BRIEF FOR RESPONDENTS

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

NO. 12-1124

THE CONFERENCE GROUP, LLC,

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

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

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties and intervenors appearing before the Federal Commission and in this Court are listed in the Brief for The Conference Group.

B. Ruling Under Review

Request for Review by InterCall, Inc. of Decision of Universal Service Administrator, Order, 23 FCC Rcd 10731 (2008) ("*Order*") (J.A. 195), *recon. denied*, 27 FCC Rcd 898 (2012) ("*Reconsideration Order*") (J.A. 313).

C. Related Cases

The order on review has not been before this Court previously. Counsel are not aware of any related cases pending before this Court or any other Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ADMINISTRATIVE DECISIONS

STATUTES AND REGULATIONS

** Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

Act	Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*
APA	Administrative Procedure Act
Cisco	Cisco Systems, Inc.
Commission	Federal Communications Commission
Communications Act	Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*
FCC	Federal Communications Commission
IAN	International Audiotext Network
USAC	Universal Service Administrative Company
USF	Universal Service Fund

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUES PRESENTED

InterCall, Inc. provides a telephone conference calling service or "audio bridging service" that, among other functions, allows multiple callers to participate in the same telephone call. In an order issued in an adjudicative proceeding arising out of an audit of InterCall, the Federal Communications Commission ("FCC" or "Commission") concluded that InterCall's audio bridging services are "telecommunications" and thus InterCall must contribute directly to the Universal Service Fund ("USF"). The Commission also made clear that the precedential effect of its decision requires similarly

situated audio bridging companies to contribute directly to the USF. *Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, Order, 23 FCC Rcd 10731 (2008) ("*Order*") (J.A. 195), *recon. denied*, 27 FCC Rcd 898 (2012) ("*Reconsideration Order*") (J.A. 313). The specific subject of the FCC's adjudicatory decision, InterCall, does not seek judicial review of the *Order*. Rather, The Conference Group, a self-described audio conference service provider, has filed a petition for review. The issues on review are as follows:

1. Whether the Commission properly determined that its orders were issued in an adjudication and therefore were not subject to the notice-and-comment procedures for rulemakings under section 4 of the Administrative Procedure Act ("APA")?

2. Whether the Commission acted within its discretion in determining that Intercall's audio bridging services are telecommunications and therefore are subject to USF contribution obligations?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the statutory addendum to this Brief.

COUNTERSTATEMENT

A. Background

1. Statutory and Regulatory Background

FCC Powers and Procedures. The Communications Act of 1934, as amended ("Communications Act" or "Act"), 47 U.S.C. §§ 151, *et seq*., establishes a framework for the regulation of interstate telecommunications services. Congress entrusted the Commission with "the authority to 'execute and enforce' the Communications Act," *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (quoting 47 U.S.C. § 151) ("*Brand X*"), and gave the FCC various regulatory tools to perform that responsibility.[1] The Commission, for example, has power to "prescribe such rules and regulations as may be necessary in the public interest." 47 U.S.C. § 201(b). The FCC also has separate authority to conduct adjudications and to issue adjudicatory orders. *E.g.*, *Central Texas Tel. Co-op., Inc. v. FCC*, 402 F.3d 205, 210 (D.C. Cir. 2005).

Section 4(j) of the Communications Act gives the FCC broad authority to "conduct its proceedings in such manner as will best conduce

[1] *See*, *e.g.*, 47 U.S.C. § 154(i) (authorizing the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions").

to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j). The Supreme Court has characterized section 4(j) as a "delegation of broad procedural authority," *FCC v. Schreiber*, 381 U.S. 279, 289 (1965), and has specifically recognized the Commission's "substantial discretion as to whether to proceed by rulemaking or adjudication," *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 808 n.29 (1978) ("*NCCB*").

Like all agencies, the FCC must adhere to the procedural requirements of the APA. Section 4 of the APA requires an agency to follow certain procedures before it adopts a "substantive" or "legislative" rule. 5 U.S.C. § 553. For example, the agency must publish a "[g]eneral notice of proposed rule making" in the Federal Register, 5 U.S.C. § 553(b), and "[must] give interested persons an opportunity to participate in the rule making through submission[s]," *id.*, § 553(c).

Sections 5, 7, and 8 of the APA establish different procedural requirements for formal trial-type adjudications generally "required by statute to be determined on the record." 5 U.S.C. § 554(a). The APA requires that parties to formal adjudications be given notice of "the matters of fact and law asserted," *id*., § 554(b)(3), an opportunity for "the submission and consideration of facts [and] arguments," *id.*, § 554(c)(1),

and an opportunity to submit "proposed findings and conclusions" or "exceptions," *id.*, § 557(c)(1) & (2).

In contrast to substantive rulemakings and formal adjudications, the APA contains no specific notice-and-comment requirements governing informal agency adjudication. *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 337 (D.C. Cir. 1989).

Telecommunications and USF Contribution Obligations.

"Telecommunications" is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(50). A "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). In contrast with a telecommunications service, an "information service" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a

telecommunications service." 47 U.S.C. § 153(24). "Telecommunications services" and "information services" are "two mutually exclusive categories of service." *Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, Internet Over Cable Declaratory Ruling, 17 FCC Rcd 4798, 4823 (¶ 41) (2002) ("*Cable Modem Order*"), *aff'd in part & vacated in part sub nom. Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev'd*, *Brand X*, 545 U.S. 967.

The Commission interprets the telecommunications service/information service dichotomy in the Communications Act in essence as codifying the regulatory distinction that the agency had established in its 1980 *Computer II Order*[2] between "basic" common carrier communications services and "enhanced services."[3] The Commission in the *Computer II Order* described a basic service as a "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer-supplied information."

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[2] *Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Second Computer Inquiry*), Final Decision, 77 FCC 2d 384 (1980) ("*Computer II Order*"), *aff'd sub nom. CCIA v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[3] *See AT&T Co. v. FCC*, 454 F.3d 329, 333 (D.C. Cir. 2006); *see also Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11830, 11516 (¶ 33) (1998) ("[T]he differently-worded definitions of 'information services' and 'enhanced services' can and should be interpreted to extend to the same functions.") (citation and internal quotation marks omitted).

Computer II Order, 77 FCC 2d at 420 (¶ 96). In contrast, an enhanced service "combines basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." *Id*. at 387 (¶ 5). *See* 47 C.F.R. § 64.702(a).

Even when a service fit within the "literal" definition of enhanced services, however, the FCC under the *Computer II* regime classified that service as basic if the object of the application was to facilitate the provision of the basic service without altering its fundamental character. *North Am. Telecomms. Ass'n*, Memorandum Opinion and Order, 101 FCC 2d 349, 359-60 (¶¶ 24-28) (1985) ("*NATA Centrex Order*"), *recon. denied*, 3 FCC Rcd 4385 (1988). For example, if the purpose of an enhanced function (such as a computer processing function) was "simply to facilitate the routing" of a basic telephone call so that "each call is no more than the creation of transmission channel chosen by the customer," the FCC deemed the enhanced function to be an "adjunct to a basic service" and it did not classify the service itself as an "enhanced service." *Id.* at 362 (¶ 31). Moreover, under the *Computer II* framework, the FCC classified

"both basic and enhanced services by reference to how the consumer perceives the service being offered." *Brand X*, 545 U.S. at 976.

The classification of a service as telecommunications or as a telecommunications service has important regulatory consequences. Section 254(d) requires "[e]very telecommunications carrier that provides interstate telecommunications services" to contribute to the federal universal service program — a program that helps to support the provision of certain communications services to schools, libraries, and persons in rural and other high-cost service areas. 47 U.S.C. § 254(d). A "telecommunications carrier" is, subject to exceptions inapplicable here, defined as any "provider of telecommunications services," *id.*, § 153(51), and is subject to regulation as a common carrier under Title II of the Communications Act, 47 U.S.C. § 201 et seq. *See Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926-927 (D.C. Cir. 1999).

Section 254(d) also authorizes the FCC to impose a universal service contribution requirement upon "[a]ny other provider of interstate telecommunications" — *i.e.*, those telecommunications providers that do not qualify as "telecommunications carriers" — " if the public interest so requires." 47 U.S.C. § 254(d). Pursuant to that authority, the Commission generally has imposed that requirement upon "providers of interstate

telecommunications for a fee on a non-common carrier basis." 47 C.F.R. § 54.706(a). Thus, with exceptions not applicable to this case, "any entity that provides interstate telecommunications to users . . . for a fee" must contribute to the USF, whether it provides such telecommunications on a common carrier basis or not. *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9178 (¶ 786) (1997) ("*Universal Service First Report and Order*"), *aff'd in part and rev'd in part, Texas Office of Public Utility Council v. FCC*, 183 F.3d 393 (5th Cir. 1999). Put differently, an entity can be required to contribute to USF as long as it provides telecommunications, regardless of whether it provides a telecommunications *service*.

