

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 11-9900

IN RE: FCC 11-161

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

FEDERAL RESPONDENTS' UNCITED RESPONSE TO THE
JOINT PRELIMINARY BRIEF OF THE PETITIONERS

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TABLE OF CONTENTS

Table Of Authorities.....	ii
Statement Of Related Cases	vi
Glossary	vii
Issues Presented.....	1
Counterstatement Of Facts	3
A. The Origins Of The FCC’s Universal Service Policy.....	3
B. The Telecommunications Act Of 1996: A New Regulatory Paradigm.....	6
1. Universal Service Under The 1996 Act.....	7
2. Intercarrier Compensation Under The 1996 Act	11
3. Section 706.....	12
C. Universal Service And Intercarrier Compensation In The New Millennium: Two Dysfunctional Regulatory Regimes In Need Of Reform.....	13
D. The Order On Review	20
1. Universal Service Reform.....	21
2. Intercarrier Compensation Reform	31
Standards Of Review.....	37

TABLE OF AUTHORITIES

CASES

Ad Hoc Telecomms. Users Comm. v. FCC, 572 F.3d 903 (D.C. Cir. 2009)..... 13, 38

Alenco Commc’ns, Inc. v. FCC, 201 F.3d 608 (5th Cir. 2000).....3

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) 4, 6, 7, 33

Auer v. Robbins, 519 U.S. 452 (1997)38

Chevron USA, Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984)37

City of Arlington v. FCC, S. Ct. No. 11-1545 (argued Jan. 16, 2013)38

Cordero Mining LLC v. Sec’y of Labor ex rel. Clapp, 699 F.3d 1232 (10th Cir. 2012).....39

Dickinson v. Zurko, 527 U.S. 150 (1999)39

FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009) 38, 39

Lorenzo v. Mukasey, 508 F.3d 1278 (10th Cir. 2007).....40

Louisiana Pub. Serv. Comm’n v. FCC, 476 U.S. 355 (1986)6

Mainstream Mktg. Servs., Inc. v. FTC, 358 F.3d 1228 (10th Cir. 2004)38

Maryland v. United States, 460 U.S. 1001 (1983).....4

Minnesota Pub. Utils. Comm’n v. FCC, 483 F.3d 570 (8th Cir. 2007)14

Morris v. NRC, 598 F.3d 677 (10th Cir. 2010).....38

Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC, 737 F.2d 1095 (D.C. Cir. 1984)5

Nat’l Ass’n of State Util. Consumer Advocates v. FCC, 372 F.3d 454 (D.C. Cir. 2004).....5

Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967 (2005)..... 8, 23, 37

Nat’l Rural Telecom Ass’n v. FCC, 988 F.2d 174 (D.C. Cir. 1993).....10

Qwest Commc’ns Int’l, Inc. v. FCC, 398 F.3d 1222 (10th Cir. 2005)9

Qwest Corp. v. FCC, 258 F.3d 1191 (10th Cir. 2001)..... 3, 6, 7, 9, 22

Qwest Corp. v. FCC, 689 F.3d 1214 (10th Cir. 2012)..... 18, 38, 39

Rivera-Barrientos v. Holder, 666 F.3d 641 (10th Cir. 2012).....37

Rural Cellular Ass’n v. FCC, 588 F.3d 1095 (D.C. Cir. 2009)..... 11, 31

Rural Cellular Ass’n v. FCC, 685 F.3d 1083 (D.C. Cir. 2012).....7

Sorenson Commc’ns, Inc. v. FCC, 567 F.3d 1215 (10th Cir. 2009)39

Sorenson Commc’ns, Inc. v. FCC, 659 F.3d 1035 (10th Cir. 2011) 37, 39

Southern Utah Wilderness Alliance v. Office of Surface Mining Reclamation & Enforcement, 620 F.3d 1227 (10th Cir. 2010).....38

Sw. Bell Tel. Co. v. FCC, 153 F.3d 523 (8th Cir. 1998).....5

Texas Office of Pub. Util. Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999)..... 4, 7, 9

Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007)23

United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).....4

Verizon Commc’ns Inc. v. FCC, 535 U.S. 467 (2002)4

Vermont Pub. Serv. Bd. v. FCC, 661 F.3d 54 (D.C. Cir. 2011).....10

ADMINISTRATIVE DECISIONS

Access Charge Reform, 12 FCC Rcd 15982 (1997), *aff'd*, *Sw. Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).....5

Connect America Fund, 27 FCC Rcd 14566 (2012).....25

Developing a Unified Intercarrier Compensation Regime, 20 FCC Rcd 4685 (2005) 16, 17

Federal-State Joint Board on Universal Service, 12 FCC Rcd 8776 (1997), *aff'd in part and rev'd in part*, *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).....9

Joint Statement on Broadband, 25 FCC Rcd 3420 (2010)20

Petition of Qwest Corp. for Forbearance, 25 FCC Rcd 8622 (2010), *aff'd*, *Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012).....18

Public Notice, *Mobility Fund Phase I Auction Closes*, 27 FCC Rcd 12031 (2012).....30

STATUTES AND REGULATIONS

American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §6001(k)(2), 123 Stat. 115, 516.....20

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.....6

Telecommunications Act of 1996, §706(c)(1), 110 Stat. 15312

5 U.S.C. §706(2)(A).....38

47 U.S.C. §1513

47 U.S.C. §152(b).....6

47 U.S.C. §153(24).....8

47 U.S.C. §153(50).....8

47 U.S.C. §153(53).....8
 47 U.S.C. §201(b).....33
 47 U.S.C. §251(b)(5)..... 11, 34
 47 U.S.C. §251(g)..... 11, 34
 47 U.S.C. §252(d)(2)(B)35
 47 U.S.C. §254(b).....8
 47 U.S.C. §254(b)(1).....8
 47 U.S.C. §254(b)(2)..... 8, 23
 47 U.S.C. §254(b)(3)..... 8, 23
 47 U.S.C. §254(b)(4).....8
 47 U.S.C. §254(b)(5).....7
 47 U.S.C. §254(b)(6).....8
 47 U.S.C. §254(b)(7).....9
 47 U.S.C. §254(c)(1).....9
 47 U.S.C. §254(e).....23
 47 U.S.C. §1302(a).....13
 47 U.S.C. §1302(b)..... 13, 24
 47 U.S.C. §1302(d)(1).....12

OTHERS

JONATHAN E. NUECHTERLEIN ET AL., DIGITAL
 CROSSROADS: AMERICAN TELECOMMUNICATIONS
 POLICY IN THE INTERNET AGE (2005)18
 PETER W. HUBER ET AL., FEDERAL
 TELECOMMUNICATIONS LAW §2.1.1 (2d ed. 1999)4
 STUART M. BENJAMIN ET AL.,
 TELECOMMUNICATIONS LAW AND POLICY §15.3.1
 (2d ed. 2006).....4

STATEMENT OF RELATED CASES

There are no prior appeals. A case now pending before the Ninth Circuit – *Ronan Tel. Co. v. FCC*, 9th Cir. No. 05-71995 – involves a challenge to a previous order that was issued in one of the administrative proceedings that led to the order on review in this case.

