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 JOINT INTERCARRIER COMPENSATION BRIEF

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, intervenors AT&T Inc., Cox Communications, Inc., NCTA, MetroPCS Communications, Inc., T-Mobile, USA, Inc., Verizon, Verizon Wireless, and Vonage Holdings Corporation respectfully submit the following corporate disclosure statements:

AT&T Inc. AT&T Inc. ("AT&T") is a publicly traded corporation that, through its wholly owned affiliates, is principally engaged in the business of providing communications services and products to the general public. AT&T has no parent company, and no publicly held company owns 10 percent or more of its stock.

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% or greater ownership interest in Cox.

MetroPCS Communications, Inc. MetroPCS Communications, Inc. is a publicly traded company listed on the New York Stock Exchange and is organized to provide wireless and data services to its customers. MetroPCS has no parent corporation, and, to MetroPCS's knowledge, no publicly held company holds 10 percent or more of its stock.

NCTA. The National Cable & Telecommunications Association ("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.

T-Mobile, USA, Inc. T-Mobile, USA, Inc., a Delaware corporation, is a wholly owned subsidiary of T-Mobile Global Holding GmbH, a German entity, which, in turn, is a wholly owned subsidiary of T Mobile Global Zwischenholding GmbH, a German entity. T Mobile Global Zwischenholding GmbH is a wholly owned subsidiary of Deutsche Telekom AG, a German entity. Deutsche Telekom AG is a publicly traded company in that the American Depository Receipts of Deutsche Telekom AG are publicly traded in the Over-the-Counter Market in the United States. T-Mobile's general nature and purpose are to provide wireless voice and data services to customers throughout the United States.

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 law 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.

Vonage Holdings Corporation. Vonage Holdings Corporation has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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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

1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (amending the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*)
2011 NPRM	Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 26 FCC Rcd 4554 (2011)
Communications Act or Act	Communications Act of 1934, as amended (47 U.S.C. § 151 *et seq.*)
CMRS	Commercial Mobile Radio Service
FCC or Commission	Federal Communications Commission
FCC Br.	Federal Respondents' Response to the Joint Intercarrier Compensation Principal Brief of Petitioners (filed Mar. 6, 2013)
ICC	Intercarrier Compensation
ILEC	Incumbent Local Exchange Carrier
ISP	Internet Service Provider
LEC	Local Exchange Carrier
Order	Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17663 (2011)
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Pet'rs Joint USF Br.	Joint Universal Service Fund Principal Brief (filed Oct. 23, 2012)
Second ISP Remand Order	Order on Remand and Further Notice of Proposed Rulemaking, *Intercarrier Compensation for ISP-Bound Traffic*, 24 FCC Rcd 6475 (2008)
USF	Universal Service Fund

INTRODUCTION AND SUMMARY OF ARGUMENT

The FCC ably refutes the claims in petitioners' Joint Intercarrier Compensation Brief. Intervenors write separately to highlight four points.

I. Petitioners portray the intercarrier compensation portions of the *Order* as reaching novel legal conclusions that raise issues of first impression for this Court. But the *Order* travels well-established paths, and many of petitioners' claims have been rejected by other courts. For example, relying in part on 47 U.S.C. § 152(b), petitioners argue (at 14-25) that the FCC lacks authority to adopt federal rules implementing 47 U.S.C. § 251(b)(5) that displace state authority over intrastate access charges. But, in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), the Supreme Court concluded that § 251 "clearly appl[ies] to intrastate service"; that the FCC's statutory authority in 47 U.S.C. § 201(b) "to carry out the provisions of" the Communications Act "extend[s] to implementation of" § 251; and that § 152(b) is irrelevant in this context. *Id.* at 378, 380 (internal quotations omitted).

Petitioners also argue (at 38-40) that 47 U.S.C. § 252(d)(2) limits "the FCC's reliance on § 201 as a standalone basis for" regulating ICC charges. But, in *Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010), the D.C. Circuit upheld the FCC's authority under § 201(b) to regulate ICC charges for interstate traffic that also falls within the scope of § 251(b)(5), holding that §§ 251 and 252 do not "trump the FCC's general rulemaking authority under section 201." *Id.* at 143 (internal quotations omitted).

II. As the FCC explains, petitioners' heavy reliance on § 252(d)(2) as a supposed limitation on the FCC's authority to enact a uniform ICC framework suffers from numerous flaws; we elaborate on two of them.