The Commission requires telecommunications providers to contribute to the USF on the basis of the revenues they receive from end users of their interstate telecommunications services. *See* 47 C.F.R. § 54.706(b). The Commission has established a specific methodology for computing those USF contributions, and has adopted forms that telecommunications providers must file to show their compliance with the USF requirements. *Changes to the Board of Directors of the National Exchange Carrier Ass'n, Inc. Federal-State Joint Bd. on Universal Service*, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400 (1997) ("*Second Order on*

Reconsideration"). *See Reconsideration Order*, 27 FCC Rcd at 899 (¶ 4) (J.A. 313-14).[4]

The Commission's staff is authorized to periodically revise these forms and their associated instructions to reflect Commission changes and clarifications in the contribution obligations. *Order*, 23 FCC Rcd at 10733 (¶ 3) (J.A. 195); *Second Order on Reconsideration*, 12 FCC Rcd at 18442 (¶ 81). In 2002, the Commission's staff revised FCC Form 499-A and 499-Q to list "toll teleconferencing" as one of the illustrative examples of telecommunications that are subject to direct USF contributions. *Order*, 23 FCC Rcd at 10732 (¶ 4) (J.A. 196). *See, e.g.*, Form 499-A Instructions at 20.

The Commission has designated the Universal Service Administrative Company ("USAC") as administrator of the FCC's universal service programs. 47 C.F.R. § 54.701. USAC is "solely responsible" for the billing and collection process, *Second Order on Reconsideration*, 12 FCC Rcd at 18424 (¶ 42), and is authorized to, *inter alia*, conduct audits of carriers concerning their universal service contributions. *See* 47 C.F.R. § 54.707. Aggrieved persons can appeal directly to the Commission any adverse

[4] Contributing providers report their revenues for direct USF contribution purposes using FCC Form 499-A (filed annually) and FCC Form 499-Q (filed quarterly). *See Reconsideration Order*, 27 FCC Rcd at 899, n.11 (J.A. 314, 317).

decisions of USAC "that raise novel questions of fact, law or policy." 47 C.F.R. § 54.722. The FCC conducts *de novo* review of those direct appeals. 47 C.F.R. § 54.723(b).

2. InterCall's Audio Bridging Service

InterCall's audio bridging service is a form of telephone "conferencing service that allows multiple end users to communicate" with each other. InterCall Request for Review (Feb. 1, 2008) at 4 (J.A. 17). InterCall supplies the conference call participants selected by its customer with local or toll free telephone service that InterCall first obtains from one or more telecommunications vendors. *Id.* at 5 (J.A. 18). Like an ordinary telephone service, InterCall's conferencing service enables persons to communicate over telephone lines without change in the form or content of the information as sent or received. *See Order*, 23 FCC Rcd at 10734 (¶ 11) (J.A. 197). However, instead of the two-way communications of an ordinary telephone call, InterCall's conferencing service permits three or more persons to communicate simultaneously.

As InterCall described its own conference calling service, the service "employ[s] a device — an audio bridge — that links [the] multiple communications together." InterCall Request for Review (Feb. 1, 2008) at 4 (J.A. 17). In addition to this linking of multiple participants, Intercall's

audio bridge "performs conference validation functions" (for example, users must enter an identification code to participate in a call), and "collects billing and participant information for each bridged call." *Id.* InterCall also provides a number of conference control features, such as muting, recording, erasing and operator assistance, InterCall Request for Review at 4 (J.A. 17), but InterCall's customers can use the conferencing service "with or without accessing these features." *Order*, 23 FCC Rcd at 10735 (¶ 13) (J.A. 197).

B. This Proceeding

1. Proceedings Before USAC

In 2007, USAC initiated an audit of InterCall concerning its obligations to make USF contributions (and file the requisite forms) based on the company's provision of its audio bridging service. *See Order*, 23 FCC Rcd 10733 (¶ 5) (J.A. 197); Letter from USAC to Steven A. Augstino, Esq., counsel to InterCall, Inc. at 1 (Jan. 15, 2008) at 1 ("*USAC Decision*") (J.A. 6). InterCall's predecessor, ECI, Inc., had acknowledged that, in providing audio bridging service, it was acting as a telecommunications provider subject to the FCC Form 499 filing requirements and associated USF contribution obligations. *Id.* at 3 n.6 (J.A. 8). The company, however, stopped filing Form 499 after it was acquired by InterCall on December 1, 2004. *Id.* In front of USAC, InterCall argued that it was acting solely as a

provider of information services and therefore had no obligation to register as a USF contributor or make associated contributions. Letter from Brad E. Mutschelknaus, Counsel to InterCall, Inc. to David Capozzi, Acting General Counsel, USAC (June 5, 2007) (J.A. 50).

In a letter ruling dated January 15, 2008, USAC held that InterCall's audio bridging services are telecommunications, and thus InterCall was subject to USF obligations. *USAC Decision* at 1 (J.A. 6). USAC accordingly directed InterCall "to make all required Form 499 filings, including filing any and all previous FCC Form 499s that have come due since InterCall started providing interstate telecommunications." *Id.* at 3 (J.A. 8).

2. Proceedings Before The FCC

a. Proceedings Leading To The *Order*

After InterCall sought FCC review of the *USAC Decision*, the Commission in February 2008 invited interested persons to file comments and reply comments on InterCall's request. *Comment Sought on InterCall, Inc.'s Request for Review of a Decision by the Universal Service Administrative Company and Petition for Stay*, Public Notice, 23 FCC Rcd 1895 (2008) ("*Public Notice I*") (J.A. 170). In response to that invitation, eight parties filed comments and/or reply comments. *Order*, App. (J.A.

200). The comments were divided on the issue as to whether InterCall provides telecommunications that are subject to USF contributions. *See*, *e.g.*, Premier Global Services Comments at 5 (Feb. 25, 2008) (S.A. 005) (arguing that InterCall's services are information services); Verizon Opposition at 2-5 (Feb. 25, 2008) (J.A. 176-79) (arguing that InterCall's services are telecommunications); Qwest Communications International Comments (Feb. 25, 2008) at 2 (S.A. 011) (taking no position on whether InterCall's services are telecommunications or information services).

On June 30, 2008, the Commission released an order denying in part and granting in part InterCall's request for review. *Order*, 23 FCC Rcd 10731 (J.A. 195). The Commission held that the audio bridging services provided by InterCall are telecommunications and thus are subject to the direct USF contribution requirements set forth in section 254 of the Communications Act and the FCC's implementing rule. *Id.* at 10734-38 (¶¶ 10-22) (J.A. 197-99).[5] The Commission explained that InterCall's service fits the statutory definition of "telecommunications": "[it] allows

[5] The Commission explained that the record did not show whether InterCall provided telecommunications on a common carrier or private carrier basis. *Order*, 23 FCC Rcd at 10734 (¶ 7) (J.A. 196). The Commission concluded, however, that InterCall has a direct USF contribution obligation whether it is (a) a telecommunications carrier that provides telecommunications services on a common-carriage basis, or (b) a private carrier that offers telecommunications. *Id.*

end users to transmit a call (using telephone lines), to a point specified by the user (the conference bridge), without change in the form or content of the information as sent and received (voice transmission)." *Id.* at 10734-35 (¶ 11) (J.A. 197). *See* 47 U.S.C. § 153(50). The Commission explained that the purpose and function of InterCall's audio bridge "is simply to facilitate the routing of ordinary telephone calls," and thus does not affect the status of InterCall's offering as telecommunications. *Id.* at 10735 (¶ 11) (J.A. 197).

The Commission also found that the additional functions and features that InterCall provides in conjunction with its conferencing service do not transform its offering into an information service. *Id.* at 10735 (¶¶ 12-13) (J.A. 197). The Commission pointed out that all providers that charge a fee for their services must collect billing-related information, such as data regarding a customer's usage, in order to provide invoices to its customers. Thus, the collection and storage of such information could not transform the offering of telecommunications into an information service. *Id.* at 10735 (¶ 12) (J.A. 197).

The Commission further determined that the other features InterCall offers in conjunction with its conferencing service, such as muting, recording, erasing, and accessing operator services, "are not sufficiently

integrated into the offering to convert the offering into an information service." *Id.* at 10735 (¶ 13) (J.A. 197). These features, the Commission explained, "do not alter the fundamental character of InterCall's telecommunications offering." *Id.* In that regard, the agency noted that these "separate capabilities are part of a package in which the customer can still conduct its conference call with or without accessing these features." *Id.* at 10735 (¶ 13) (J.A. 197). The Commission therefore rejected Intercall's argument that these distinct enhanced features transformed the company's audio bridging service into an information service. *Id.*

Finally, the Commission made clear that under the *Order* all "similarly situated" stand-alone audio bridging providers must directly contribute to the USF. *Id.* at 10737 (¶ 21) (J.A. 198).[6] The Commission explained that this would "promote the public interest by establishing a level playing field and encouraging open competition among [stand-alone and integrated] providers of audio bridging services." *Id.* at 10739 (¶ 25) (J.A. 199).

