FEDERAL RESPONDENTS' UNCITED RESPONSE TO THE INCUMBENT LOCAL EXCHANGE CARRIER INTERVENORS' BRIEF IN SUPPORT OF PETITIONERS

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

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GLOSSARY

FCC	Federal Communications Commission
FCC Principal ICC Brief	Federal Respondents' Response to the Joint ICC Principal Brief of Petitioners
FCC Principal USF Brief	Federal Respondents' Response to the Joint USF Principal Brief of Petitioners
ICC	Intercarrier Compensation
USF	Universal Service Fund

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INTRODUCTION AND SUMMARY OF ARGUMENT

Some incumbent local exchange carriers and affiliated organizations (collectively, "intervenors") have intervened in support of certain petitioners in this case. The brief filed by these intervenors merely repeats several of the arguments that petitioners advanced in their briefs. The Federal Communications Commission ("FCC") does not wish to burden the Court by repeating arguments it has made in other briefs. Therefore, in responding to the arguments made by these intervenors, we will simply cross-reference to other briefs where we explained why the arguments lack merit.

Insofar as the intervenors' brief could be construed to present new arguments that were not previously raised by any petitioner, the Court should decline to consider any such arguments. Except in extraordinary cases,

intervenors may not enlarge the scope of a case by presenting issues that were not raised by petitioners. *Arapahoe County Pub. Airport Auth. v. FAA*, 242 F.3d 1213, 1217-18 n.4 (10th Cir. 2001); *see also* Order Governing Motion Practice in the Consolidated Proceedings, 10th Cir. No. 11-9900, at 6 (issued March 13, 2012).

ARGUMENT

I. THE INTERVENORS' CHALLENGES TO THE NEW UNIVERSAL SERVICE RULES LACK MERIT.

The intervenors argue that the Communications Act prohibits the FCC from using Universal Service Fund ("USF") subsidies to support non-telecommunications services provided by non-telecommunications carriers. Br. 17-18. Petitioners made the same claim in the Joint USF Brief (at 11-18). Insofar as intervenors assert that entities that are not telecommunications carriers and do not provide telecommunications services will receive USF support under the new rules, that claim is not ripe and lacks merit. *See* FCC Principal USF Br. 24-27. We also showed that the FCC has authority under 47 U.S.C. §254 to condition the receipt of USF subsidies on the deployment of broadband-capable networks and the satisfaction of clearly defined broadband public interest obligations. *See* FCC Principal USF Br. 12-24; FCC Response to Wireless Carrier USF Principal Br. 9-23. In addition, we explained that the FCC has independent authority under section 706 of the

Telecommunications Act of 1996, 47 U.S.C. §1302, to require recipients of USF support to deploy broadband networks and services. *See* FCC Principal USF Br. 27-30; FCC Response to Wireless Carrier USF Principal Br. 23-26.

Just like petitioners (Joint USF Br. 30-33), the intervenors maintain that the new universal service rules fail to ensure "sufficient" funding to "preserve and advance" universal service. Br. 13-15. As we explained in the FCC Principal USF Brief (at 33-38), the FCC reasonably predicted that its new rules would provide for sufficient USF support, and the agency's predictive judgment is entitled to deference.

The intervenors also adopt petitioners' contentions (Joint USF Br. 36-39) that the FCC's benchmarking rule violates the statutory directive that USF support be "predictable," and that the FCC improperly delegated authority to its Wireline Competition Bureau to implement this rule. Br. 15-16 (citing 47 U.S.C. §254(b)(5)). In the FCC Principal USF Brief (at 40-46), we explained that these claims are both procedurally barred and substantively baseless.

Adopting another argument presented in the Joint USF Brief (at 53-55), the intervenors contend that the FCC violated 47 U.S.C. §254(b) by eliminating USF support in areas where an unsubsidized competitor offers voice and broadband service. Br. 22-23. That contention lacks merit. *See*

FCC Principal USF Br. 58-61; FCC Response to Additional USF Issues Principal Brief of Petitioners at 17-22.

The intervenors' argument that the FCC violated 47 U.S.C. §410(c) by failing to refer certain issues to a Joint Board (Br. 16-17) echoes an argument in the Additional USF Issues Principal Brief of Petitioners (at 14-23). We refuted it in the FCC Response to the Additional USF Issues Principal Brief of Petitioners (at 11-17). *See also* FCC Principal ICC Br. 41 n.17.

II. THE INTERVENORS' CHALLENGES TO THE NEW INTERCARRIER COMPENSATION RULES LACK MERIT.

The intervenors contend that the FCC lacks statutory authority to "set a specific rate" for intercarrier compensation ("ICC"). Br. 7-8. Petitioners made the same argument in the Joint ICC Brief (at 28-31). We addressed that argument in the FCC Principal ICC Brief (at 41-45), where we demonstrated (among other things) that the Communications Act permits the use of a bill-and-keep methodology.

The intervenors also assert that the FCC's default bill-and-keep methodology is inconsistent with 47 U.S.C. §252(d)(2). Br. 8-10. Petitioners

presented that argument in the Joint ICC Brief (at 31-38). We rebutted that claim in the FCC Principal ICC Brief (at 33-37).[1]

The intervenors reiterate petitioners' argument (Joint ICC Br. 7-28) that the FCC lacks authority to regulate intrastate access services under 47 U.S.C. §251(b)(5) and to preempt state regulation of intrastate access charges. Br. 10-12. We refuted those arguments in the FCC Principal ICC Brief (at 12-22, 25-32).

Finally, the intervenors argue (Br. 19-21) – as did petitioners in the Joint ICC Brief (at 49-57) – that the new ICC rules do not permit ILECs to recover their "used and useful" costs. We showed in the FCC Principal ICC Brief (at 45-54) that the claim is unfounded.

[1] In a footnote (Br. 10 n.1), the intervenors adopt petitioners' argument (Joint ICC Br. 45-49) that the FCC lacks authority to interfere with states' evaluation of requests for relief under 47 U.S.C. §251(f)(2). In the FCC Principal ICC Brief (at 55-58), we explained why that assertion is unripe and unsound.

CONCLUSION

The petitions for review should be dismissed in part and otherwise denied.

Respectfully submitted,

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March 20, 2013

CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limitations, Typeface Requirements, Type Style Requirements, Privacy Redaction Requirements, and Virus Scan

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 Incumbent Local Exchange Carriers' Intervenors' Brief was certified to be 4,476 words in length. Therefore, the FCC may file a response brief up to 5,147 words in length. This brief contains 887 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.

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/s/ James M. Carr
James M. Carr
Counsel

March 20, 2013

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2013, I caused the foregoing Federal Respondents' Uncited Response to the Incumbent Local Exchange Carriers' Intervenors' Brief 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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March 20, 2013