IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 11-9900

IN RE: FCC 11-161

On Petitions for Review of Orders of the
Federal Communications Commission

UNCITED BRIEF OF INTERVENORS SUPPORTING RESPONDENTS IN RESPONSE TO THE WINDSTREAM PRINCIPAL BRIEF

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, intervenors Cox Communications, Inc., the National Cable & Telecommunications Association ("NCTA"), Verizon, and Verizon Wireless respectfully submit the following corporate disclosure statements:

Cox Communications, Inc. Cox Communications, Inc. ("Cox") is a privately held corporation, formed under the laws of the State of Delaware. Cox Enterprises, Inc., a privately held corporation, owns Cox through a direct majority interest and through a minority interest held by an intermediate holding company, Cox DNS, Inc. Cox has no other parent companies within the meaning of Rule 26.1, and no publicly held company has a 10 percent or greater ownership interest in Cox.

NCTA. NCTA is the principal trade association of the cable industry in the United States. Its members include owners and operators of cable television systems serving over ninety (90) percent of the nation's cable television customers as well as more than 200 cable program networks. NCTA's cable operator members also provide high-speed Internet service to more than 50 million households, as well as telephone service to more than 26 million customers. NCTA also represents equipment suppliers and others interested in or affiliated

with the cable television industry. NCTA has no parent companies, subsidiaries or affiliates whose listing is required by Rule 26.1.

Verizon and Verizon Wireless. The Verizon companies participating in this filing are Cellco Partnership, d/b/a Verizon Wireless, and the regulated, wholly owned subsidiaries of Verizon Communications Inc. Cellco Partnership, a general partnership formed under the laws of the State of Delaware, is a joint venture of Verizon Communications Inc. and Vodafone Group Plc. Verizon Communications Inc. and Vodafone Group Plc indirectly hold 55 percent and 45 percent partnership interests, respectively, in Cellco Partnership. Both Verizon Communications Inc. and Vodafone Group Plc are publicly traded companies. Verizon Communications Inc. has no parent company. No publicly held company owns 10 percent or more of Verizon Communications Inc.'s stock. Insofar as relevant to this litigation, Verizon's general nature and purpose is to provide communications services, including broadband Internet access services provided by its wholly owned telephone-company and Verizon Online LLC subsidiaries and by Verizon Wireless.

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STATEMENT OF RELATED CASES

Intervenors adopt the Statement of Related Cases set forth in the Federal Respondents' Uncited Response to the Joint Preliminary Brief of the Petitioners.

GLOSSARY

FCC	Federal Communications Commission
FCC Br.	Federal Respondents' Response to the Windstream Principal Brief (filed Mar. 27, 2013)
ICC	Intercarrier Compensation
LEC	Local Exchange Carrier
Order	Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17663 (2011)
PSTN	Public Switched Telephone Network
Second Reconsideration Order	Second Order on Reconsideration, *Connect America Fund*, 27 FCC Rcd 4648 (2012)
VoIP	Voice over Internet Protocol
Windstream	Windstream Corporation, Windstream Communications, Inc., and Windstream Corporation's wholly owned regulated subsidiaries

INTRODUCTION AND SUMMARY OF ARGUMENT

In the *Order*, the FCC adopted new, prospective rules authorizing LECs to charge their federally tariffed access charges to other carriers for originating or terminating VoIP calls that begin or end on a traditional telephone network (referred to as "VoIP-PSTN" calls). In the *Second Reconsideration Order*, the FCC partially granted Windstream's petition for reconsideration of that determination and concluded that, for two years (until June 30, 2014), LECs would also be permitted to charge their (generally higher) state tariffed access charges for *originating* intrastate VoIP-PSTN calls, before moving to the (lower) federal rates.

Even though the FCC *granted* Windstream substantial relief on reconsideration, Windstream seeks this Court's review, claiming that the FCC failed adequately to explain its treatment of originating charges for VoIP-PSTN calls. The FCC's brief ably refutes that claim. Intervenors write separately to emphasize three points.

I. The FCC demonstrates that the rule it adopted in the *Order* unambiguously authorized LECs, prospectively, to bill for originating and terminating VoIP-PSTN traffic at no higher than their federally tariffed rates. Contrary to Windstream's claim (at 16), the *Second Reconsideration Order* amended that rule *not* to make the original rule clearer, but to codify the additional relief the FCC granted to Windstream in that order.