First, petitioners' construction of § 252(d)(2) would produce highly anomalous consequences: it would enable the FCC to ensure national consistency in the rules applicable to most of the traffic subject to that provision (as well as all of the traffic not subject to that provision), but entitle states to adopt mutually inconsistent ICC regimes for relatively tiny and arbitrarily defined categories of traffic. Congress did not require that result, let alone in such unambiguous terms as to overcome the FCC's contrary, reasonable interpretation of § 252(d)(2).

Second, there is no merit to petitioners' reliance on the Eighth Circuit's decision in *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000) (subsequent history omitted). As the FCC explains, that case addressed a fundamentally different type of FCC rule, which (unlike bill-and-keep) was not a methodological choice, but rather a fact-specific application of a methodological choice. We write separately to point out that the Eighth Circuit's holding in *Iowa Utilities Board* rested on judicial estoppel, not statutory construction, and that, if the Eighth Circuit had interpreted the statute as petitioners say, that interpretation would have been plainly incorrect.

III. Petitioners incorrectly argue that, because the text of § 251(b)(5) does not mention call origination, the FCC cannot regulate ICC charges for call origination. The FCC has long reasonably interpreted the omission of origination in § 251(b)(5) to mean that the statute prohibits origination charges for traffic subject to § 251(b)(5) — *not* that the agency lacks authority to regulate origination charges — and numerous courts have approved of the FCC's interpretation. The FCC also reasonably determined to address origination charges on a step-by-step basis.

IV. However the Court resolves these petitioners' challenges to the *Order*, it should not vacate the ICC rules promulgated therein. This Court has authority to remand matters to the FCC without vacating the underlying rules. Moreover, the ICC rules are severable from the aspects of the FCC's USF reforms that these and other petitioners challenge.

ARGUMENT

I. COURTS HAVE CONSIDERED AND REJECTED PETITIONERS' CLAIMS

Several key questions presented in petitioners' brief have been asked and answered in prior judicial decisions.

A. Petitioners contend (at 14) that the FCC's statutory authority to implement § 251(b)(5) "necessarily excludes *intra*state access by . . . the action of § 152(b)." But the Supreme Court rejected that analysis in *AT&T*. There, as here, parties argued that the FCC's authority to implement provisions of the 1996 Act did not "displace" states' "traditional authority" over intrastate service. 525 U.S. at 379. The Supreme Court held, however, that the 1996 Act "clearly appl[ies] to intrastate service" and that the FCC's statutory authority in § 201(b) "to carry out the provisions of [the Communications] Act" "extend[s] to implementation of" the 1996 Act, including "§§ 251 and 252." *Id.* at 377-78, 380 (internal quotations omitted).

The Court emphasized the breadth of the FCC's authority to regulate intrastate matters under those provisions. The Court explained that, "[w]ith regard to the matters addressed by the 1996 Act," Congress "unquestionably" has "taken the regulation of local telecommunications competition away from the States." *Id.* at 378 n.6 (internal quotations omitted). Elaborating on that conclusion, the Court recognized that the 1996 Act "fundamentally restructure[d] local telephone markets" in a manner that established a "new *federal* regime [that] is to be guided by federal-agency regulations" and "removed a significant area from the States' exclusive control." *Id.* at 371, 378 n.6, 381 n.8; *see also id.* at 385 n.10 ("Congress has broadly extended its law into the field of intrastate telecommunications").

The Supreme Court's conclusion that Congress empowered the FCC to regulate "intrastate telecommunications" under the 1996 Act was "unaffected by 47 U.S.C. § 152(b)" — on which petitioners rely here (at 14) — because "§ 201(b) *explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies." 525 U.S. at 379, 380. Similarly, the Court rejected reliance on *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986) — which petitioners cite (at 19) — to narrow the scope of the FCC's authority, explaining that *Louisiana PSC* "involved the Commission's attempt to regulate services over which it had not explicitly been given rulemaking authority." *AT&T*, 525 U.S. at 381 n.7.

Petitioners argue (at 19-20) that *AT&T* addressed only "*local* service" and not "whether the 1996 Act preserved State ratemaking authority over intrastate exchange access rates." Nothing in the Court's opinion or the statute, however, supports petitioners' proposed distinction between "local" intrastate traffic and "non-local" intrastate traffic for purposes of the FCC's authority. *Cf. United States v. Nelson*, 383 F.3d 1227, 1232 (10th Cir. 2004) ("We do not . . . approach opinions of the Supreme Court with a view to reaching the narrowest construction possible."). Petitioners' claim that the FCC exceeded its authority in regulating intrastate access charges cannot be squared with *AT&T*.