With respect to the appropriate remedy, the Commission reversed USAC's ruling that InterCall must directly contribute to the USF for past

[6] Stand-alone audio bridging service providers are audio bridging service providers that purchase the underlying telecommunications transmission service from another entity. *See Order*, 23 FCC Rcd 10738 n.62 (J.A. 203).

periods. Observing that it had been unclear prior to the issuance of the adjudicatory *Order* whether stand-alone providers of audio bridging services were subject to direct USF contribution requirements, the Commission made an equitable determination that InterCall was obligated to contribute directly to the USF only on a prospective basis. *Id.* at 10738-39 (¶¶ 24-25) (J.A. 199). In doing so, the Commission made clear that this obligation likewise extended to similarly situated providers. *See id.*

b. Reconsideration Proceedings

InterCall did not seek reconsideration of the *Order*. On July 30, 2008, however, the FCC received petitions for reconsideration of the *Order* from (1) Global Conference Partners ("GCP") and (2) The Conference Group, A+ Conference Ltd, and Free Conferencing Corporation, filing jointly (collectively The Conference Group). Global Conference Partners Petition (July 30, 2008) (J.A. 204); The Conference Group Petition (July 30, 2008) (J.A. 251). The Commission invited public comment on the petitions, *see Public Notice*, DA 08-1875 (Aug. 8, 2008) ("*Public Notice II*") (S.A. 015), and nine persons submitted comments and/or reply comments. For example, Cisco Systems, Inc. ("Cisco") — the parent company of Cisco Webex, which has appeared as an intervenor in support of petitioner in this case — expressed "support[]" for the Commission's

"plainly correct" decision which, in its view, "simply confirms that services like Intercall's audio bridging that share the same fundamental character as traditional telecommunications are subject to the same regulatory obligations as traditional telecommunications." Cisco Comments at 1, 3 (Sept. 8, 2008) (S.A. 018, 020). Cisco told the FCC that it was "clear that the Commission did not *sub silentio* narrow or modify its long-standing tests" for "[d]istinguishing between an information service and a telecommunications service." *Id.* at 4 (S.A. 021).

After considering the petitions and comments, the Commission in January 2012 denied the reconsideration petitions and reaffirmed that InterCall's audio bridging service is telecommunications. *Reconsideration Order*, 27 FCC Rcd 898 (J.A. 313). The Commission explained that whether a service is classified as "information or telecommunications hinges on whether the transmission capability is 'sufficiently integrated' with the information service capabilities to make it reasonable to describe the two as a single, integrated offering." *Id.* at 903 (¶ 12) (J.A. 315) (quoting *Regulation of Prepaid Calling Card Services*, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290, 7296 (¶ 14) (2006) ("*Prepaid Calling Card Order*"), *aff'd in part & vacated in part*, *Qwest Services Corp. v. FCC*, 509 F.3d 531 (D.C. Cir. 2007)).

The Commission reiterated that a provider's addition of enhanced features to a teleconferencing service (such as functions enabling caller verification, collection of billing and participant information, operator assistance, and the ability to record, delete, play back, and mute) does not create a single integrated information service. *Id.* The FCC also clarified that the bundling of "whiteboarding[7] and other computer capabilities that may be used simultaneously with the voice teleconference [do not] transform the service into an information service" because those service "are not sufficiently integrated with audio conferencing services to be reasonably determined a single product." *Id.* at 904 (¶ 13) (J.A. 315). Indeed, the bridging service could be used "with or without" those features. *See id.* Consistent with the *Prepaid Calling Card Order*, the Commission held that a provider offering a bundled service containing both telecommunications and information services "may not treat the entire bundled service as an information service for purposes of USF contribution assessment, but must

[7] "Whiteboarding" permits conference call participants to interact with a screen on which a computer image (for example, of other callers) appears. *See generally Schools and Libraries Universal Service*, Report and Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 6562, 6577 n.118 (2009).

instead apportion its end user revenues between telecommunications and non-telecommunications sources." *Id.* at 904, 905 (¶¶ 13, 16) (J.A. 316).

The Commission rejected the argument that the agency, in ruling that InterCall offers telecommunications and thus must contribute to the USF — and that similarly situated audio bridging service providers likewise must do so — violated the APA by effectively issuing a new substantive rule without proper notice and comment. *Id.* at 904-05 (¶ 14) (J.A. 316). The Commission pointed out that it had not engaged in rulemaking, but rather had issued an adjudicatory ruling that "determined the regulatory status of the service in question based on existing rules and requirements and applicable precedent." *Id.* at 905 (¶ 15) (J.A. 316). The Commission explained further that the APA notice and comment requirements do not apply when the FCC issues an adjudicatory ruling. *Id.* at 904 (¶ 15) (J.A. 316).

SUMMARY OF ARGUMENT

1. The FCC indisputably had authority to determine that InterCall's audio bridging service is an offering of "telecommunications" regardless of whether USAC likewise had authority to rule on the regulatory classification of InterCall's service. Section 54.722(a) of the FCC's rules explicitly authorizes the Commission to review *de novo* USAC rulings involving novel questions of law. More fundamentally, Congress empowered the

Commission to administer and enforce the Communications Act, and the FCC's ruling in this case is well within that delegated authority.

2. The *Order* is an adjudicatory ruling not subject to the APA requirements for substantive rulemaking. The *Order* arose out of an audit of a specific company, InterCall, and the FCC based its ruling that InterCall's audio bridging service was telecommunications on the specific functions and features of InterCall's service. The FCC's observation that, like InterCall, similarly situated audio bridging service providers must contribute directly to the USF does not transform the FCC's adjudicatory ruling into a rulemaking order. Instead, it merely reflects the fundamental administrative law principle that an adjudicatory order has precedential effect on "similarly situated" entities.

The FCC's ruling in this case also has none of the characteristics of a substantive rule. The FCC's ruling neither creates any new rights or duties, nor does it amend any existing rule or depart from agency precedent. The FCC decided only that InterCall's audio bridging service is telecommunications as defined in the Communications Act, thus clarifying that InterCall and similarly situated providers are required by section 254 of the Communications Act and section 54.706 of the FCC's rules to contribute directly to the USF. That direct USF contribution requirement thus arises

from preexisting law (section 254 and section 54.706), and not from the *Order* on review.

Section 4(j) of the Communications Act gives the FCC broad discretion to determine the procedures it uses in its own proceedings. Because the procedures the FCC used in the proceeding below complied with all applicable constitutional and statutory requirements for informal adjudication, the Supreme Court's decision in *Vermont Yankee* requires the Court to defer to the agency's choice of procedures.

The FCC reasonably classified InterCall's audio bridging service as telecommunications. InterCall offers basic transmission that enables multiple callers to participate in the same telephone conference call. From the perspective of the user, InterCall's service essentially is an ordinary telephone call (although it may involve three or more participants). By linking the multiple callers together, the audio bridge facilitates the provision of telecommunications without altering its fundamental character.

Although InterCall also provides enhanced service capabilities (such as muting, recording, and operator assistance) in conjunction with its offering of telecommunications, the Commission reasonably determined that those capabilities are not sufficiently integrated with the conferencing service to so as to transform the entire offering into an "information service." Applying

the functional integration test established in prior FCC cases and applied by the Supreme Court in *Brand* X, the Commission reasonably took into account whether InterCall's customers conduct conference calls with or without using any of those enhanced capabilities. The agency found that, if customers use a service without any of the enhanced functionalities, the service is pure transmission and the telecommunications and information service elements are not functionally integrated. The standard applied by the Commission was fully consistent with the agency's precedent and sound policy. Communications providers should not be able to evade their USF contribution obligations (which hinge here on classification of an offering as "telecommunications") by the simple expedient of repackaging their offering to include add-ons that customers may not use in order to access the basic telecommunications function.

ARGUMENT

I. THE FCC'S *ORDER* IS REVIEWED UNDER DEFERENTIAL STANDARDS.

1. The Conference Group bears a heavy burden to establish that the *Order* on review is "arbitrary, capricious [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). Under this "highly deferential" standard, the court presumes the validity of agency action. *E.g.*, *Nat'l Tel. Co-op. Ass'n v. FCC*, 563 F.3d 536, 541 (D.C. Cir. 2009). The court must affirm unless the

Commission failed to consider relevant factors or made a clear error in judgment. *E.g.*, *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

2. Review of the Commission's interpretation of the Communications Act is governed by two-step analysis set forth in *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984). Under *Chevron*, the Court must determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 843 n.9, 842. If it has, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43.

When, as in this case, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843. *See Brand X*, 545 U.S. at 984-85 (concluding that the definition of "telecommunications service" in the Communications Act is ambiguous). In such circumstances, "*Chevron* requires a federal court to accept the agency's [reasonable] construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Brand X*, 545 U.S. at 980.

3. "Reviewing courts accord even greater deference to agency interpretations of agency rules than they do to agency interpretations of ambiguous statutory terms." *Capital Network Sys. v. FCC*, 28 F.3d 201, 206

(D.C. Cir. 1994). "The Commission's interpretation of its own rules is 'entitled to controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Star Wireless, LCC v. FCC*, 522 F.3d 469, 473 (D.C. Cir. 2008) (citation omitted); *accord Talk Am., Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011).

Relying upon *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), The Conference Group contends that the Court should not accord deference to the FCC's interpretation of its own rules because "the question of whether deference is due has," according to petitioner, "recently undergone a significant shift," Pet. Br. at 16. The Conference Group is mistaken. In *Christopher*, the Court expressly recognized that the "general rule" "calls for [judicial] deference to an agency's interpretation of its own ambiguous regulation." *Id*. at 2166. The Court declined to apply that general rule because it would have "impose[d] potentially massive liability on [the] respondent for conduct that occurred well before that interpretation was announced." *Id.* at 2167. The Court was concerned that giving deference to the agency's interpretation in such circumstances would "seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" *Id.* at 2167 (quoting *Gates & Fox Co.*

v. Occupational Safety and Health Review Comm'n, 790 F.2d 154, 156 (D.C. Cir. 1986)).

That is not the case here. To avoid any risk of the "unfair surprise" (*id.*) that concerned the Court in *Christopher*, the FCC carefully limited its adjudicatory ruling to prospective-only effect and underscored that InterCall and similarly situated providers had no USF contribution obligation for the time period before the Commission issued its ruling. *See Order*, 23 FCC Rcd at 10738 (¶ 24) (J.A. 199). Thus, there is no reason for the Court to depart from the "general rule" of deference to an agency's reasonable understanding of its own regulations.