GLOSSARY

APA	Administrative Procedure Act
ARC	Access Recovery Charge; federally tariffed end user charge designed to recover some revenues reduced as a result of the FCC's intercarrier compensation reform
CAF	Connect America Fund; a new mechanism for distributing federal universal service subsidies
FCC	Federal Communications Commission
IP	Internet Protocol; protocol for routing VoIP and Internet traffic within and among communications networks
IXC	Interexchange Carrier; provider of long-distance telephone service
LEC	Local Exchange Carrier; provider of local wireline telephone service
1996 Act	Telecommunications Act of 1996
VoIP	Voice over Internet Protocol; technology for delivering voice telephone service over the Internet or other networks using Internet Protocol

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ISSUES PRESENTED

Through its “universal service” rules, the Federal Communications Commission (“FCC”) for decades has sought to make affordable telephone service available nationwide by subsidizing service in less populous areas, where costs are high. Similarly, through its “intercarrier compensation” rules, the FCC has implicitly subsidized local phone service by authorizing local phone companies to collect certain charges from long-distance carriers.

When the FCC originally adopted those rules, consumers principally communicated with each other through voice calls made over legacy wireline networks owned by companies with state-approved local monopolies. Much has changed since then. In 1996, Congress passed legislation designed to open local telecommunications markets to competition. And with the

emergence of wireless and Internet-based voice services, wireline service is no longer the sole means of voice telephony. More significantly, Americans today increasingly use broadband Internet services to engage in non-voice communications (via texting, e-mail, or social networking websites like Facebook). Broadband communication services, which provide consumers with high-speed Internet access and high-capacity video and data retrieval capabilities, have “become crucial to our nation’s economic development and civic life.” *Connect America Fund*, 26 FCC Rcd 4554, 4558 ¶3 (2011) (“*2011 NPRM*”) (JA____, ____).

In light of these fundamental changes, the FCC concluded that its antiquated universal service and intercarrier compensation systems – which focused on traditional voice service – no longer serve the evolving communications needs of 21st century America. The FCC accordingly initiated a rulemaking to determine how it should reorient its rules to support the provision of broadband. After providing public notice, receiving hundreds of comments from interested parties, and reviewing the voluminous administrative record, the FCC substantially reformed and modernized its universal service and intercarrier compensation rules. *Connect America Fund*, 26 FCC Rcd 17663 (2011) (“*Order*”) (JA____).

Petitioners challenge those rules on multiple grounds, contending that they violate the Communications Act, the Administrative Procedure Act (“APA”), and the Constitution.

COUNTERSTATEMENT OF FACTS

A. The Origins Of The FCC’s Universal Service Policy

“Universal service” – the availability of affordable, reliable telephone service throughout the nation – “has been a fundamental goal of federal telecommunications regulation since the passage of the Communications Act of 1934.” *Alenco Commc’ns, Inc. v. FCC*, 201 F.3d 608, 614 (5th Cir. 2000). Section 1 of the Act, which created the Federal Communications Commission, directs the agency to “make available, so far as possible, to all the people of the United States, ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.” 47 U.S.C. §151. To fulfill this universal service mandate, the FCC historically has adopted policies designed to subsidize local phone service in remote and sparsely populated areas, where the cost of providing service is high. *See Qwest Corp. v. FCC*, 258 F.3d 1191, 1195-96 (10th Cir. 2001) (“*Qwest I*”).

For most of the 20th century, local phone service was regulated as a natural monopoly: “States typically granted an exclusive franchise in each

local service area to a local exchange carrier (LEC).” *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). This regulatory framework enabled state and federal regulators to support universal service through “a large number of implicit cross-subsidies,”¹ which “involve[d] the manipulation of rates for some customers to subsidize more affordable rates for others.”² “Urban users subsidize[d] rural ones, business subscribers subsidize[d] residential, and long-distance service subsidize[d] local.” PETER W. HUBER ET AL., *FEDERAL TELECOMMUNICATIONS LAW* §2.1.1, at 84 (2d ed. 1999); *see also Verizon Commc’ns Inc. v. FCC*, 535 U.S. 467, 480 (2002).

After an antitrust consent decree led to the divestiture of AT&T (the nation’s largest phone company) in the early 1980s,³ the FCC implicitly subsidized universal service through a system of intercarrier compensation known as interstate “access charges.” Under this regime, interexchange carriers (“IXCs”) – providers of long-distance service such as MCI and AT&T – compensated LECs for originating and terminating interstate long-distance calls. *See generally Nat’l Ass’n of Regulatory Util. Comm’rs v.*

¹ STUART M. BENJAMIN ET AL., *TELECOMMUNICATIONS LAW AND POLICY* §15.3.1, at 763 (2d ed. 2006).

² *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 406 (5th Cir. 1999) (“TOPUC”).

³ *See United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

FCC, 737 F.2d 1095 (D.C. Cir. 1984). For example, when an MCI subscriber placed a call from Dallas to Denver, MCI paid interstate access charges to the originating LEC (the caller's local carrier) in Dallas and to the terminating LEC (the LEC serving the call recipient) in Denver. By recovering a portion of their network costs from the IXC, the originating and terminating LECs did not need to recover those costs from their own customers. This allowed LECs to keep local rates artificially low. "The implicit subsidies inherent in" interstate access charges "helped to assure access to affordable [local] telecommunication service in rural areas." *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 372 F.3d 454, 457 (D.C. Cir. 2004).

Similarly, state regulators maintained low rates for local phone service by setting high *intrastate* access rates, which IXCs paid to LECs for originating and terminating intrastate long-distance calls (*e.g.*, calls from Durango to Denver). *Access Charge Reform*, 12 FCC Rcd 15982, 15988 ¶11 (1997), *aff'd*, *Sw. Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

Thus, "universal service policies and intercarrier compensation policies worked in tandem to enable companies to provide affordable local phone service to residential consumers." *2011 NPRM* ¶45 (JA_____).

B. The Telecommunications Act Of 1996: A New Regulatory Paradigm

Even after the breakup of AT&T, consumers typically had only one choice for local phone service: the state-designated LEC that served their area. With the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (“1996 Act”), Congress “ended the longstanding regime of state-sanctioned monopolies”⁴ by amending the Communications Act “to introduce competition to local telephone markets.”⁵ Under the 1996 Act, “States may no longer enforce laws that impede competition, and incumbent LECs are subject to a host of duties intended to facilitate market entry.” *AT&T*, 525 U.S. at 371.

To accomplish its objectives, the 1996 Act fundamentally altered the traditional division of federal and state regulatory responsibilities. Historically, FCC jurisdiction over domestic telecommunications generally was limited to interstate matters; state commissions regulated intrastate telephone service. *See* 47 U.S.C. §152(b); *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355 (1986). “[B]y extending the Communications Act into local competition,” Congress “removed a significant area from the States’ exclusive control.” *AT&T*, 525 U.S. at 381 n.8. “With regard to the matters

⁴ *AT&T*, 525 U.S. at 371.