B. Judicial precedent likewise forecloses petitioners' argument (at 38-40) that § 252(d)(2) limits "the FCC's reliance on § 201 as a standalone basis for" regulating ICC charges for interstate traffic. In *Core*, the D.C. Circuit addressed an earlier FCC ruling regarding ICC charges by LECs serving dial-up Internet service providers ("ISPs"). *See Core*, 592 F.3d at 140-43. The FCC had found that ISP-bound traffic is jurisdictionally interstate, but nonetheless within § 251(b)(5) — because (contrary to petitioners' position here) § 251(b)(5) is not limited to local traffic.[1] The FCC also had concluded that it "retain[ed] full authority to regulate charges for traffic and services subject to federal jurisdiction [under § 201], even when it is within the sections 251(b)(5) and 252(d)(2) framework." *Second ISP Remand Order* ¶ 21.

On review, parties argued there (as they do here) that, when § 251(b)(5) applies to interstate traffic, § 252(d)(2) limits the FCC's authority to regulate ICC

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[1] *See* Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, *High-Cost Universal Service Support*, 24 FCC Rcd 6475, ¶ 7 (2008) ("*Second ISP Remand Order*") ("[W]e conclude that the scope of section 251(b)(5) is broad enough to encompass ISP-bound traffic. . . . [T]he better view is that section 251(b)(5) is not limited to local traffic."); *id.* ¶ 17 ("[T]he ISP-bound traffic at issue here is clearly interstate in nature and thus also subject to our section 201 authority.").

charges for that interstate traffic.[2] The D.C. Circuit rejected that argument. The court acknowledged that the FCC, "en route to finding that § 201 authorized [it] to impose its rate cap system on the communications in question, also expressed its view that [those communications] *were* 'subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2).'" *Core*, 592 F.3d at 145 (quoting *Second ISP Remand Order* ¶ 15).[3] And it agreed with the FCC that, even though the jurisdictionally interstate dial-up ISP traffic at issue there "implicate[d] the regime[ ] of . . . §§ 251-252," those provisions did not "trump the FCC's general rulemaking authority under section 201" for that interstate traffic. *Id.* at 143-44 (internal quotations omitted). The D.C. Circuit thus rejected the notion that § 252(d)(2) limits the FCC's authority to regulate ICC charges for interstate traffic under § 201(b).

II. THE *ORDER*'S ADOPTION OF A UNIFORM ICC REGIME DOES NOT VIOLATE 47 U.S.C. § 252(d)(2)

Petitioners argue (at 28-40) that the FCC's adoption of "bill-and-keep" as the ultimate default compensation methodology violates § 252(d)(2). They contend (at 4, 29) that § 252(d)(2) requires that states "set the rate for § 251(b)(5)

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[2] *See* Br. for Pet'r Core Communications, Inc. at 33-35, *Core*, *supra* (Nos. 08-1365 et al.) (D.C. Cir. filed June 19, 2009), 2009 WL 2525340.

[3] The D.C. Circuit also paid no heed to the argument raised there — which petitioners also assert here — that § 251(b)(5) "applies only to reciprocal compensation arrangements between competing local carriers for exchanges of local traffic." Br. of Pet'rs Pub. Serv. Comm'n of New York et al. at 20, *Core*, *supra* (Nos. 08-1365 et al.) (D.C. Cir. filed June 19, 2009), 2009 WL 2564689.

traffic"; that "the FCC only has authority to set a [pricing] 'methodology' " for that traffic; and that bill-and-keep exceeds the FCC's authority to implement § 252(d)(2) because it "results in a zero rate." The FCC persuasively demonstrates (at 41-43) that the bill-and-keep regime established in the *Order* fits comfortably within the FCC's conceded authority to design pricing methodologies. Indeed, the statutory language does not mention state rate-setting at all, but rather provides certain standards that states must apply "[f]or the purposes of" determining "compliance by an incumbent [LEC] with section 251(b)(5)" in an arbitration under § 252(b). 47 U.S.C. § 252(d)(2)(A).