II. THE FCC ACTED WITHIN ITS AUTHORITY AND USED PROPER PROCEDURES IN RULING THAT THE AUDIO BRIDGING SERVICES AT ISSUE ARE TELECOMMUNICATIONS.

As the expert agency entrusted by Congress to "execute and enforce" the Communications Act, 47 U.S.C. § 151, the FCC acted well within its authority in determining that InterCall's audio bridging service constitutes "telecommunications." And because it made that determination in the context of an informal adjudication (rather than a rulemaking) — a proceeding arising out of a specific audit of a specific company — it properly concluded that the APA's notice-and-comment requirements for rulemakings did not apply.

A. The FCC Had Clear Authority To Decide Whether InterCall's Audio Bridging Service Is Telecommunications.

The Conference Group appears to contend that the FCC, in reviewing USAC's ruling, lacked authority to determine that InterCall's audio bridging service is "telecommunications" and thus providers of such services must make direct contributions to the USF. Pet. Br. at 19-25. The rationale for that claim appears to be that (a) *USAC* allegedly exceeded its authority in determining whether InterCall's audio bridging service is "telecommunications" without first seeking the FCC's guidance, and thus (b) the *FCC*, in reviewing USAC's ruling, lacked authority itself to decide whether InterCall's service constitutes "telecommunications." *Id.* at 19. According to The Conference Group, the FCC had "only one option — [to] reverse USAC's determination . . . in total." *Id.* That argument rests on a fundamental misunderstanding of the FCC's authority under the Communications Act.

The Conference Group has invoked the Court's jurisdiction to review the FCC's *Order*, not the underlying USAC ruling (which in any event is not reviewable in court). Thus, the relevant issue is the FCC's authority in the *Order* to adjudicate whether InterCall's audio bridging service is "telecommunications," not whether USAC in the earlier ruling had exceeded

the authority delegated to it by the FCC.[8] Here, the FCC's rules do not support The Conference Group's position, and certainly do not do so with the clarity that would be necessary to overcome the deference due the Commission in interpreting its own regulations.

On the contrary, section 54.723(b) of the FCC's rules authorizes the Commission to "conduct [a] *de novo* review" of USAC rulings "that involve novel questions of fact, law or policy." 47 C.F.R. § 54.723(b). *See also* 47 C.F.R. § 54.722(a) ("requests for review [of USAC rulings] that raise novel questions of fact, law or policy shall be *considered* by the full Commission.") (emphasis added). In conducting that *de novo* review here, the Commission independently evaluated whether InterCall's audio bridging service is telecommunications. Nothing in sections 54.722 or 54.723 supports The

[8] In challenging the lawfulness of USAC's ruling, The Conference Group emphasizes that the "the plain language" of 47 C.F.R. § 54.706(a) does not include audio bridge services "in the list of 'telecommunications' that are subject to direct USF contribution under 47 C.F.R. § 54.706(a)." Pet. Br. at 20. The Conference Group, however, fails to acknowledge that the "plain language" of that rule states that "[i]nterstate telecommunications include, *but are not limited to*" the services enumerated in section 54.706(a). 47 C.F.R. § 54.706(a) (emphasis added). The fact that audio bridging service does not appear in the non-exhaustive list of services in section 54.706(a) thus does not mean that the service is not telecommunications.

Conference Group's claim that the FCC's "only . . . option" (Pet. Br. at 19) in reviewing an allegedly *ultra vires* USAC's ruling is summary reversal.[9]

More fundamentally, Congress entrusted the Commission with the duty to "execute and enforce" the Communications Act, including section 254. 47 U.S.C. § 151. *See Brand X*, 545 U.S. at 980. Thus, independent of the FCC's jurisdiction to review USAC rulings under 47 C.F.R. § 54.723(b), the FCC, in administering section 254, has authority to issue a ruling clarifying that InterCall must contribute directly to the USF because the audio bridging service it offers is "telecommunications" within the meaning of the Act and the agency's implementing rules. *See also* 47 C.F.R. § 1.2; 5 U.S.C. § 554(e). Indeed, the Supreme Court has explicitly held that the FCC is entitled to deference in exercising its authority to determine whether or not a specific service is an information service under the Communications Act. *Brand X*, 545 U.S. at 980-86. The Conference Group's suggestion that the FCC lacked authority to classify InterCall's audio bridge service as telecommunications is inconsistent with this precedent.

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[9] The Conference Group also challenges the action of the FCC's *staff* in revising FCC Forms 499-A and 499-Q *in 2002* to include providers of "toll teleconferencing services" as entities that must contribute directly to the USF. *See* Pet. Br. at 22-24. The Conference Group's petition for review of the FCC's *Order*, however, does not invoke the Court's jurisdiction to review that 10-year-old staff action. Nor could it do so. *See, e.g.*, 28 U.S.C. § 2344; 47 U.S.C. § 155(c)(7).

B. Because The FCC's Orders Were Adjudicatory, The APA's Notice-And-Comment Requirements For Rulemakings Are Inapplicable.

The Conference Group's claim that the FCC in this informal adjudication violated the APA notice-and-comment requirements for substantive rulemaking has a fundamental defect. The Conference Group ignores a well-established proposition of administrative law that, in contrast to substantive rulemakings and formal adjudications, the APA contains no specific notice-and-comment requirements for informal agency adjudications. *Occidental Petroleum*, 873 F.2d at 337; *see also FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 529 n.8 (2009); *United States Telecom Ass'n v. FCC*, 400 F.3d 29, 34 n.9 (D.C. Cir. 2005). The *Order* on review was a classic informal adjudication not subject to the APA's notice-and-comment requirements for rulemakings, and the Commission acted well within its discretion in proceeding via adjudication rather than rulemaking in this case.

1. The *Order* Is An Adjudicatory Ruling.

The FCC reasonably determined that the *Order* on review was an "adjudicatory decision." *Reconsideration Order*, 27 FCC Rcd at 905 (¶ 15) (J.A. 316). The administrative proceeding below involved the FCC's review of USAC's audit ruling of a specific company, InterCall. Based upon its review of the functions and features of InterCall's audio bridging service, the

FCC classified that offering as "telecommunications," and clarified that InterCall is therefore subject to USF contribution requirements. The proceeding below thus involved "a classic case of agency adjudication, a case that involves decisionmaking concerning [a] specific person[], based on a determination of particular facts and the application of general principles to those facts." *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1093 n.11 (D.C. Cir. 1979). *See AT&T Co., v. FCC*, 454 F.3d 329, 333 (D.C. Cir. 2006) (FCC's rulings in classifying services as telecommunications or information services "reflect a highly fact-specific, case-by-case style of adjudication.").

The Conference Group acknowledges that the *Order* was issued as the culmination of an "informal adjudication." Pet. Br. at 1, 24, 35, 36. It maintains, however, that the FCC's statement that "InterCall and similarly situated stand-alone audio bridging service providers [must] contribute directly to the USF," *Order*, 23 FCC Rcd at 10735 (¶ 14) (J.A. 197), transformed the FCC's adjudicatory ruling into a rulemaking order. That argument is incorrect. It is well-established that orders handed down in adjudications "may affect agency policy and have general prospective application." *New York State Comm'n on Cable Television v.* FCC, 749 F.2d 804, 814 (1984) (quoting *Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir. 1976)). Indeed, "[m]ost norms that emerge from a rulemaking are equally

capable of emerging (legitimately) from an adjudication." *Qwest Servs. Corp.*, 509 F.3d at 536 (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974)).

Because "basic tenets of administrative law *require* the Commission to apply its rules consistently in adjudicatory proceedings," *General Am. Transp. Corp. v. ICC*, 872 F.2d 1048, 1060 (D.C. Cir. 1989) (emphasis in original), the FCC's classification of Intercall's service as "telecommunications" and its ruling that Intercall therefore must make direct USF contributions would have precedential effect for similarly situated providers of audio bridging services whether or not the FCC had explicitly stated so in the *Order* on review. *See also Bell Aerospace*, 416 U.S. at 292 (agency may in an adjudication "promulgate a new standard that would govern future conduct" of non-parties); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765-766 (1969) (plurality opinion) ("[a]djudicated cases may and do . . . serve as vehicles for the formulation of agency policies, which are applied and announced therein," and such cases "generally provide a guide to action that the agency may be expected to take in future cases"); *Goodman v. FCC*, 182 F.3d 987, 994 (D.C. Cir. 1999) ("[T]he nature of adjudication is that similarly situated non-parties may be affected by the policy or precedent applied, or even merely announced in dicta.").

In sum, the FCC merely noted the obvious proposition that the agency's adjudicatory ruling as to InterCall, like any other adjudicatory decision of the agency, has precedential effect for "other similarly situated" entities — in this case, audio bridge service providers. *See Reconsideration Order*, 27 FCC Rcd at 905 (¶ 15) (J.A. 316). That unremarkable — and correct — statement of administrative law did not somehow convert the proceeding from adjudication into rulemaking. Rather, it merely ensured that there was no confusion as to the effect of this precedent on similarly situated parties. As in any other adjudicatory case, other entities are free to show that they are not similarly situated and that this precedent therefore does not apply to them.