II. Windstream's assertion that the FCC could not have intended, in the *Order*, to apply interstate access rates to originating VoIP-PSTN traffic ignores Windstream's own proposal (in conjunction with other carriers) urging the FCC to treat all VoIP-PSTN traffic as interstate for jurisdictional purposes. The FCC expressly noted in the *Order* that the compensation rule for VoIP traffic it adopted in the *Order* is the same one that would have applied had the FCC agreed that all VoIP-PSTN traffic is jurisdictionally interstate — state tariffed rates do not apply to originating or terminating VoIP-PSTN traffic.

III. The FCC, in the *Second Reconsideration Order*, established a multi-year transition for originating VoIP traffic, not a "flash cut." Windstream's complaints about that transition — and the eventual reduction to federally tariffed rates for originating traffic — ignore the additional revenue it will receive from the new rules. They are also inconsistent with Windstream's own SEC disclosures.

ARGUMENT

I. THE *ORDER* MADE CLEAR THAT ITS VoIP RULE APPLIED FEDERAL RATES TO ORIGINATING VoIP TRAFFIC

The FCC's rule for VoIP traffic, promulgated in the *Order*, unambiguously applied federally tariffed rates to all ICC charges for VoIP traffic — originating and terminating. Specifically, that rule provided that "Access Reciprocal Compensation . . . between a local exchange carrier and another telecommunications carrier" for "originat[ing] and/or terminat[ing]" VoIP-PSTN

traffic would "be subject to a rate equal to the relevant interstate access charges specified by this subpart [of the FCC's regulations]." *Order*, 26 FCC Rcd at 18178-79 (promulgating 47 C.F.R. § 51.913(a)) (JA___-__). As the FCC explains, that language "plainly applies to both originating and terminating traffic." FCC Br. 22; *see Second Reconsideration Order* ¶ 31 (the *Order*'s "text and the implementing rules demonstrate that the intercarrier compensation framework for toll VoIP traffic limits both default origination and termination charges to the level of interstate access rates") (JA___).

Windstream is thus wrong to claim repeatedly (at 16, 20, 28) that the FCC, in the *Second Reconsideration Order*, "amended" and "revise[d]" the FCC's "rules" to make that initial decision clear. Instead, the FCC amended the rule to codify the substantial relief given to Windstream on reconsideration — namely, a two-year period in which LECs such as Windstream are authorized to charge higher state tariffed rates for originating intrastate VoIP-PSTN calls. *See Second Reconsideration Order*, 27 FCC Rcd at 4671 (amending 47 C.F.R. § 51.913 to divide subsection (a) into paragraphs, with paragraph (1) defining the ICC rules for terminating VoIP-PSTN traffic and originating interstate VoIP-PSTN traffic and paragraph (2) specifying the transition period for originating intrastate VoIP-PSTN traffic) (JA___).

No different from the rule promulgated in the *Order*, the FCC's amended rule expressly authorizes the charging of federally tariffed rates for all VoIP traffic. The only substantive difference between the two rules is that the old rule made the change effective immediately, whereas the new rule provides a two-year transition period (until June 2014) in which LECs such as Windstream are expressly authorized to bill for originating intrastate VoIP traffic at their (generally higher) state tariffed rates.

II. THE *ORDER* REACHED A RESULT CONSISTENT WITH THE JURISDICTIONAL CLASSIFICATION WINDSTREAM AND OTHER CARRIERS HAD PROPOSED

As the FCC shows (at 8-10), Windstream's challenges to the *Order*'s treatment of VoIP traffic are based on portions of the order addressing traditional telecommunications traffic rather than the separate section of the order specific to VoIP traffic.

Moreover, as the FCC explained in the *Order*, the compensation rule it adopted for all VoIP traffic was consistent with an industry proposal that Windstream joined. As the FCC noted, Windstream and others urged the FCC to find that "all VoIP-PSTN traffic should be treated as interstate" for jurisdictional purposes. *Order* ¶ 959 (JA___-__). In the *Order*, the FCC did not adopt that jurisdictional classification of VoIP traffic, but it expressly recognized that the compensation rule it adopted would produce the same outcome — default rates for

VoIP traffic "equal to interstate access rates" — as if it had classified all VoIP-PSTN traffic as jurisdictionally interstate. *Id.*; *see also Second Reconsideration Order* ¶ 31 n.88 (noting that the industry proposal contained "no explanation of how the [FCC] would (or could) both classify all VoIP traffic as interstate and nonetheless adopt intrastate originating access rates" for that traffic) (JA___).