The FCC also ably refutes (at 33-37) petitioners' assertions that bill-and-keep is inconsistent with the standards for ICC charges set forth in § 252(d)(2). In particular, § 252(d)(2)(B)(i) specifies that those standards do not "preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations," including "bill-and-keep arrangements." Congress's specific endorsement of bill-and-keep arrangements forecloses petitioners' argument that § 252(d)(2)(A) forbids them. Moreover, although petitioners assert (at 36-37) that § 252(d)(2) "unambiguously provides" that bill-and-keep is appropriate only where carrier rates are "symmetrical" and traffic is "in balance," no "symmetry" or "balanced traffic" limitation appears anywhere in that provision

— and certainly not "unambiguously." *See Order* ¶ 774 n.1405 (JA___); FCC Br. 34-36.

Furthermore, as the FCC also explains (at 33-34), petitioners' assertion (at 34-35) that bill-and-keep precludes carriers from recovering their actual costs lacks merit. Bill-and-keep permits "the mutual and reciprocal recovery by each carrier of costs" (47 U.S.C. § 252(d)(2)(A)(i)) by allowing carriers to recover their termination costs from their own customers. *See Order* ¶ 775 (JA___). That is enough to comply with § 252(d)(2); nothing in that section gives carriers a right to recover their costs from *other carriers*.

Furthermore, § 252(d)(2) does not guarantee that carriers will recover the full costs of the facilities used to terminate calls. The statute permits recovery only of the "additional costs" of termination. 47 U.S.C. § 252(d)(2)(A)(ii). The term "additional costs" can be reasonably construed as limited to the short-run incremental costs of processing each additional call over already-constructed facilities. *See Order* ¶ 753 n.1332 (JA___). The FCC accurately observed that those costs are "extremely low, and very near $0." *Id.* ¶ 746 n.1309 (JA___). Petitioners have presented no evidence suggesting that bill-and-keep fails to provide a "reasonable approximation" of such costs, 47 U.S.C. § 252(d)(2)(A)(ii),[4] and their facial challenge to bill-and-keep fails for that reason alone.

Intervenors elaborate on two additional reasons why petitioners' reliance on § 252(d)(2) is unavailing.

A. The FCC Reasonably Construed the Statute Not To Require the Absurd Results That Petitioners' Position Entails

Petitioners' argument that § 252(d)(2) forecloses the FCC's uniform ICC regime "is (necessarily) an extremely subtle one," *AT&T*, 525 U.S. at 379, because the FCC has independent authority to regulate the vast majority of the traffic subject to the *Order* without regard to any limitations in § 252(d)(2).

First, the FCC has independent authority — not restricted in any way by § 252(d)(2) — to regulate ICC charges for all interstate and wireless traffic. As to interstate traffic, § 201(b) gives the FCC authority to regulate such traffic without regard to any limitations in § 252. *See Core*, 592 F.3d at 144. As to wireless traffic, the FCC similarly has independent authority over intercarrier compensation for such traffic under 47 U.S.C. § 332(c). *See Order* ¶ 779 (JA___); FCC Br. 24-25 (citing cases); *see also* 47 U.S.C. § 152(b) (exempting § 332 from restrictions

[4] Contrary to petitioners' claim (at 34), the FCC did not "acknowledge[] that competitive considerations generally *prevent* carriers" from recovering costs through retail rates. *See Order* ¶ 864 (noting only that "[s]ome competitive LECs have argued that their rates are constrained by incumbent LEC rates") (JA___); *id.* ¶ 908 n.1781 (saying only that competitive considerations "may" restrict incumbent LECs' ability to increase retail charges) (JA___).

on FCC jurisdiction over intrastate traffic).[5] That includes authority "to preempt any rates set by the states" that would "undermine the federal policy." *MetroPCS California, LLC v. FCC*, 644 F.3d 410, 413 (D.C. Cir. 2011). Thus, as to interstate and wireless calls, petitioners' primary criticism of bill-and-keep — that it intrudes on state commissions' authority under §§ 251 and 252 — is wholly inapplicable.