The Conference Group nonetheless contends that the FCC's action fits within the broad definition of a rule and thus the FCC must be deemed to have engaged in rulemaking. Pet. Br. at 29 (citing 5 U.S.C. § 551(4)). That argument likewise fails. The Commission has "very broad discretion whether to proceed by way of adjudication or rulemaking." *Qwest Corp.*, 509 F.3d at 536 (quoting *Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126, 1141 (D.C. Cir. 2001)). Although the FCC could have classified the audio bridging services of InterCall and similarly situated companies as telecommunications by adopting an interpretative rule — which, like

adjudicatory orders are not subject to the notice and comment requirements of section 4 of the APA, *see* 5 U.S.C. § 553(b)(A) — it had discretion to take the same action in an adjudicatory ruling. *See Qwest Corp*, 509 F.3d at 536 (rejecting petitioner's argument "that if it walks like a rule and talks like a rule, it must be a rule."); *Goodman*, 182 F.3d at 993 (same). Indeed, the FCC in a long line of cases has used its adjudicatory authority to classify specific services as telecommunications or information services under the Communications Act and/or the Commission's rules.[10] *See AT&T*, 454 F.3d at 333.

The Conference Group mistakenly contends that the FCC's characterization of its action as adjudication and not rulemaking "is accorded no deference by a reviewing court." *See* Pet. Br. at 29. The courts have long held that an agency's characterization of its decision as an adjudicatory ruling "in itself is entitled to a significant degree of credence." *British Caledonian*

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[10] *E.g.*, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as An Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006); *Prepaid Calling Card Order*, 21 FCC Rcd 7290; *In the Matter of AT&T Corp.*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826 (2005), *aff'd sub nom. AT&T Co.*, 454 F.3d 329 (D.C. Cir. 2006).

Airways, Ltd. v. CAB, 584 F.2d 982, 992 (D.C. Cir. 1978). *See*, *e.g.*, *Am. Airlines, Inc. v. DOT*, 202 F.3d 788, 797 (5th Cir. 2000) (courts accord "significant deference to the agency's characterization of its own action [as adjudicatory].")

Contrary to The Conference Group's assertion, the fact that, in the interests of fairness, the FCC chose to limit its adjudicatory ruling to prospective-only effect does not convert that determination into a substantive rule. As this Court has recognized, agencies may decline to give adjudicative rulings retroactive effect for equitable reasons, *see generally Qwest*, 509 F.3d 531, and any precedential impact of the specific ruling here on similarly situated third parties naturally would be on a prospective-only basis.

Equally flawed is The Conference Group's suggestion that the *Order* is not adjudicatory because the agency's ruling allegedly applies broadly to the entire audio bridging industry. *E.g.*, Pet. Br. at 19, 25, 33-34. First, contrary to The Conference Group's contention, the Commission's *Order* did not decide that *all* audio bridging companies (regardless of the type of service they offer) must contribute to the USF. Rather, the *Order* states only that InterCall and "*similarly situated* stand-alone audio bridging service providers" are subject to a direct contribution obligation, *Order*, 23 FCC Rcd

at 10735 (¶ 14) (emphasis added) (J.A. 197), leaving unaffected those audio bridging companies that do not provide services similar to those of InterCall.

Second, The Conference Group is wrong in suggesting that the Commission can only issue a broadly applicable order in a rulemaking. "Orders handed down in adjudications may establish broad legal principles," *Central Texas Tel. Co-op.*, 402 F.3d at 210, and "have general prospective application." *Chisholm*, 538 F.2d at 365. *See also Kidd Commc'ns v. FCC*, 427 F.3d 1, 5 (D.C. Cir. 2005) ("An administrative agency can, of course, make legal-policy through rulemaking or by adjudication."). It is well-established that "an adjudication can affect a large group of [persons] without becoming a rulemaking." *Goodman*, 182 F.3d at 994. *See British Caledonian Airways*, 584 F.2d at 989 (rejecting argument that rulemaking is required because the agency's action "will have a significant effect on the entire airline industry.").

This Court's decision in *Qwest*, 509 F.3d 531, is instructive. In that case, the Court upheld the FCC's choice of adjudication in ruling that two kinds of prepaid calling cards are "telecommunications" and that the providers of such cards therefore are subject to a direct USF contribution requirement. *Id.* at 536. The Court rejected petitioner's argument that "such a broadly applicable order," *i.e.*, one that determined the regulatory

classification of all such cards, "can only take the form of a rule." *Id.* at 536. Noting that "[m]ost norms that emerge from a rulemaking are equally capable of emerging (legitimately) from an adjudication," the Court held that the FCC acted lawfully in classifying the services in question in an adjudicatory ruling — notwithstanding the broad sweep of the agency's decision. *Id.* *Qwest* thus forecloses any argument that the FCC cannot proceed by adjudication in classifying a service as telecommunications because its ruling allegedly has "industry-wide implications." Pet. Br. at 10.

2. The FCC Did Not Enact A Substantive Rule.

The Conference Group argues that the FCC in the *Order* effectively adopted a substantive rule and that failure to provide formal notice seeking comment violated the APA. That argument fails for two reasons. First, as shown in Section I.B.1, the *Order* on review is a product of informal adjudication (to which notice-and-comment requirements are inapplicable), not rulemaking. Second, as shown below, the FCC's ruling has none of the characteristics of a substantive rule in any event.

A rule is considered substantive if the agency "'intends to create new law, rights, or duties,'" *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1307-08 (D.C. Cir. 1991) (citation omitted), or "effectively amends a prior legislative rule." *American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d

1106, 1112 (D.C. Cir. 1993). Here, the FCC did neither. Rather it decided that Intercall's audio bridging services are "telecommunications." *Order*, 23 FCC Rcd at 10734-35 (¶¶ 10-13) (J.A. 197). To be sure, that ruling had the effect of clarifying that InterCall (and entities providing services similar to InterCall's) must make direct contributions to the USF as required by section 54.706 of the FCC's rules. The genesis of that direct contribution requirement, however, is section 54.706, a regulation predating the *Order* that was not amended in the *Order* on review. Because the *Order* merely "clarified the *existing* obligations of InterCall — and other similarly situated audio bridge service providers — based upon existing rules and requirements," *Reconsideration Order*, 27 FCC Rcd at 905 (¶ 15) (J.A. 316) (emphasis added), the FCC in the proceeding below did not effectively adopt a substantive rule.

The Conference Group errs in claiming that the FCC's ruling must be a substantive rule because it has a "substantive adverse impact" upon the affected industry. *See* Pet. Br. at 26 (internal quotations omitted). As this Court has recognized, the agency's selection of a particular "interpretation of an ambiguous statute or rule," "always" has "real consequences." *Paralyzed Veterans of Am. v. D.C. Arena, LP*, 117 F.3d 579, 588 (D.C. Cir. 1997). Notwithstanding those consequences, an agency does not enact a substantive

rule when it "spells out a duty fairly encompassed within the regulation that the interpretation purports to construe." *Id.* *See also Fertilizer Inst.*, 935 F.2d at 1308 ("the proper focus in determining whether an agency's act is legislative is the source of the agency's action, not the implications of [the] action.").

The Conference Group also argues that the FCC effectively adopted a substantive rule because the *Order* is at odds with the "understanding" of The Conference Group and other audio bridging companies that the services they offered were not telecommunications subject to a direct USF contribution obligation. Pet. Br. 27. The Conference Group, however, does not show that any such "understanding" is based upon any FCC rule or authoritative order establishing that the services at issue are not telecommunications. *See Funeral Consumer Alliance, Inc. v. FTC*, 481 F.3d 860, 863 (D.C. Cir. 2007) (agency rule is substantive if it "repudiates or is irreconcilable with [a prior legislative rule].") (citation omitted).

Equally unavailing is The Conference Group's suggestion of an inconsistency between the FCC's identification in two prior cases of "stand alone conference bridging providers" as end-users and its ruling that InterCall offers telecommunications that is subject to a direct USF contribution obligation. Pet. Br. at 31 & n.57 (citing *Qwest Commc'ns Corp. v. Farmers*

& Merchants Mutual Tel., 22 FCC Rcd 17973 (2007) (subsequent history omitted), and *AT&T Corp. v. Jefferson Tel. Co.*, 16 FCC Rcd 16130 (2001)). In one of these cases, the end-user provided a chat-line service that was "materially different" from InterCall's audio bridging services, *Reconsideration Order*, 27 FCC Rcd at 902 n.35 (J.A. 318).[11] The other case involved a tariff dispute, and the Commission's characterization "was premised on [the carrier's] assertion that this was how they were defined in [its] tariff." *Order*, 23 FCC Rcd at 10737 (¶ 21) (J.A. 198). In any event, "a company may be classified as an end-user due to its role in obtaining telecommunications services" yet also offer telecommunications with an obligation to directly contribute to the USF. *Id*. at 10737 (¶ 22) (J.A. 199).[12]

[11] The chat-line service offered by International Audiotext Network ("IAN"), "randomly paired callers" and thus did not satisfy one the basic requirements of telecommunications, *i.e.*, that the transmission be routed "between or among points specified by the user." 47 U.S.C. § 153(50). *See Reconsideration Order*, 27 FCC Rcd at 902 n.35 (J.A. 318); *Order*, 23 FCC Rcd at 10737 (¶ 19) (J.A. 198). Moreover, in contrast to InterCall's services, which are "provided for a fee," *Order*, 23 FCC Rcd at 10736 (¶ 17) (J.A. 198), "IAN did not impose any charges on callers," *AT&T Inc.*, 16 FCC Rcd at 16131 (¶ 3). Only providers that offer service "for a fee" are required to contribute directly to the USF. 47 C.F.R. § 54.706(a).