⁵ *Qwest I*, 258 F.3d at 1196.

addressed by the 1996 Act,” Congress “has taken the regulation of local telecommunications competition away from the States,” *id.* at 378 n.6, and has “explicitly ... given rulemaking authority” to the FCC, *id.* at 381 n.7.

1. Universal Service Under The 1996 Act

Congress recognized that its decision to open local telephone markets to competition would unravel the intricate web of implicit subsidies that had long supported universal service. Such “implicit subsidies are suited to a monopoly environment, but become difficult to sustain as competition increases.” *Qwest I*, 258 F.3d at 1196. “In a competitive environment, a carrier that tries to subsidize below-cost rates to rural customers with above-cost rates to urban customers is vulnerable to a competitor that offers at-cost rates to urban customers.” *TOPUC*, 183 F.3d at 406.

To ensure universal service in a competitive marketplace, Congress “directed the Commission to replace the system of implicit subsidies with explicit ones.” *Rural Cellular Ass’n v. FCC*, 685 F.3d 1083, 1085 (D.C. Cir. 2012) (“*RCA II*”). Under section 254 of the Communications Act (a provision added by the 1996 Act), the FCC must establish “specific, predictable and sufficient” funding “mechanisms to preserve and advance universal service.” 47 U.S.C. §254(b)(5).

This mandate to create new funding mechanisms is one of six “principles” on which the FCC must “base [its] policies for the preservation and advancement of universal service.” 47 U.S.C. §254(b). The other five principles are:

- the availability of quality services at affordable rates, 47 U.S.C. §254(b)(1);
- nationwide access to “advanced telecommunications and information services,”⁶ *id.* §254(b)(2);
- nationwide access to telecommunications and information services that are “reasonably comparable” in quality and price to services provided in urban areas, *id.* §254(b)(3);
- “equitable and nondiscriminatory” contributions by all providers of telecommunications service “to the preservation and advancement of universal service,” *id.* §254(b)(4); and
- access to advanced telecommunications services for schools, libraries, and health care providers, *id.* §254(b)(6).

⁶ The Communications Act differentiates between “telecommunications service” and “information service.” *See* 47 U.S.C. §153(53) (defining “telecommunications service”); *id.* §153(24) (defining “information service”); *see also id.* §153(50) (defining “telecommunications”). Telecommunications service, which involves the transmission of information without change in form or content, is regulated on a common carrier basis under Title II of the Act. Information service, which gives users the capability to alter or process information via telecommunications, is not subject to Title II regulation. It falls within the FCC’s Title I jurisdiction. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (“*Brand X*”).

Section 254(b) also authorizes the FCC to adopt additional universal service principles that are “consistent with this [Act]” if the FCC determines that such principles are “necessary and appropriate for the protection of the public interest.” *Id.* §254(b)(7).

Given the breadth and variety of the principles listed in section 254(b), this Court has concluded that while “the FCC must base its policies on [those] principles,” it “may exercise its discretion to balance the principles against one another when they conflict,” and “any particular principle can be trumped in the appropriate case.” *Qwest Commc’ns Int’l, Inc. v. FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005) (“*Qwest II*”) (quoting *Qwest I*, 258 F.3d at 1200).

Section 254 defines “universal service” as “an evolving level of telecommunications services that the [FCC] shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services.” 47 U.S.C. §254(c)(1). When the FCC first issued rules implementing section 254 in 1997, it designated certain voice telephone services (*e.g.*, voice grade access to the public switched network, long-distance service, and directory assistance) as the services supported by federal universal service subsidies. *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8809-22 ¶¶61-82 (1997), *aff’d in part and rev’d in part*, *TOPUC*, 183 F.3d 393.

The FCC also established four separate universal service funds: low-income support; rural health care support; schools and libraries support; and “high-cost support” – the fund at issue in this case – “which supports the provision of services in high-cost areas.” *Vermont Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 56-57 (D.C. Cir. 2011). “The high-cost support fund is by far” the “most expensive.” *Id.* at 57.

The FCC used different formulas to calculate the amount of high-cost support for different categories of carriers that serve both rural and non-rural areas. It employed a forward-looking cost model to determine the level of support for “non-rural” LECs (*i.e.*, the largest incumbent LECs, including the former Bell operating companies, which are generally subject to “price cap” regulation). *2011 NPRM* ¶51 (JA____).⁷ By contrast, for rural LECs (generally smaller incumbent LECs that operate under rate-of-return regulation), the agency based universal service payments on each carrier’s historical costs. *Id.* ¶52 (JA____).⁸ Finally, for administrative ease, the FCC

⁷ Under price cap regulation, the FCC “sets a maximum price,” and carriers must set their rates “at or below the cap.” *Nat’l Rural Telecom Ass’n v. FCC*, 988 F.2d 174, 178 (D.C. Cir. 1993).

⁸ Under rate-of-return regulation, which “is based directly on cost,” rural LECs “can charge rates no higher than necessary to obtain sufficient revenue to cover their costs and achieve a fair return on equity.” *Nat’l Rural Telecom Ass’n*, 988 F.2d at 177-78 (internal quotation marks omitted).

adopted an “identical support” rule, under which wireless carriers and new wireline entrants into local markets received universal service support “for each line based not on their own costs, but rather on the same per-line support” received by the incumbent LEC “in the relevant service area.”

Rural Cellular Ass’n v. FCC, 588 F.3d 1095, 1099 (D.C. Cir. 2009) (“*RCA I*”).

2. Intercarrier Compensation Under The 1996 Act

The 1996 Act significantly expanded the scope of federal regulation of intercarrier compensation. Congress for the first time imposed on LECs a “duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.” 47 U.S.C. §251(b)(5). All LECs (whether incumbents or new entrants into local markets) are subject to this duty.

At the same time that Congress created this “reciprocal compensation” duty, it expressly preserved LECs’ existing exchange access “obligations (including the receipt of compensation)” until those obligations “are explicitly superseded by regulations prescribed by the Commission.” 47 U.S.C. §251(g). Thus, for a transitional period, the 1996 Act maintained the pre-existing system of access charges that IXCs paid to LECs to originate and terminate long-distance calls.