Second, even for many categories of intrastate *wireline* traffic, the FCC's power to implement § 251(b)(5) — which the Supreme Court confirmed in *AT&T* — does not implicate the authority of state commissions under § 252. The class of intrastate traffic to which § 251(b)(5) applies is significantly broader than the class of intrastate traffic to which § 252(d)(2) applies. That is largely because, whereas § 251(b)(5) applies to all telecommunications exchanged with a LEC, § 252(d)(2) applies only to ICC charges collected by *incumbent* LECs. *See* 47 U.S.C. § 252(a)(1) (allowing an "incumbent local exchange carrier" to "enter into a binding agreement" and "submit[ ]" it "to the State commission" for approval); *id.* § 252(b)(1) (carrier "may petition a State commission to arbitrate any open issues" concerning negotiations involving an "incumbent local exchange carrier"); *id.* § 252(d)(2)(A) (authorizing state commission to assess only "compliance by an incumbent local exchange carrier with" § 251(b)(5)).

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[5] Indeed, in adopting bill-and-keep, the FCC "[i]n essence . . . adopted for local telephone companies the same model that was already in place and continues to work well for the wireless industry." FCC Br. 3 (citing *Order* ¶ 34 (JA___)).

Thus, even on petitioners' erroneous view that § 251(b)(5) is limited to local traffic, that section still applies to local traffic exchanged between two competitive LECs, or a competitive LEC and wireless carrier — yet § 252(d)(2) does not establish a standard (or give states any authority with respect to charges) for that traffic. Furthermore, even as to traffic exchanged with an incumbent LEC, § 252(d)(2) is silent about charges paid by an incumbent LEC; it applies only to charges collected by an incumbent LEC. *See id.*

On the FCC's interpretation of § 251(b)(5) (in place since 2001) to include *all* telecommunications traffic, not merely local traffic, that section includes even more intrastate traffic as to which § 252(d)(2) grants states no authority. That is because, under the FCC's interpretation, § 251(b)(5) includes traffic exchanged between LECs and long-distance carriers — traffic that is *not* covered by § 252(d)(2). *See Order* ¶ 774 (JA___).

In sum, petitioners' approach "produces a most chopped-up statute." *AT&T*, 525 U.S. at 381 n.8. They are left to contend that — even though the FCC has (1) independent authority to regulate ICC charges for interstate and wireless traffic under §§ 201(b) and 332, and (2) plenary pricing authority over ICC charges for various categories of intrastate traffic that are within § 251(b)(5) but outside § 252(d)(2) — § 252(d)(2) unambiguously precludes the FCC from establishing a uniform ICC regime that also encompasses the narrow category of intrastate traffic to which that provision applies.

But they can point to no statutory language that would require the FCC to accept the absurd consequences their approach entails. On the contrary, as shown above (at 8-10), the language of § 252(d)(2) is sufficiently broad to encompass the FCC's bill-and-keep default rule for the limited category of traffic to which that section applies.

Furthermore, the FCC's interpretation of that section — which allows for a uniform ICC regime for all telecommunications traffic — is reasonable. Petitioners' contrary position ensures a "patchwork" of ICC rates,[6] with the FCC's regime covering all interstate and wireless traffic and most intrastate traffic, but 50 or more different state regimes covering the remaining intrastate traffic. That would perpetuate the very arbitrage and market distortions that the *Order* seeks to eradicate, leaving in place the same incentives that existed before the *Order* to mischaracterize traffic or engage in traffic-pumping schemes. *See Order* ¶ 752 (observing "marketplace distortions" where "rates apply differently across providers") (JA___); 2011 NPRM ¶ 40 (noting that "wasteful attempts to game the

[6] Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 4554, ¶ 502 (2011) ("2011 NPRM").

system will likely persist as long as ICC rates remain disparate and well above carriers' incremental costs of terminating a call").

The point is not, as petitioners assert, that "a little unlawfulness is permitted." Pet. Br. 32 (internal quotations omitted). Rather, it is that the FCC reasonably interpreted the statute not to impose the balkanized regime that their reading produces. *Cf. In re Core Communications, Inc.*, 455 F.3d 267, 283 (D.C. Cir. 2006) (noting that it is "not for this court to second-guess the conclusion reached by the agency" that the "policies favoring a unified compensation regime outweigh" other concerns) (internal quotations omitted).

B. The Eighth Circuit's Decision in *Iowa Utilities Board* Does Not Support Petitioners' Position

Petitioners erroneously rely (at 29-30) on the Eighth Circuit's decision in *Iowa Utilities Board*, 219 F.3d 744. The FCC's brief correctly demonstrates (at 41-43) that the "proxy prices" that the Eighth Circuit struck down were unlike the bill-and-keep framework established here, because (among other considerations) bill-and-keep embodies a *methodological choice* about how costs should be recovered, whereas the proxy prices were *fact-specific applications* of a (different) methodological choice. Petitioners' reliance on *Iowa Utilities Board* is unavailing for two additional reasons.