[12] The Conference Group fares no better in arguing that the FCC changed course based on an alleged "inconsistency" between the *Order* and the lack of any previous FCC enforcement action against an audio bridging provider for failure to make USF contributions. Pet. Br. at 28, 31. As the Supreme Court has recently pointed out, "an agency's enforcement decisions are informed by

3. The FCC Used Procedures That Both Complied With The APA And Gave Interested Parties Notice And A Full Opportunity To Participate

Section 4(j) of the Communications Act authorizes the Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j). Congress in Section 4(j) gave the Commission "broad discretion" to prescribe procedures for use in its own proceedings, because it recognized that the Commission is "in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved." *FCC v. Schreiber*, 381 U.S. at 289, 290. Section 4(j) reflects the "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 544 (1978).

As discussed above, the Order on review arose out of a classic adjudicatory proceeding—an audit of a specific company—and petitioner has raised no persuasive argument that the agency abused its discretion in proceeding by adjudication rather than notice-and-comment rulemaking in this instance. The Supreme Court has long held that the APA establishes the

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a host of factors, some bearing no relation to the agency's views regarding whether a violation has occurred." *Christopher*, 132 S. Ct. at 2168.

maximum procedural requirements a reviewing court may impose on an administrative agency, except where the due process clause or the agency's governing statute mandates otherwise. *Pension Benefit Guar. Corp. v. LTV Corp*., 496 U.S. 633, 653-56 (1990); *Vermont Yankee*, 435 U.S. at 524-25. Because the FCC complied with all applicable constitutional and statutory requirements applicable to informal adjudications, the FCC's choice of procedures in the adjudication below were within its discretion.

In any event, The Conference Group is wrong in claiming that the procedures the FCC used "deprived The Conference Group, along with others in the conference bridging services industry, of a meaningful opportunity to participate and deprived the record of facts and legal argument." *See* Pet. Br. at 34. The FCC issued a Public Notice inviting the public to comment on the issues raised in InterCall's request for review of USAC's ruling. *Public Notice I* (J.A. 170). A number of persons, recognizing the possible precedential impact of a Commission adjudicatory ruling on companies providing audio bridging services similar to those of InterCall, filed

comments and/or reply comments in response to the FCC's invitation.[13] After the *Order* was released, the FCC accepted two petitions for reconsideration, including one from The Conference Group. The FCC notified the public of those petitions and invited interested persons again to submit comments and reply comments. *Public Notice II* (S.A. 015).

The four rounds of comments the FCC offered in two separate pleading cycles provided interested persons a full opportunity to present their views to the agency. The Conference Group complains that the procedures the FCC used "deprived the record of facts and legal argument," Pet. Br. at 34, but it fails to identify any relevant facts or legal arguments that were excluded from the administrative record. And The Conference Group's assertion that it was somehow "deprived" of a "meaningful opportunity to participate," *id.*, rings hollow in light of its

[13] Although The Conference Group suggests that the eleven-day initial comment period was inadequate (Pet. Br. at 10), it provides no support for that claim. This Court has upheld much shorter agency time limits for providing comments. *See, e.g., Am. Trading Transp. Co., Inc. v. United States*, 841 F.2d 421, 424 & n.4 (D.C. Cir. 1988) (holding that a three-day comment period is "adequate"). Significantly, no party — including The Conference Group — asked the FCC to extend the time period for submitting initial comments, and the fact that interested parties were able to submit their initial comments in a timely fashion undermines petitioner's suggestion that the allotted time period was inadequate. In addition, the FCC established a second pleading cycle for the submission of comments and reply comments at the reconsideration stage, and The Conference Group does not even attempt to show that the time limits for filing those pleadings was insufficient.

active participation in the reconsideration phase of the administrative proceedings below. *See* The Conference Group Petition (J.A. 251); Reply Comments in Support of Petition for Reconsideration by A+ Conferencing, LTD., Free Conferencing Corp. and The Conference Group (Sept. 22, 2008) (J.A. 280).

III. THE FCC REASONABLY DETERMINED THAT INTERCALL PROVIDES TELECOMMUNICATIONS.

As shown below, the Commission (1) reasonably classified InterCall's audio bridging service as telecommunications, and (2) reasonably determined that the additional enhanced features InterCall provided in conjunction with its audio bridging service were not sufficiently integrated with the audio bridging service so as to transform the service as a whole into an information service.

A. The FCC Reasonably Classified InterCall's Audio Bridging Service As Telecommunications.

The Commission reasonably determined that InterCall's audio bridging services are telecommunications. *Order*, 23 FCC Rcd at 10734-35 (¶¶ 11-13) (J.A. 197). *See* 47 U.S.C. § 153(50). In essence, InterCall offers transmission that enables persons selected by its customer (the conference host) to talk to each other over ordinary telephone lines "without change in the form or content of the information as sent or received." *See Order*, 23

FCC Rcd at 10734 (¶ 10) (citing 47 U.S.C. § 153(50)) (J.A. 197). From the user's perspective, the essential difference between InterCall's conferencing service and an ordinary telephone call is that InterCall's conferencing service permits simultaneous communication among three or more persons whereas a typical telephone call involves communications between only two individuals. Because telecommunications involves "transmission[] *between or among* points specified by the user," 47 U.S.C. § 153(50) (emphasis added), however, the number of speakers does not affect the classification of InterCall's service as telecommunications.

Nor does the existence of the audio bridge prevent InterCall's conferencing service from properly being classified as telecommunications. As the FCC pointed out, the function of the audio bridge "is simply to facilitate the routing of ordinary telephone calls . . . . [to ensure] 'the creation of the transmission channel chosen by the customer.'" *Order*, 23 FCC Rcd at 10735 (¶ 11) (quoting *NATA Centrex Order*, 101 FCC 2d at 362 (¶ 31)) (J.A. 197). By "link[ing] multiple callers together," *id.* at 10734 (¶ 10) (J.A. 197), in a way that assures "transmission between or among points specified by the user," 47 U.S.C. § 153(50), the audio bridge facilitates the provision of basic transmission without altering its fundamental character. In this respect, the audio bridge performs an

"adjunct to basic" function that is incidental to the underlying telecommunications service. *See AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Cards*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826, 4831 (¶ 16) (2005), *aff'd sub nom. AT&T Co.*, 454 F.3d 329; *NATA Centrex Order*, 101 FCC 2d at 362 (¶ 31).

The Conference Group contends that "the FCC premised its finding that conference bridging providers are providers of telecommunications services, as opposed to information services, on a significant factual error: the conference bridge routes traffic, essentially operating like a switch or router." Pet. Br. at 39. It is petitioner's own argument — not the *Order* — that contains significant errors. First, the Commission did *not* find that audio bridging companies "are providers of telecommunications services, as opposed to information services." Pet. Br. at 39. The Commission made clear that "the record does *not* permit a clear determination" as to whether or not InterCall provides telecommunications services (*i.e.*, provides telecommunications on a common carrier basis), and thus determined only that InterCall at a minimum provided "telecommunications." *Order*, 23 FCC Rcd at 10734 (¶ 7) (J.A. 196) (emphasis added).

Second, The Conference Group errs in suggesting that the FCC found that the conference bridge itself "routes traffic, essentially operating like a switch or router." Pet. Br. at 39. In fact, the agency said precisely the opposite — *i.e.*, that it "did *not* conclude that the audio bridge . . . was a router or provided the functionality of a router." *Reconsideration Order*, 27 FCC Rcd at 902 (¶ 9) (J.A. 314) (emphasis added). Rather, the Commission explained that it found the purpose and function of InterCall's audio bridge, by linking the conference callers together, was to *facilitate* the provision of basic telecommunications. *Id.*; *see also Order*, 23 FCC Rcd at 10735 (¶ 11) (J.A. 197) ("the purpose . . . of the bridge is simply to facilitate the routing of ordinary telephone calls."). Thus, in arguing that InterCall's audio bridge does not actually route telephone calls, petitioner challenges a finding the FCC never made.

The Conference Group also suggests that the agency erred in noting that the audio bridge *facilitates* routing of calls because those calls terminate at the audio bridge. Pet. Br. at 43. This misses the point. The FCC used the phrase "facilitate routing" only to denote that the audio bridge facilitates the provision of basic telecommunications by linking together multiple calls. The Commission acknowledged that, as a technical matter, calls are

terminated at "a point [selected] by the user (the conference bridge."). *Order*, 23 FCC Rcd 10735 (¶ 11) (J.A. 197).

The Conference Group next contends that the FCC erroneously conflated the transmission component of InterCall's service with the audio bridging component of that service. Pet. Br. at 39, 44-46. According to petitioner, the transmission that InterCall provides to the individual conference callers to reach the audio bridge is an "entirely distinct service" from that of the audio bridge, which links the conference call participants together. *Id.* at 44. That argument also fails.

InterCall's conferencing service provides the ability for "multiple end users to *communicate* and collaborate *with each other* using telephone lines." InterCall Request for Review at 4 (J.A. 17) (emphasis added). That service necessarily entails both the transmission to the audio bridge of the calls of individual conference call participants *and* the linkage of those separate transmission paths to permit simultaneous communication between three or more parties. Both the transmission and the linkage are integral elements of InterCall's service.