Different per-minute rates applied to interstate access, intrastate access, and traffic subject to federal reciprocal compensation rules. Therefore, the amount of intercarrier compensation for a particular call depended on where the call began and ended. If a call crossed “state lines,” it incurred “interstate access” charges, which were “regulated by the [FCC].” *2011 NPRM* ¶53 (JA____). If a call came from “within the state” but outside the local calling area, “intrastate access” rates applied; they were “governed by state law” and were “typically higher than interstate rates.” *Id.* And if a call stayed within a local area, it was subject to “reciprocal compensation” charges, which were “either negotiated by the parties” or “set by states” using a methodology prescribed by the FCC. *Id.*

3. Section 706

Anticipating technological innovation, the 1996 Act also sought to promote the spread of “advanced telecommunications capability” – “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.” 1996 Act, §706(c)(1), 110 Stat. 153 (codified in 2008 at 47 U.S.C. §1302(d)(1)). Congress sought to ensure that Americans everywhere would have access to broadband services. Consequently, section 706(a) of the 1996 Act directs the FCC and state

regulators to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” by using “regulating methods that remove barriers to infrastructure investment.” 47 U.S.C. §1302(a). Section 706(b) provides that if advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion, the FCC “shall take immediate action to accelerate deployment.” *Id.* §1302(b). Given the “generous phrasing” of section 706, “the FCC possesses significant, albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband.” *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 906-07 (D.C. Cir. 2009).

C. Universal Service And Intercarrier Compensation In The New Millennium: Two Dysfunctional Regulatory Regimes In Need Of Reform

In the decade and a half since the 1996 Act took effect, “the communications landscape has changed dramatically.” 2011 NPRM ¶8 (JA____). With the explosive growth of the Internet, demand for broadband services has surged. Broadband Internet access revenues grew “from \$13.1 billion in 2003 to \$36.7 billion in 2009.” *Id.* (JA____-____). And a growing number of consumers are purchasing Voice over Internet Protocol (“VoIP”) service – the phone service typically offered by cable companies, Vonage,

and Skype.⁹ Interconnected VoIP subscriptions “increased by 22 percent” between 2008 and 2009. *Id.* (JA____).

While the communications marketplace was undergoing rapid change, the universal service and intercarrier compensation systems – which had been “designed for 20th century networks and market dynamics,” *2011 NPRM* ¶8 (JA____) – remained largely static during the first decade of the 21st century. Those regulatory regimes became more inadequate and inefficient with each passing year because they were “directed at telephone service, not broadband.” *Id.* ¶6 (JA____).

1. In 2011, federal universal service subsidies “still primarily support[ed] voice” telephony. *2011 NPRM* ¶6 (JA____). By then, however, older circuit-switched “networks that provide[d] only voice service” were “no longer adequate for the country’s communication needs.” *Id.* ¶2 (JA____). Broadband deployment has “become crucial to our nation’s economic development and civic life.” *Id.* ¶3 (JA____). “Businesses need broadband to start and grow; adults need broadband to find jobs; children need broadband to learn.... Broadband also helps lower the costs and improve the quality of health care.” *Id.*

⁹ VoIP uses “‘packet-switching’ to transmit a voice communication over a broadband ... connection ... in small digital packets.” *Minnesota Pub. Utils. Comm’n v. FCC*, 483 F.3d 570, 574 (8th Cir. 2007).

The “distance-conquering benefits of broadband” are especially important to “America’s more remote small towns, rural and insular areas, and Tribal lands.” *2011 NPRM* ¶3 (JA____). Yet in 2010, “as many as 24 million Americans” – one out of every thirteen – “live[d] in areas where there [was] no access to any broadband network.” *Id.* ¶5 (JA____). These “unserved areas” could be found in all 50 states. *Id.* (JA____).

The FCC’s existing universal service program was ill-suited to close these gaps in broadband coverage. The agency had tried to stimulate broadband deployment by adopting a policy of “no barriers to advanced services,” under which recipients of federal universal service funding were permitted (but not required) to use the subsidies “to upgrade their facilities to modern networks.” *2011 NPRM* ¶52 (JA____). While this policy “enabled some rural telephone companies to deploy broadband-capable lines,” the FCC’s indirect method of supporting broadband left “many rural areas” with “insufficient support for broadband.” *Id.* ¶6 (JA____).

2. The intercarrier compensation system likewise failed to keep pace with changes in technology and market conditions. The compensation LECs received under that system was based on “voice minutes” provided over legacy networks. *2011 NPRM* ¶6 (JA____). But with “the rise of new modes of communications,” *id.* ¶495 (JA____) – including VoIP, texting, e-mail, and

wireless telephony – compensable wireline telephone minutes “plummeted from 567 billion in 2000 to 316 billion in 2008.” *Id.* ¶8 (JA____). As a result, incumbent LECs’ intercarrier compensation revenues had “become dangerously unstable, impeding investment.” *Order* ¶9 (JA____); *see also id.* Figures 10, 11 (JA____, ____).

Simply put, the 20th century framework for intercarrier compensation no longer made sense in the modern communications market. A system that based compensation on minutes of use could not accommodate 21st century modes of communication, which are largely provided over Internet Protocol (“IP”) facilities, because “payments for the exchange of IP traffic are not based on per-minute charges, but ... on charges for the amount of bandwidth consumed per month.” *2011 NPRM* ¶505 (JA____) (internal quotation marks omitted).

An access charge regime that assumed the existence of “separate long-distance and local telephone companies,” *2011 NPRM* ¶6 (JA____), became outdated after carriers began offering bundled packages of local, long-distance, and other services, “blur[ring] traditional ... distinctions among various types of services and service providers.” *Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685, 4696 ¶21 (2005). And a system where the type and amount of compensation depended on a

call's point of origin struggled to incorporate wireless and IP-based services that "are not tied to a geographic location." *Id.* at 4696 ¶22.

Moreover, the existing system of intercarrier compensation impeded innovation by "rewarding carriers for maintaining outdated infrastructure rather than migrating to" advanced IP-based facilities. *2011 NPRM* ¶6 (JA____). Due to "uncertainty about whether or what intercarrier compensation payments are required for VoIP traffic," *id.* ¶507 (JA____), the FCC's rules "create[d] the perverse incentive" for carriers "to maintain and invest in legacy" networks to ensure the continued collection of intercarrier compensation. *Id.* ¶506 (JA____).

3. The universal service and intercarrier compensation regimes were not only becoming obsolete; they were wasteful and counterproductive. "In many areas of the country," the FCC was "provid[ing] more support than necessary" to achieve the goal of universal service, "subsidiz[ing] a competitor to a voice and broadband provider that [was] offering service without government assistance, or support[ing] several voice networks in a single area." *2011 NPRM* ¶7 (JA____). "[S]ome companies with fewer than 500 lines" were receiving "between \$8,000 [and] over \$23,000 per year per line" in universal service funding, "which translates into subsidies for local

phone service ranging from roughly \$700 to nearly \$2,000 per line per month.” *Id.* ¶210 (JA_____).

4. Similarly, the intercarrier compensation system was riddled with inefficiencies. The intercarrier compensation rate for a particular call depended on numerous factors that were largely unrelated to the incremental costs of connecting the call – not only “where the call begins and ends,” but also the “types of carriers ... involved” and “the type of traffic” (*e.g.*, wireline voice, wireless voice, data). *2011 NPRM* ¶502 (JA_____). While “the Commission’s rules allow[ed] wireline carriers to recover some costs from other carriers” through intercarrier compensation, “wireless carriers generally [had to] recover all costs from their end users.”¹⁰ And protracted disputes arose over intercarrier compensation for VoIP calls because the FCC had not clarified “the intercarrier compensation obligations associated with VoIP traffic.” *2011 NPRM* ¶610 (JA_____ - _____).