First, the Eighth Circuit's conclusion rested on the procedural doctrine of judicial estoppel, rather than any substantive interpretation of the Act. The court accepted the argument that the FCC's proxy prices "should be vacated" because the FCC had "expressly disavowed the proxy prices" in a related case before the Supreme Court; it held that the FCC was "estopped from trying to now revive the proxy prices." 219 F.3d at 756. The language on which petitioners rely (at 29-30) appears as part of the Eighth Circuit's discussion of why it was "not persuaded" by the FCC's effort to explain away its "position before the Supreme Court" and thereby to avoid judicial estoppel. 219 F.3d at 756. The Eighth Circuit's holding that judicial estoppel procedurally barred the FCC's argument does not imply anything about the proper legal construction of the Act. *Cf. In re Kane*, 628 F.3d 631, 638 (3d Cir. 2010) (when judicial estoppel applies, court does not "consider[ ] the merits of the underlying claims") (internal quotations omitted).[7]

Second, even if the Eighth Circuit's decision could be read in a way that would preclude the FCC from adopting bill-and-keep, it would be incorrect. The Eighth Circuit's remark about the FCC's "authority" being limited "to design[ing] a pricing methodology" rested entirely on the court's interpretation of the Supreme Court's opinion in *AT&T*. *See* 219 F.3d at 757. But the Supreme Court did not say that the FCC's authority to implement § 252(d)(2) is limited to methodological

[7] Nor could judicial estoppel foreclose the FCC's position here. *Cf. Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (agencies are "not estopped from changing" a "legal interpretation").

issues.[8] Rather, the relevant portion of the Court's opinion addressed only charges for interconnection and access to network elements under § 252(d)(1), which unlike § 252(d)(2) expressly authorizes states to set "rates." *See AT&T*, 525 U.S. at 383-85. Furthermore, given the Court's conclusion that the FCC regulations implementing § 252(d)(1) were within the agency's authority, the Court had no occasion to opine on the outer limits of the FCC's authority to promulgate "rules to guide the state-commission judgments" applying that section. *Id.* at 385.

III. PETITIONERS' CHALLENGE TO THE FCC'S JURISDICTION OVER ORIGINATING CHARGES LACKS MERIT

Petitioners challenge the FCC's interpretation of § 251(b)(5) with respect to originating ICC charges, asserting (at 25-26) that "[t]he FCC lacks any authority over intrastate *originating* access charges" because "§ 251(b)(5) addresses only the '*transport and termination* of telecommunications.'" But the FCC has long reasonably interpreted § 251(b)(5) to preclude originating carriers from charging other carriers for delivery of traffic covered by that section — not to preclude the FCC from regulating originating charges for that traffic.[9]

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[8] Nor did the FCC concede that its authority is so limited. *See* Br. for Fed. Pet'rs at 25-28, *AT&T*, *supra* (No. 97-831) (U.S. filed Apr. 3, 1998), 1998 WL 396945.

[9] *See* FCC Br. 21 (citing First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 1042 (1996) (subsequent history omitted)); 47 C.F.R. § 51.703(b); *see also* Memorandum Opinion and Order, *MAP Mobile Communications, Inc. v. Illinois Bell Tel. Co.*, 24 FCC Rcd 5582, ¶ 28 (2009) ("Section 51.703(b) of the

Numerous courts have approved of that interpretation. The Eighth Circuit upheld the FCC's rule against an *ultra vires* challenge. *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997) (upholding rule as applied to wireless traffic) (subsequent history omitted).[10] Other courts of appeals have consistently enforced the FCC's rule. *See MCImetro Access Transmission Servs., Inc. v. BellSouth Telecomms., Inc.*, 352 F.3d 872, 881 (4th Cir. 2003) (holding that 47 C.F.R. § 51.703(b) is "unambiguous" in prohibiting origination charges); *Southwestern Bell Tel. Co. v. Public Utils. Comm'n of Texas*, 348 F.3d 482, 487 (5th Cir. 2003); *Qwest Corp. v. FCC*, 252 F.3d 462, 467-68 (D.C. Cir. 2001).