The Conference Group is also wrong in suggesting that the fact that InterCall "purchases" the transmission used in its conferencing service from other telecommunications providers somehow shows that it does not provide

telecommunications. Pet. Br. at 39, 44. After InterCall procures that transmission, it "resells [it] with its audio bridging service to its teleconferencing customers." *Order*, 23 FCC Rcd at 10735 n.31 (J.A. 202) (internal citation and quotations omitted). InterCall undeniably offers transmission as part of its conferencing service, and the particular means by which it obtained the capacity to provide its customers with that transmission is irrelevant to the regulatory classification of its service.[14] By petitioner's own account, "the bundled long distance transport component *of InterCall's service*" is a separate stand-alone offering of "telecommunications." Pet. Br. at 44 (emphasis added). InterCall provides that transmission to its customers as a part of its audio bridging service (after procuring the underlying transmission capacity from other telecommunications providers). Thus, under The Conference Group' own analysis, a portion of InterCall's service is telecommunications.

[14] Contrary to The Conference Group's suggestion, there is no inconsistency between the *Order* and the FCC's statement in *Qwest*, 22 FCC Rcd at 17985-86 (¶ 32), that "users of the conference calling services make calls that terminate at the conference bridge, and are connected together at that point." The FCC in the *Order* explained both that "InterCall's service allows end users to transmit a call (using telephone lines) to a point specified by the user (the conference bridge)" and that the audio bridge "links multiple call[s] together." *Order*, 23 FCC Rcd at 10734-35 (¶¶ 10-11) (J.A. 197).

The Conference Group next complains that the Commission in the *Order* "failed to even mention" its prior order in the *Pulver.com* proceeding. Pet. Br. at 53. It neglects to note, however, that the Commission's *Reconsideration Order* in this case discussed the *Pulver.com Order* extensively, and explained why that ruling addressed very different facts from those here. *Reconsideration Order*, 27 FCC Rcd at 902 (¶ 10) (J.A. 315). Chief among the differences is that pulver.com's Free World Dialup offering — "a type of directory service" — "neither offer[ed] nor provide[d] transmission." *Petition for Declaratory Ruling That Pulver.com's Free World Dialup Is Neither Telecommunications Nor A Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3312 (¶ 9) (2004). Thus, in contrast to InterCall's audio bridge service, the service at issue in the *Pulver.com Order* did not even colorably satisfy the statutory definition of telecommunications. *See* 47 U.S.C. § 153(50).

B. The FCC Reasonably Determined That InterCall's Information Services Were Not Functionally Integrated With Its Audio Bridging Service.

InterCall bundles several add-on conferencing capabilities (such as muting, recording, erasing, and accessing operator services) with its basic teleconferencing service. *Order*, 23 FCC Rcd at 19735 (¶ 13)

(J.A. 197). In considering whether those capabilities transformed InterCall's conferencing service as a whole from telecommunications to an information service, the FCC properly applied the standard established in prior FCC decisions and endorsed by the Supreme Court in *Brand X*: "whether the transmission capability is 'sufficiently integrated' with the information service capabilities to make it reasonable to describe the two as a single, integrated offering and classify the entire integrated service as an information service." *Reconsideration Order*, 27 FCC Rcd at 903 (¶ 12) (quoting *Prepaid Calling Card Order*, 21 FCC Rcd at 7296 (¶ 14), in turn, quoting *Brand X*, 545 U.S. at 990) (J.A. 315).

Petitioner incorrectly states the Commission's holding in the InterCall order and thus focuses on the wrong question: the FCC did not require conference bridge providers to contribute to the USF "because such service constitutes a 'telecommunications service' as opposed to an 'information service.'" Pet. Br. at 2. As noted above, the FCC expressly declined to resolve — and was not required to resolve — whether InterCall and similarly situated providers offer a "telecommunications service" or merely "telecommunications." As the agency explained, in either event, the provider must make USF contributions. *See Order*, 23 FCC Rcd at 10734 (¶ 7) (J.A. 196). The agency went on to explain that the add-on features

offered by InterCall in addition to its call-transmission function (the core "telecommunications" element of its service) did not convert the entire offering into an "information service" because those additional features did not create an integrated service that was different from a pure offering of telecommunications. *Id.* at 10735 (¶ 13) (J.A. 197); *Reconsideration Order*, 27 FCC Rcd at 903 (¶ 12) (J.A. 315). Because petitioner misapprehends the FCC's actual holding, it makes little effort to refute the well-supported finding that InterCall's service offers telecommunications; indeed, as shown above, petitioner's own analysis leads to that conclusion.

The Commission reasonably concluded that the enhanced features InterCall provides in conjunction with its conferencing service are not "sufficiently integrated" into InterCall's telecommunications offering to transform its entire offering into an information service. *Order*, 23 FCC Rcd at 10735 (¶ 13) (J.A. 197). *See Reconsideration Order*, 27 FCC Rcd at 903 (¶ 12) (J.A. 315). As the Commission explained, the enhancements "do not alter the fundamental character" of InterCall's telecommunications service — the ability of more than two people to communicate with each other. *Id.* Indeed, InterCall's customers can conduct a conference call "with or without accessing these features." *Id.*

The Conference Group also contends that the FCC misapplied the functional services test by relying on the fact that InterCall's customers can conduct a conference call "with or without accessing [the enhanced] features." *Id.* See Pet. Br. at 47-52. Its supporting intervenor, Cisco Webex, goes further, arguing that consideration of this fact renders the FCC's order so "vague" that one that cannot tell whether the FCC formulated an entirely new test — in potential conflict with prior agency decisions — for determining whether a communications service is an "information service." Cisco Webex Br. at 13-14.

The Commission in the *Order* on review did not apply any new or modified test, and the hypothetical conflict with prior agency precedent that Cisco Webex identifies is non-existent. Indeed, the vagueness that Cisco Webex purports to find in the *Order* stems from its own misunderstanding of the Commission's ruling rather than any lack or clarity or failure by the agency to sufficiently explain its reasoning. Rather, the Commission's observation that InterCall's customers can conduct a conference call "with or without accessing [the enhanced] features," *Order*, 23 FCC Rcd 10735 (¶ 13) (J.A. 197), is simply an application of the longstanding functional integration standard previously used by the agency. *See* Cisco Webex Br. at

14 (conceding that language in the Order "could be viewed as a straightforward application of the existing functional-integration standard.").

Under the functional integration test, a provider does not create an integrated information service offering merely by bundling enhanced functionalities with telecommunications. *See Brand X*, 545 U.S. at 988; *Prepaid Calling Cards Order*, 21 FCC Rcd at 7295 (¶ 14). Telephone service packaged with voice mail, for example, is not an integrated informative service offering because the telephone company "offers a *transparent transmission path* — telephone service — that transmits information independent of the information storage capabilities provided by voice mail." *Brand X*, 545 U.S. at 998 (emphasis added).

With an integrated information service offering, "[the] telecommunications input used to provide an information service[s] . . . is not 'separable from the data-proceeding capabilities of the service.'" *Id.* at 997 (quoting *Cable Modem Order*, 17 FCC Rcd at 4823 (¶ 39). It "is instead 'part and parcel of [the information service] and is integral to [the information service's] other capacities.'" *Id.* In other words, with an integrated information service, "the consumer uses the [transmission component] *always* in connection with the information-processing capabilities." *Id.* at 988, 990 (emphasis added). Thus, it was entirely appropriate for the Commission, in

applying the functional integration test in this case, to consider whether InterCall's customers *always* use the enhanced processing capabilities when using the conferencing service or whether that customer can "conduct its conference call with or without accessing [the enhanced] features." *Order*, 23 FCC Rcd at 10735 (¶ 13) (J.A. 197).

In arguing that such consideration was improper, The Conference Group and Cisco Webex rely upon — but take out of context — the FCC's statement in its *Cable Modem Order* that an offering can be a single integrated information service "regardless of whether subscribers use *all* of the [enhanced] functions provided as part of the service." *Cable Modem Order*, 17 FCC Rcd 4822 (¶ 38) (emphasis added). That reliance is unavailing. When a customer invariably uses at least *some* (even if not all) of the enhanced features of a communications service along with the transmission component, those enhanced functionalities may be functionally integrated with the transmission component — as the Commission has determined with respect to broadband Internet access service. *See Brand X*, 545 U.S. at 990. But when a customer uses *none* of those enhanced functionalities — or, stated differently, when it may use the transmission component "with or without accessing the[] [enhanced] features," *Order*, 23 FCC Rcd at 10735 (¶ 13) (J.A. 197); *see also Reconsideration Order*, 27

FCC Rcd at 904 (¶ 13) (J.A. 315) — the service is pure transmission and the telecommunications and information service elements are not functionally integrated.

The Commission's decision in the *Prepaid Calling Cards Order*, 21 FCC Rcd 7290, is fully consistent. In that case, the Commission classified certain types of prepaid calling cards — essentially debit cards used to make ordinary telephone calls — as telecommunications, even though the prepaid cards at issue in that case included a menu that permitted the user to access certain types of information, such as sports, weather and entertainment information. 21 FCC Rcd at 7294 (¶ 11). The Commission held that there was no functional integration between the information service features and the use of the telephone calling capability. *Id.* at 7296 (¶ 15). In making this determination, the Commission found that "the . . . transmission capability is completely *independent of* the various other capabilities that the card makes available," pointing out that "an individual may use [the prepaid calling] card to make a long distance call without . . . accessing the information made available with the card." *Id.* (emphasis added). The Commission made essentially the same analysis in this case when observed that Intercall's customers could use the transmission function of the company's audio bridging service "with or without accessing" enhanced services such as

muting, recording, erasing and operator services. *Order*, 23 FCC Rcd at 10735 (¶ 13) (J.A. 197); *see also Reconsideration Order*, 27 FCC Rcd at 904 (¶ 13) (J.A. 315).