This “incoherent patchwork” of intercarrier compensation schemes produced severe “competitive distortion.” JONATHAN E. NUECHTERLEIN ET AL., *DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE* 293 (2005). Most intercarrier compensation rates were “set

¹⁰ *Petition of Qwest Corp. for Forbearance*, 25 FCC Rcd 8622, 8681-82 n.339 (2010), *aff’d*, *Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012) (“*Qwest Phoenix*”).

above incremental cost.” *2011 NPRM* ¶495 (JA____). Consequently, traditional wireline phone companies effectively “receive[d] implicit subsidies from [their] competitors” through intercarrier compensation, while many of those competitors “largely compete[d] without the benefit of such subsidies.” *Order* ¶9 (JA____). Under this inequitable scheme, “hundreds of millions of Americans” paid more than they should for wireless and long-distance service “in the form of hidden, inefficient charges.” *Id.*

This competitive distortion was exacerbated by the fact that “the majority of states have not comprehensively reformed intrastate access charges.” *2011 NPRM* ¶54 (JA____). As a result, intrastate access charges “far exceed[ed] interstate charges” in most states. *Id.* (JA____). While interstate access rates averaged 2 cents (or less) per minute, intrastate access rates exceeded 10 cents per minute in some states (with South Dakota’s per-minute rate surpassing 13 cents).¹¹

To make matters worse, the intercarrier compensation rules provided ample opportunities for arbitrage. Some carriers sought to increase the intercarrier compensation payments they received by “artificially inflat[ing] their traffic volumes” (a practice called “access stimulation”). *2011 NPRM*

¹¹ See Letter from Joe Douglas, NECA, to Marlene Dortch, FCC, December 29, 2010, Attachment (JA____).

¶7 (JA____). Others tried to avoid intercarrier charges by concealing the source of voice traffic (a practice dubbed “phantom traffic”). *Id.* “Practices like these and the disputes surrounding them cost [consumers] hundreds of millions of dollars annually.” *Id.*

In sum, there was widespread consensus that the FCC’s universal service and intercarrier compensation rules were broken and needed to be updated to account for technological advances and new market conditions.

D. The Order On Review

Recognizing the need to bridge the gaps in broadband coverage throughout the nation, Congress in 2009 directed the FCC to develop a National Broadband Plan “to ensure that all people of the United States have access to broadband capability.” American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §6001(k)(2), 123 Stat. 115, 516, . The FCC understood that it could not ensure universal access to broadband unless it “comprehensively reformed” its universal service and intercarrier compensation systems “to increase accountability and efficiency, encourage targeted investment in broadband infrastructure, and emphasize the importance of broadband to the future of these programs.” *Joint Statement on Broadband*, 25 FCC Rcd 3420, 3421 (2010).

In order to accomplish this reform, the FCC solicited public comment on a wide range of proposed rule changes.¹² Hundreds of interested parties submitted comments. After reviewing this voluminous administrative record, the FCC in November 2011 issued the *Order* that is the subject of this litigation. In the *Order*, the FCC fundamentally revised its universal service and intercarrier compensation rules in an effort to ensure that they will serve the nation's modern communications needs more efficiently and cost-effectively. *Order* ¶¶17-42 (JA____-____).

1. Universal Service Reform

The FCC took several steps to modernize its universal service program by reorienting it to support dual-use networks capable of providing both voice and broadband services. First, exercising its authority under 47 U.S.C. §254(b)(7), the agency adopted an additional principle on which to base its universal service policies: “Support for Advanced Services – Universal service support should be directed where possible to networks that provide advanced services, as well as voice services.” *Order* ¶¶43-45 (JA____-____).

¹² See *Connect America Fund*, 25 FCC 6657 (2010) (JA____); *2011 NPRM* ¶¶55-689 (JA____-____); Public Notice, *Further Inquiry into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding*, 26 FCC Rcd 11112 (2011) (JA____).

Second, pursuant to 47 U.S.C. §254(c)(1), the FCC redefined the services supported by federal universal service funding to encompass all “voice telephony service,” including VoIP. *Order* ¶¶77-81 (JA____-____).

Finally, the FCC required that, as a condition of receiving universal service support, carriers must deploy networks capable of providing “modern broadband” services “as well as voice telephony services.” *Order* ¶65 (JA____). To ensure that support is being used to deploy such dual-use networks, the agency prescribed new public interest obligations under which recipients of universal service funding must offer voice and broadband services that meet certain performance standards. *Id.* ¶¶86-108 (JA____-____).

The FCC explained that it had authority to promote ubiquitous access to broadband under section 254. *Order* ¶¶61-65 (JA____-____). It noted that in *Qwest I*, this Court concluded that the FCC not only has “a ‘mandatory duty’ to adopt universal service policies that advance the principles outlined in section 254(b),” but also has “the authority to ‘create some inducement’ to ensure that those principles are achieved.” *Id.* ¶65 (JA____) (quoting *Qwest I*, 258 F.3d at 1200, 1204). Two of those principles identify access to “information services” (including broadband) as an integral component of

universal service. *Id.* (citing 47 U.S.C. §254(b)(2), (b)(3)).¹³ To create an inducement to achieve those principles and the “advanced services” principle it adopted under section 254(b)(7), the agency required recipients of universal service support to “invest in and deploy networks capable of providing consumers with access to modern broadband capabilities, as well as voice telephony services.” *Id.*

In this regard, the FCC found that it had authority “to support not only voice telephony service but also the facilities over which it is offered.” *Order* ¶64 (JA____). Section 254(e) states that recipients of universal service support “shall use that support only for the provision, maintenance, and upgrading of *facilities and services* for which the support is intended.” 47 U.S.C. §254(e) (emphasis added). Noting that section 254(e) “refer[s] to ‘facilities’ and ‘services’ as distinct items for which federal universal service funds may be used,” the FCC reasoned that “Congress granted the [agency] the flexibility ... to encourage the deployment of the types of facilities that will best achieve the principles set forth in section 254(b).” *Order* ¶64 (JA____).

¹³ The FCC has classified broadband Internet access as an information service. *See Brand X*, 545 U.S. at 975-79; *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

The FCC explained that this reading of the statute is consistent with the agency's longstanding recognition that "[t]he public switched telephone network is not a single-use network." *Id.* n.70 (JA____) (internal quotation marks omitted). Previously, the agency had adopted a "no barriers" policy, which permitted (but did not require) recipients of universal service support to invest in facilities that could provide broadband service as well as voice service. *Id.* ¶64 (JA____). The FCC concluded that it had authority under sections 254(b) and (e) "to go beyond the 'no barriers' policy" to "require carriers receiving federal universal service support to invest in modern broadband-capable networks." *Id.* ¶65 (JA____).

