY FUND FOR INSULAR AREAS

The APA's notice-and-comment procedures "obligate the FCC to respond to all significant comments, for 'the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.'" *ACLU*, 823 F.2d at 1581 (quoting

HBO, Inc. v. FCC, 567 F.2d 9, 35-36 (D.C. Cir. 1977)). Moreover, the FCC "must respond in a reasoned manner" to significant comments, *Covad Communications Co. v. FCC*, 450 F.3d 528, 550 (D.C. Cir. 2006), which "cast doubt on the reasonableness of a position taken by the agency." *Arizona PSC*, 562 F.3d at 1128 (quoting *National Mining Ass'n v. Mine Safety Health Admin.*, 116 F.3d 520, 549 (D.C. Cir. 1997)).

The FCC construes the § 254(b)(3) principle to require that consumers in "rural, insular and high cost areas" have access to telecom services that are "reasonably comparable" in terms of price and quality to "those services provided in urban areas." *High-Cost Universal Service Support*, 25 F.C.C.R. 4136, 4148 (2010) ("*Insular Order*"). It recognizes that § 254(b)(3) affords it discretion to establish a separate support mechanism for consumers in insular areas. *See id.* And the FCC evidently determined that the question of whether it should reserve a defined amount of funds in the CAF for insular areas was a significant issue for it sought comment on the issue. *See* Jt. Br. at 31.

The FCC received comments from wireless CETCs in insular areas urging it to establish a separate insular component of the

Mobility Fund.[28] In contrast to its 25-page disposition of a request for a support mechanism for non-rural insular ILECs in Puerto Rico, *see Insular Order*, 25 F.C.C.R. at 4137-64, and its establishment of a separate Tribal Mobility I fund, *see Order* ¶¶ 481-88 (JA), the FCC relegated its one-sentence response to the wireless CETCs' comments to the margin of the *Order*. *See id.* ¶ 481 n.790 (JA). The FCC declined to create a Mobility Fund for insular areas, because "these areas generally do not face the same level of deployment challenges as Tribal areas." *Id.* That unexplained statement was unresponsive to the comments the FCC invited and received.

For the FCC's decision making to be rational, it must be found to have responded to the "significant points" raised in comments. *Allied Local and Regional Manufacturers Caucus v. EPA*, 215 F.3d 61, 80 (D.C. Cir. 2000). The wireless CETCs made significant points that deserved a reasoned response. The FCC's failure to provide one demonstrates that its "decision was not based on a

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[28] *See, e.g.*, Comments of DOCOMO, PR Wireless, Choice, and BlueSky, WC Docket No. 10-90, at 10-11 (Apr. 18, 2011) (JA); Comments of PR Wireless, WT Docket No. 10-208, at 1-5 (Dec. 16, 2010) (JA).

consideration of the relevant factors." *Covad*, 689 F.3d at 784. The *Order* should be remanded to the FCC to respond to the comments. *See Louisiana Federal Land Bank Ass'n v. Farm Credit Admin.*, 336 F.3d 1075, 1085 (D.C. Cir. 2003).

CONCLUSION

We ask the Court to vacate and remand §§ I-IX of the *Order*.

Respectfully submitted,

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October 23, 2012

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of the Amended First Briefing Order because it contains 9,199 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Bookman Old Style font.

3. No privacy redactions were required to be made to this brief.

4. This brief was scanned for viruses using Trend Micro Office Scan, version 10.0 Service Pack (most recently updated on October 23, 2012) and determined to be free of viruses.

/s/ Russell D. Lukas
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CERTIFICATION OF SERVICE

I, Russell D. Lukas, certify that on this 23rd day of October 2012, the foregoing Uncited Wireless Carrier Universal Service Fund Principal Brief was filed using the Court's CM/ECF system. I further certify that the brief was served on all parties via the Court's ECF system.

/s/ Russell D. Lukas
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