The FCC's discussion in the *Order* of the industry proposal that Windstream joined thus provides further refutation of its assertion (at 21) that the FCC's clear treatment of originating charges for VoIP-PSTN traffic in the *Order* was not "conscious[ ]" or was merely a "linguistic possibilit[y]."

III. WINDSTREAM'S COMPLAINTS ABOUT A "FLASH CUT" AND LOST REVENUE ARE ERRONEOUS AND UNSUPPORTED

Windstream's repeated complaints about a "flash cut" (at 2, 17, 20-21, 24) are wrong. Windstream ignores the relief it was granted in the *Second Reconsideration Order*: it now has an express authorization through June 30, 2014, to charge its state tariffed rates for originating intrastate VoIP-PSTN traffic. *See Second Reconsideration Order* ¶¶ 34-35 (JA___-__). It did not have that express authorization before the *Second Reconsideration Order*.[1] Moreover, two years' advance notice that Windstream's rate for originating intrastate VoIP traffic

[1] Nor did Windstream previously have an express FCC rule authorizing interstate rates for originating interstate VoIP-PSTN traffic (or terminating any VoIP-PSTN traffic).

will be no greater than its federal tariffed rate is not a "flash cut." It is a lengthy, generous transition period that the agency reasonably predicted will give Windstream and other LECs ample time to adjust their business plans. *See id.* ¶ 36 (JA___).

Windstream also complains (at 29) about the six-month gap between the *Order* and the effective date of the relief granted in the *Second Reconsideration Order*. But Windstream offers no basis to conclude that it lost any revenue during that period. It points to no record evidence about the rates it charged (or the amounts it collected) during that period. And there is some evidence that Windstream continued to charge its state rates based on its erroneous argument that the *Order*'s VoIP rule did not apply to originating charges.[2]

Finally, Windstream's suggestion (at 27) that it will suffer "significant revenue losses" once the transition occurs in 2014 ignores the agency's reasonable predictive judgment about the benefits of clear, prospective VoIP rules — which expressly authorize Windstream to charge federal tariffed rates for VoIP traffic (an area previously subject to much dispute). *See Order* ¶ 930 (predicting that the new rules "may increase the proportion of traffic for which intercarrier compensation

[2] *See* Letter from Windstream to Texas PUC (Mar. 6, 2012) (acknowledging that Windstream's 2012 tariff revisions did not limit access charges on originating intrastate VoIP-PSTN traffic to interstate rates), *available at* http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/27385_7575_720105.PDF.

can be collected," "will provide LECs, including incumbent LECs, with more certain revenue throughout the transition, and will also allow them to avoid the litigation expense associated with attempts to collect access charges for VoIP traffic") (JA___). Indeed, Windstream's claims here conflict with its own disclosures to regulators and investors, where it has stated that it does "not believe the Order's reform of intercarrier compensation will have a material impact on [its] results of operation, cash flows or [its] financial condition."[3]

CONCLUSION

For the foregoing reasons, and those set forth in the FCC's brief, the Court should deny Windstream's petition for review.

[3] Windstream Corp. Form 10-Q for Q2 2012, at 55 (SEC filed Aug. 9, 2012), *available at* http://www.sec.gov/Archives/edgar/data/1282266/000128226612000030/a201263010q.htm.

Respectfully submitted,

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April 24, 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 contains 1,418 words of the 21,400 words the Court allocated for the briefs of intervenors in support of the FCC in its October 1, 2012 Order Consolidating Case No. 12-9575 with Other FCC 11-161 Cases, Establishing Windstream Briefing Schedule, and Modifying Intervenor Participation. The intervenors in support of the FCC have complied with the type-volume limitation of that order because their briefs, combined, contain a total of fewer than 21,400 words, excluding the parts of those briefs 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 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 12.1.671.4971, updated on April 24, 2013) and, according to the program, is free of viruses.

/s/ *Scott H. Angstreich*
Scott H. Angstreich

April 24, 2013

CERTIFICATE OF SERVICE

I hereby certify that, on April 24, 2013, I caused the foregoing Uncited Brief of Intervenors Supporting Respondents in Response to the Windstream Principal 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.

/s/ *Scott H. Angstreich*
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April 24, 2013