The FCC also concluded that section 706 of the 1996 Act independently authorized the agency to fund the deployment of broadband networks in order "to 'remov[e] barriers to infrastructure investment' and 'promot[e] competition in the telecommunications market.'" *Order* ¶66 (JA____) (quoting 47 U.S.C. §1302(b)).

To help achieve its goal of stimulating broadband deployment, the FCC created the Connect America Fund ("CAF"). *Order* ¶¶115-120 (JA____). It contemplated that the CAF would ultimately replace the existing mechanisms for federal high-cost universal service support after a transitional period of several years. In the meantime, the FCC established an annual budget of no

more than \$4.5 billion for high-cost support (including legacy programs and CAF subsidies). *Id.* ¶¶125-126 (JA____-____). It based this budget on funding estimates that reflected the agency’s “predictive judgment as to how best to allocate limited resources.” *Id.* ¶123 (JA____).

The FCC also adopted new rules for distributing universal service support to price cap carriers, rate-of-return carriers, mobile wireless carriers, and carriers serving the nation’s most remote areas.

Price Cap Carriers. More than 83 percent of Americans who lack access to fixed (*i.e.*, non-mobile) broadband service live in areas served by carriers subject to price cap regulation. *Order* ¶127 (JA____). Yet “such areas currently receive approximately 25 percent of high-cost support.” *Id.* ¶158 (JA____). To address this disparity, the FCC planned to disburse CAF support to price cap carriers in two phases. During Phase I (in 2012), the agency supplemented existing high-cost support by making available to price cap carriers \$300 million in CAF funding to jump-start broadband deployment in areas that are unserved by any broadband provider. *Id.* ¶¶132-155 (JA____-____).¹⁴

¹⁴ Participation in Phase I was optional. Price cap carriers accepted roughly \$115 million in Phase I support. The FCC currently is considering several proposals to distribute the remaining \$185 million of Phase I funding. *See Connect America Fund*, 27 FCC Rcd 14566 (2012).

For Phase II, the agency budgeted \$1.8 billion in annual CAF support for price cap carriers for a five-year term. *Order* ¶¶156-193 (JA____ - ____). The FCC will use a new forward-looking cost model to set Phase II support levels for specific carriers. *Id.* ¶¶181-193 (JA____ - ____). Any price cap carrier that accepts Phase II CAF funding for a particular state must make a five-year commitment to offer broadband service that meets FCC-prescribed performance standards in every location where it receives CAF support. *Id.* ¶¶171-178 (JA____ - ____). In areas where the incumbent price cap carrier declines a state-level service commitment, the FCC will use a competitive bidding mechanism to distribute Phase II support. *Id.* ¶179 (JA____). That mechanism is in the process of being developed.

Rate-of-Return Carriers. Under rate-of-return regulation, carriers obtained “a stable 11.25 percent interstate return ... regardless of the necessity or prudence of any given investment.” *Order* ¶287 (JA____). Historically, the FCC’s universal service program subsidized “both a well-run company operating as efficiently as possible, and a company with high costs due to imprudent investment decisions, unwarranted corporate overhead, or an inefficient operating structure.” *Id.*

While the FCC decided to continue supporting rate-of-return carriers “under the legacy universal service system in the near-term,” *Order* ¶286

(JA____), it acted “to eliminate waste and inefficiency” by adopting “a number of reforms” to “improve incentives for rational investment and operation by rate-of-return LECs.” *Id.* ¶195 (JA____). Among other things, the agency: (1) placed limits on reimbursable capital and operating expenses for rate-of-return carriers whose costs are significantly higher than similarly situated companies, *id.* ¶¶210-226 (JA____ - ____); (2) capped recovery of corporate operations expense, *id.* ¶¶227-233 (JA____ - ____); and (3) imposed a per-line cap on monthly high-cost support, *id.* ¶¶272-279 (JA____ - ____). These reforms were designed to set the stage for a transition to “a more incentive-based form of regulation” under which rate-of-return carriers will receive “new CAF support.” *Id.* ¶204 (JA____).

In addition, for both price cap and rate-of-return carriers, the agency: (1) phased out high-cost support in areas where an unsubsidized competitor (or a combination of unsubsidized competitors) offers voice and broadband service throughout the incumbent carrier’s service area, *id.* ¶¶170, 280-284 (JA____, ____ - ____); and (2) reduced support for areas with “artificially low” end-user rates that fall below a specified “rate floor,” *id.* ¶¶234-247 (JA____ - ____).

Based on data in the record, the FCC concluded that these “incremental reforms will not endanger existing service to consumers.” *Order* ¶289

(JA____). Areas served by rate-of-return carriers will continue to receive up to \$2 billion in annual universal service payments. *Id.* ¶286 (JA____).

According to the FCC’s projections, nearly half of the rate-of-return carriers will see no change (or even a slight increase) in support, and most of the others will experience reductions of less than 10 percent. *Id.* ¶290

(JA____).¹⁵ In the event that any carrier can demonstrate that the universal service reforms will threaten its “financial viability, imperiling service to consumers,” the FCC will grant a waiver “exempting the carrier from some or all of those reforms.” *Id.* ¶539 (JA____).

To cushion the impact of those reforms, the FCC imposed less burdensome broadband service obligations on rate-of-return carriers. It decided that those carriers – which typically are much smaller than price cap carriers – “should be provided greater flexibility” to roll out broadband facilities gradually “in response to consumer demand.” *Order* ¶206 (JA____). Rate-of-return carriers that receive universal service support under the new rules are not required to “deploy broadband-capable facilities to all locations within their service territory.” *Id.* They need only “deploy

¹⁵ The FCC further noted that rate-of-return carriers will also receive “funding through the CAF created to address access charge reform.” *Order* ¶207 (JA____); *see id.* ¶¶917-920 (JA____-____).

broadband to [a] requesting customer within a reasonable amount of time” after “receipt of a reasonable request for service.” *Id.* ¶208 (JA____).

Wireless Carriers. In response to the increasing prevalence of mobile services, the FCC created the CAF Mobility Fund, “the first universal service mechanism dedicated to ensuring availability of mobile broadband networks in areas where a private-sector business case is lacking.” *Order* ¶28 (JA____). Although existing high-cost support will be phased out during a transition period, wireless carriers will be eligible for Mobility Fund support reserved for mobile services. *Id.* ¶¶29, 512-532 (JA____, ____-____).

During the transition period, the FCC will allocate Mobility Fund support in two stages. Phase I of the Mobility Fund will provide one-time support of up to \$300 million to jump-start deployment of mobile broadband networks in unserved areas. *Order* ¶¶28, 301-478 (JA____, ____-____). In addition, “a separate and complementary one-time Tribal Mobility Fund Phase I” will “award up to \$50 million in additional universal service funding to Tribal lands to accelerate mobile voice and broadband availability in these remote and underserved areas.” *Id.* ¶28 (JA____); *see also id.* ¶¶481-488 (JA____-____). Phase II of the Mobility Fund “will provide up to \$500 million per year in ongoing support,” including “ongoing support to Tribal

areas of up to \$100 million per year.” *Id.* ¶28 (JA____); *see also id.* ¶¶493-497 (JA____-____).