The FCC's conclusion also accords with common sense. Communications providers should not be able to evade their USF contribution obligations (which hinge on classification of a service as "telecommunications" or "telecommunications service") by the simple expedient of repackaging their offering to include add-ons that customers need not use in order to access the basic telecommunications function. Here, petitioner and its intervenor do not seriously dispute that InterCall's customers may participate in conference calls without using such features as muting, recording, erasing, and operator assistance.

Nor does that result change because callers must enter a code (as is common of any teleconferencing service) in order to participate in a conference call. Pet. Br. at 50-51. As shown at pages 45-46, that function of the audio bridge merely facilitates the provision of a basic transmission service without altering its fundamental character and therefore is not an enhanced service. *NATA Centrex Order*, 101 FCC 2d at 359-60. And because it is not an enhanced service, it cannot alone transform the entire offering into an information service. Indeed, the Commission has held that

an offering of access to a data base for the purpose of obtaining telephone numbers (in that case, directory service) may be offered as an adjunct to basic telephone service, where that service provides only the information necessary to allow the network place a call to another subscriber. *Id.* Similarly, the need for the data base dip for password verification to facilitate the establishment of the transmission path to the bridge is an adjunct to basic feature that does not transform the whole service into an information service. In any event, at a minimum, the Commission's conclusion regarding the basic character of Intercall's service offering was well within the agency's broad discretion. *See Brand X*, 545 U.S. at 980-86 (deference due to FCC's determinations regarding "information service" and "telecommunications service").

CONCLUSION

The Court should affirm.

Respectfully submitted,

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January 28, 2013

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

THE CONFERENCE GROUP, LLC, PETITIONER, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	NO. 12-1124

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 12,207 words.

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January 28, 2013

STATUTORY APPENDIX

5 U.S.C. § 553
5 U.S.C. § 554

47 U.S.C. § 151
47 U.S.C. § 154(i) & (j)
47 U.S.C. § 153(24), (50), (51), (53)
47 U.S.C. § 254(d)

47 C.F.R. § 54.701
47 C.F.R. § 54.706
47 C.F.R. § 54.707
47 C.F.R. § 54.722
47 C.F.R. § 54.723

5 U.S.C. § 553

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

§ 553. Rule making

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) interpretative rules and statements of policy; or

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

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

5 U.S.C. § 554

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

§ 554. Adjudications

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

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

(2) the selection or tenure of an employee, except a [FN1] administrative law judge appointed under section 3105 of this title;

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

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

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

(6) the certification of worker representatives.

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

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

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

(3) the matters of fact and law asserted.

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

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

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

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

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

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

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

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

(A) in determining applications for initial licenses;

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

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

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

47 U.S.C. § 151

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

§ 151. Purposes of chapter; Federal Communications Commission created

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

47 U.S.C. § 154(i) & (j)

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

§ 154. Federal Communications Commission

* * * * * *

(i) Duties and powers

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

(j) Conduct of proceedings; hearings

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

* * * * * *

47 U.S.C.A. § 153

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

§ 153. Definitions

* * * * *

(24) Information service

The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

* * * * *

(50) Telecommunications

The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(51) Telecommunications carrier

The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A

telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

* * * * *

(53) Telecommunications service

The term "telecommunications service" means 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.A. § 254

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART II. DEVELOPMENT OF COMPETITIVE MARKETS

§ 254. Universal service

* * * * *

(d) Telecommunications carrier contribution

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

* * * * *

47 C.F.R. § 54.701

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 54. UNIVERSAL SERVICE
SUBPART H. ADMINISTRATION

§ 54.701 Administrator of universal service support mechanisms.

(a) The Universal Service Administrative Company is appointed the permanent Administrator of the federal universal service support mechanisms, subject to a review after one year by the Federal Communications Commission to determine that the Administrator is administering the universal service support mechanisms in an efficient, effective, and competitively neutral manner.

(b) The Administrator shall establish a nineteen (19) member Board of Directors, as set forth in § 54.703. The Administrator's Board of Directors shall establish three Committees of the Board of Directors, as set forth in § 54.705: (1) the Schools and Libraries Committee, which shall oversee the schools and libraries support mechanism; (2) the Rural Health Care Committee, which shall oversee the rural health care support mechanism; and (3) the High Cost and Low Income Committee, which shall oversee the high cost and low income support mechanism. The Board of Directors shall not modify substantially the power or authority of the Committees of the Board without prior approval from the Federal Communications Commission.

(c)(1) The Administrator shall establish three divisions:

(i) The Schools and Libraries Division, which shall perform duties and functions in connection with the schools and libraries support mechanism under the direction of the Schools and Libraries Committee of the Board, as set forth in § 54.705(a);

(ii) The Rural Health Care Division, which shall perform duties and functions in connection with the rural health care support mechanism under the direction of the Rural Health Care Committee of the Board, as set forth in § 54.705(b); and

(iii) The High Cost and Low Income Division, which shall perform duties and functions in connection with the high cost and low income support mechanism, the interstate access universal service support mechanism for price cap carriers described in subpart J of this part, and the interstate common line support mechanism for rate-of-return carriers described in subpart K of this part, under the direction of the High Cost and Low Income Committee of the Board, as set forth in § 54.705(c).

(2) As directed by the Committees of the Board set forth in § 54.705, these divisions shall perform the duties and functions unique to their respective support mechanisms.

(d) The Administrator shall be managed by a Chief Executive Officer, as set forth in § 54.704. The Chief Executive Officer shall serve on the Committees of the Board established in § 54.705.

47 C.F.R. 54.706

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 54. UNIVERSAL SERVICE
SUBPART H. ADMINISTRATION

§ 54.706 Contributions.

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

(1) Cellular telephone and paging services;

(2) Mobile radio services;

(3) Operator services;

(4) Personal communications services (PCS);

(5) Access to interexchange service;

(6) Special access service;

(7) WATS;

(8) Toll-free service;

(9) 900 service;

(10) Message telephone service (MTS);

(11) Private line service;

(12) Telex;

(13) Telegraph;

(14) Video services;

(15) Satellite service;

(16) Resale of interstate services;

(17) Payphone services; and

(18) Interconnected VoIP services.

(19) Prepaid calling card providers.

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

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

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

(e) Any entity required to contribute to the federal universal service support mechanisms shall retain, for at least five years from the date of the contribution, all records that may be required to demonstrate to auditors that the contributions made were in compliance with the Commission's universal service rules. These records shall include without limitation the following: Financial statements and supporting documentation; accounting records; historical customer records; general ledgers; and any other relevant documentation. This document retention requirement also applies to any contractor or consultant working on behalf of the contributor.

47 C.F.R. § 54.707

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 54. UNIVERSAL SERVICE
SUBPART H. ADMINISTRATION

§ 54.707 Audit controls.

The Administrator shall have authority to audit contributors and carriers reporting data to the administrator. The Administrator shall establish procedures to verify discounts, offsets, and support amounts provided by the universal service support programs, and may suspend or delay discounts, offsets, and support amounts provided to a carrier if the carrier fails to provide adequate verification of discounts, offsets, or support amounts provided upon reasonable request, or if directed by the Commission to do so. The Administrator shall not provide reimbursements, offsets or support amounts pursuant to part 36 and § 69.116 through 69.117 of this chapter, and subparts D, E, and G of this part to a carrier until the carrier has provided to the Administrator a true and correct copy of the decision of a state commission designating that carrier as an eligible telecommunications carrier in accordance with § 54.201.

47 C.F.R. § 54.722

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 54. UNIVERSAL SERVICE
SUBPART I. REVIEW OF DECISIONS ISSUED BY THE ADMINISTRATOR

§ 54.722 Review by the Wireline Competition Bureau or the Commission.

(a) Requests for review of Administrator decisions that are submitted to the Federal Communications Commission shall be considered and acted upon by the Wireline Competition Bureau; provided, however, that requests for review that raise novel questions of fact, law or policy shall be considered by the full Commission.

(b) An affected party may seek review of a decision issued under delegated authority by the Common Carrier Bureau pursuant to the rules set forth in part 1 of this chapter.

47 C.F.R. § 54.723

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 54. UNIVERSAL SERVICE
SUBPART I. REVIEW OF DECISIONS ISSUED BY THE ADMINISTRATOR

§ 54.723 Standard of review.

(a) The Wireline Competition Bureau shall conduct de novo review of request for review of decisions issue by the Administrator.

(b) The Federal Communications Commission shall conduct de novo review of requests for review of decisions by the Administrator that involve novel questions of fact, law, or policy; provided, however, that the Commission shall not conduct de novo review of decisions issued by the Wireline Competition Bureau under delegated authority.

12-1124

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

The Conference Group, LLC, Petitioner,

v.

Federal Communications Commission and United States of America, Respondents.

CERTIFICATE OF SERVICE

I, Laurel R. Bergold, hereby certify that on January 28, 2013, I electronically filed the foregoing Final Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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