The FCC planned to distribute Mobility Fund Phase I subsidies through a nationwide “reverse auction,” under which funding will be awarded to the carriers that offer to provide the most service for the least amount of support. *Order* ¶¶321-329 (JA____-____). The winning bidders must offer both voice and broadband service. *Id.* ¶¶358-368 (JA____-____). They “will be required to deploy 4G service [*i.e.*, the latest generation of mobile broadband technology] within three years, or 3G service within two years.” *Id.* ¶28 (JA____).¹⁶

The FCC eliminated the “identical support” rule, which previously governed the distribution of universal service support to competitive carriers (predominantly wireless providers). *Order* ¶¶498-511 (JA____-____). Under that rule, competitive carriers received the same amount of support as the incumbent LEC, whether or not their costs were the same. The FCC found that the identical support rule “makes little sense” because it generates

¹⁶ The FCC conducted the Mobility Fund Phase I auction on September 27, 2012. It awarded \$300 million to extend mobile service to up to 83,494 road miles across the country. Public Notice, *Mobility Fund Phase I Auction Closes*, 27 FCC Rcd 12031 (2012).

“support levels” that “bear no relation to the efficient cost of providing mobile voice service in a particular geography.” *Id.* ¶504 (JA____).¹⁷

Remote Areas. Recognizing that the cost of deploying networks can be extremely high in remote areas, the FCC concluded that it should eventually support such areas through a separate, newly created fund. To that end, the agency established a separate budget for CAF support “in the most remote areas of the nation.” *Order* ¶533 (JA____). Exercising its “predictive judgment,” the FCC concluded that “a budget of at least \$100 million per year is likely to make a significant difference in ensuring meaningful broadband access in the most difficult-to-serve areas.” *Id.* ¶534 (JA____). The agency “expect[ed] to revisit this decision over time,” “adjust[ing] support levels as appropriate.” *Id.* ¶538 (JA____). It also “exempted the most remote areas, including fewer than 1 percent of all American homes,” from the “broadband service obligations that otherwise apply to CAF recipients.” *Id.* ¶533 (JA____-____).

2. Intercarrier Compensation Reform

As a first step in reforming its intercarrier compensation system, the FCC promulgated new rules designed to curb two wasteful arbitrage practices

¹⁷ The FCC reached a similar conclusion in 2008 when it imposed an interim cap on funding under the identical support rule. The D.C. Circuit upheld the interim cap. *RCA I*, 588 F.3d at 1100-08.

that harm consumers: access stimulation and phantom traffic. *Order* ¶¶33, 656-735 (JA____, ____-____).

The FCC also adopted a comprehensive plan “to phase out regulated per-minute intercarrier compensation charges” over a multi-year transition period. *Order* ¶736 (JA____). Ultimately, “a uniform national bill-and-keep framework” – in which a carrier “bills” its own subscriber and “keeps” the revenue – will apply to “all telecommunications traffic exchanged with a LEC.” *Id.* ¶34 (JA____). Under this framework, service providers will recover the costs of their networks from their own subscribers (and, where necessary, the CAF) rather than from other carriers. “In this respect, bill-and-keep helps fulfill” the 1996 Act’s directive that the FCC “should make support explicit rather than implicit.” *Id.* ¶747 (JA____).

The FCC found that bill-and-keep “has significant policy advantages” over other approaches to compensation. *Order* ¶738 (JA____). By “eliminating the existing opaque implicit subsidy system under which consumers pay” billions of dollars “to support other carriers’ network costs,” a bill-and-keep methodology “will ensure that consumers pay only for services that they choose and receive.” *Id.*; *see also id.* ¶¶748-751 (JA____-____). Such a methodology allocates costs more efficiently than the existing intercarrier compensation system by ensuring that the initiator and recipient

of a phone call “split the cost of the call.” *Id.* ¶744 (JA____). Bill-and-keep “also imposes fewer regulatory burdens” and “reduces arbitrage and competitive distortions” by “eliminating carriers’ ability to shift network costs to competitors and their customers.” *Id.* ¶738 (JA____). “Wireless providers have long been operating pursuant to what are essentially bill-and-keep arrangements, and this framework has proven to be successful for that industry.” *Id.* ¶737 (JA____). Furthermore, a bill-and-keep framework “will promote the nation’s transition to [broadband] networks” because it reduces incentives for carriers to maintain legacy equipment to receive intercarrier compensation revenues. *Id.* ¶655 (JA____).

The FCC determined that it had authority to implement bill-and-keep as the default framework for all telecommunications traffic exchanged with LECs. *Order* ¶¶760-781 (JA____-____). Section 201(b) of the Communications Act empowers the FCC to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this [Act].” 47 U.S.C. §201(b); *see also AT&T*, 525 U.S. at 378. The FCC concluded that section 201(b) authorized it “to regulate the default compensation arrangement applicable to traffic subject to section 251(b)(5).” *Order* ¶770 (JA____).

Section 251(b)(5) imposes on all LECs the “duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.” 47 U.S.C. §251(b)(5). The FCC construed this provision to apply to all telecommunications traffic of any geographic scope, including intrastate access traffic. *Order* ¶¶761-768 (JA____-____). Section 251(g) provides that the “restrictions and obligations” of the traditional access charge regime will remain in effect “until ... explicitly superseded by regulations prescribed by the [FCC].” 47 U.S.C. §251(g). In the *Order*, the FCC “explicitly supersede[d] the traditional access charge regime” by opting to “regulate terminating access traffic in accordance with the section 251(b)(5) framework.” *Order* ¶764 (JA____).

The FCC rejected the argument that “bill-and-keep intrudes on states’ rate-setting authority” under 47 U.S.C. §252(d)(2) “by effectively setting a compensation rate of zero.” *Order* ¶773 (JA____).¹⁸ The agency pointed out that “the pricing standard in section 252(d)” does not even apply to access traffic, which constitutes “most of the traffic” affected by the new rules. *Id.* ¶774 (JA____). Moreover, the FCC observed, “[s]ection 252(d)(2)(B) makes clear that ‘arrangements that waive mutual recovery (such as bill-and-keep

¹⁸ Section 252(d)(2) establishes a pricing standard that state commissions apply in arbitrations for purposes of assessing incumbent LECs’ compliance with section 251(b)(5).

arrangements) are consistent with section 252(d)'s pricing standard." *Id.*

¶775 (JA____) (quoting 47 U.S.C. §252(d)(2)(B)).

The FCC found that a gradual transition to bill-and-keep generally was warranted to minimize disruption to consumers and service providers. When the new rules took effect, rates for terminating access and reciprocal compensation were capped at existing levels, and certain rates began the transition to bill-and-keep. This transition will take six years for price cap carriers and nine years for rate-of-return carriers. *Order* ¶¶798-805 (JA____-____).¹⁹

The FCC also clarified the intercarrier compensation obligations that apply prospectively to VoIP and wireless traffic. *Order* ¶¶933-1008 (JA____-____). In response to the "significant and growing problem of traffic stimulation and regulatory arbitrage" associated with wireless traffic,

¹⁹ The transition to bill-and-keep for originating access and other rate elements has not yet been established. The FCC sought further comment on how to implement that transition. In the meantime, it has capped all originating access charges for price cap carriers and interstate originating access charges for rate-of-return carriers. *Order* ¶¶739, 800-801 (JA____, ____-____).

id. ¶995 (JA____), the FCC ordered an immediate transition to bill-and-keep for wireless traffic exchanged with LECs. *Id.* ¶¶995-1000 (JA____-____).²⁰

In addition, the FCC created a mechanism that enables incumbent LECs to recover some of the intercarrier compensation revenues that are reduced as a result of the new rules. *Order* ¶¶847-853 (JA____-____). Under this mechanism, price cap incumbents and rate-of-return incumbents use different formulas to calculate the revenue they are eligible to recover. *Id.* ¶¶867-904 (JA____-____). Carriers can recover that revenue by assessing an Access Recovery Charge (“ARC”) on their end users (subject to certain restrictions to ensure that rates remain affordable). *Id.* ¶¶906-916 (JA____-____). If the ARC is insufficient to yield all of the revenue they are eligible to recover, carriers can recover the remainder through CAF support. *Id.* ¶¶917-920 (JA____-____).

The FCC noted that “[a]bsent reform,” LECs would “face an increasingly unpredictable revenue stream” from intercarrier compensation, “which will only get worse as demand for traditional telephone service continues to decline.” *Order* ¶848 (JA____). The agency found that its new

²⁰ On reconsideration, the FCC postponed the transition to bill-and-keep for some wireless traffic until July 1, 2012. *Connect America Fund*, 26 FCC Rcd 17633, 17636-37 ¶7 (2011) (JA____, ____-____).

recovery mechanism would “provide carriers with significantly more revenue certainty than the *status quo*.” *Id.* ¶39 (JA____).

STANDARDS OF REVIEW

Review of the FCC’s interpretation of the statutes it administers is governed by *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). Under *Chevron*, if “Congress has directly spoken to the precise question at issue,” the Court “must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842-43. But “if the statute is silent or ambiguous,” the Court must decide whether the agency has adopted “a permissible construction of the statute.” *Id.* at 843; *see also Sorenson Commc’ns, Inc. v. FCC*, 659 F.3d 1035, 1042 (10th Cir. 2011) (“*Sorenson II*”). If the implementing agency’s reading of an ambiguous statute is reasonable, “*Chevron* requires that [the Court] accept this construction, ‘even if the agency’s reading differs from what the [Court] believes is the best statutory interpretation.’” *Rivera-Barrientos v. Holder*, 666 F.3d 641, 645 (10th Cir. 2012) (quoting *Brand X*, 545 U.S. at 980). This Court applies the *Chevron* framework to an agency’s interpretation of its own statutory

authority. *See Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228, 1250 (10th Cir. 2004).²¹

The Court must also defer to the FCC’s reading of its own orders and regulations unless the agency’s interpretation is plainly erroneous or inconsistent with them. *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Southern Utah Wilderness Alliance v. Office of Surface Mining Reclamation & Enforcement*, 620 F.3d 1227, 1236 (10th Cir. 2010); *Morris v. NRC*, 598 F.3d 677, 684 (10th Cir. 2010).

In evaluating petitioners’ APA claims, the Court must assess whether the challenged FCC action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §706(2)(A). Under this “‘narrow’ standard of review,” courts “require only that the [FCC] ‘examine the relevant data and articulate a satisfactory explanation for its action.’” *Qwest Phoenix*, 689 F.3d at 1224 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009)). Review under this standard is “particularly deferential in matters” that “implicate competing policy choices” and “predictive market judgments.” *Ad Hoc*, 572 F.3d at 908. “An agency’s action is entitled to a presumption of validity, and the burden is upon the

²¹ The Supreme Court recently heard argument in a case that presents this issue. *City of Arlington v. FCC*, S. Ct. No. 11-1545 (argued Jan. 16, 2013).

petitioner to establish the action is arbitrary or capricious.” *Sorenson II*, 659 F.3d at 1046 (quoting *Sorenson Commc’ns, Inc. v. FCC*, 567 F.3d 1215, 1221 (10th Cir. 2009) (“*Sorenson I*”).

Judicial review of FCC action under the APA “is no more searching” where (as here) the agency’s decision “represents a change in policy.” *Qwest Phoenix*, 689 F.3d at 1224. “[I]t suffices that the new policy is permissible under the statute, [and] that there are good reasons for it....” *Id.* at 1225 (quoting *Fox Television*, 556 U.S. at 515).

When an agency’s reasoning is “bound up with a record-based factual conclusion,” a reviewing court must “determine whether [the agency’s conclusion] is supported by ‘substantial evidence.’” *Dickinson v. Zurko*, 527 U.S. 150, 164 (1999). “Substantial evidence is that which a reasonable mind might accept as adequate to support the conclusion reached by the [agency].” *Cordero Mining LLC v. Sec’y of Labor ex rel. Clapp*, 699 F.3d 1232, 1236 (10th Cir. 2012) (internal quotation marks omitted). “Under this deferential standard of review, [a court] may not displace the agency’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.” *Id.* (internal quotation marks omitted).

The Court reviews constitutional claims de novo. *Lorenzo v. Mukasey*,
508 F.3d 1278, 1282 (10th Cir. 2007).

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February 6, 2013

CERTIFICATE OF COMPLIANCE
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1. This brief complies with the type-volume limitation of the Second Briefing Order. It does not exceed 15% of the size of the brief to which it is responding. The Joint Preliminary Brief of the Petitioners was certified to be 6,748 words in length. Therefore, the FCC may file a response brief up to 7,760 words in length. This brief contains 7,745 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 10th Cir. R. 32(a) and the type style requirements of Fed. R. App. P. 32(a)(6) because this filing has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.
3. All required privacy redactions have been made.
4. This brief was scanned for viruses with Symantec Endpoint Protection, version 11.0.7200.1147, updated on February 6, 2013, and according to the program is free of viruses.

/s/ James M. Carr
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February 6, 2013

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2013, I caused the foregoing Federal Respondents' Uncited Response to the Joint Preliminary Brief of the Petitioners to be filed by delivering a copy to the Court via e-mail at FCC_briefs_only@ca10.uscourts.gov. I further certify that the foregoing document will be furnished by the Court through (ECF) electronic service to all parties in this case through a registered CM/ECF user. This document will be available for viewing and downloading on the CM/ECF system.

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February 6, 2013