Commission's rules prohibit LECs from charging CMRS carriers for traffic originated on their networks."); Memorandum Opinion and Order, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes*, 17 FCC Rcd 27039, ¶ 53 (2002) ("the Commission's rules for section 251(b)(5) traffic . . . prohibit any LEC from charging any other carrier for traffic originating on that LEC's network"); Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, ¶ 112 (2001) ("Our current reciprocal compensation rules preclude an ILEC from charging carriers for local traffic that originates on the ILEC's network."); Memorandum Opinion and Order, *Joint Application by SBC Communications Inc. et al. for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237, ¶ 235 & n.698 (2001) ("rule[] preclude[s] an incumbent LEC from charging carriers for local traffic that originates on the incumbent LEC's network") (subsequent history omitted).

[10] Although the Eighth Circuit vacated the rule as applied to local wireline traffic, it did so based on an interpretation of the FCC's authority to implement § 251 that the Supreme Court reversed in *AT&T*. *See AT&T*, 525 U.S. at 377-82; *see also Order* ¶ 823 (JA___).

Now that the Commission has determined that all telecommunications, including traffic previously subject to interstate and intrastate access charge regimes, should be governed by § 251(b)(5), its longstanding interpretation of § 251(b)(5) requires the eventual prohibition of originating access charges. *See Order* ¶¶ 777, 817, 961 n.1976 (JA___, ___, ___). The FCC acted reasonably in capping, rather than immediately eliminating, originating ICC charges. *See Order* ¶ 818 (JA___). No one challenges that decision, which was consistent with the FCC's authority to confront issues one step at a time. *See, e.g.*, *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1135-36 (D.C. Cir. 1984) (per curiam).

IV. IN ALL EVENTS, THE COURT SHOULD NOT VACATE THE CHALLENGED ICC RULES

A. The Court Can Remand Without Vacating

Even if the Court were to conclude that further consideration by the FCC is required for any issue raised by these petitioners, it should remand for that consideration without vacating the challenged ICC rules. This Court followed that approach in *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001), in which it remanded "to allow the FCC to establish an adequate legal and factual basis for the [order] and, if necessary, to reconsider the operative mechanism promulgated in that Order." *Id*. at 1201. The Court subsequently issued an order clarifying that it had not vacated the rules adopted in the FCC's order; "[r]ather, [the Court] merely reversed and remanded for further hearings." Order of Clarification at 4, *Qwest*, *supra* (No. 99-9546) (10th Cir. Aug. 27, 2001); *see also Qwest Communications Int'l, Inc. v. FCC*, 398 F.3d 1222, 1239 (10th Cir. 2005).[11]

By the time the Court hears oral argument in this appeal, more than two years will have passed since the FCC released the *Order*, and the industry will have changed significantly in light of the reforms adopted therein. The transition to bill-and-keep will be well underway: by July 2013, ICC rates for wireline traffic will have been reduced twice already, and the formerly separate rate structure for intrastate access rates will have been eliminated. *See Order* ¶ 801 (figure 9) (JA___). ICC rates for certain types of traffic — in particular, intraMTA traffic exchanged between LECs and wireless providers — will already have moved to bill-and-keep. *See id.* ¶¶ 806, 988, 995 (JA___, ___, ___).[12] Against the backdrop of the ICC rules promulgated in the *Order*, carriers have negotiated and renegotiated interconnection agreements, settled disputes over ICC charges, and adjusted business plans — including abandoning arrangements built on arbitraging

[11] *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999), is not to the contrary. In that case, there was no agency action to vacate. The Court held that the agency's non-action violated a non-discretionary statutory duty, and it remanded under 5 U.S.C. § 706(1) for publication of a final regulation. *See id.* at 1193.

[12] In all events, even if the Court were to vacate some of the FCC's ICC rules, other rules as to which the FCC's authority is upheld should not be vacated. *See Iowa Utils. Bd.*, 120 F.3d at 800 n.21 (declining to vacate rules authorized by the FCC's independent authority over wireless traffic under § 332).

the former ICC regime. In short, "[t]he egg has been scrambled and there is no apparent way to restore the status quo ante." *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 756 (D.C. Cir. 2002) (internal quotations omitted).

Given the passage of time and the scope of the reforms at issue, vacating any of the ICC rules these petitioners challenge would cause massive industry disruption and regulatory uncertainty. *See MCI Telecomms. Corp. v. FCC*, 143 F.3d 606, 609 (D.C. Cir. 1998) (per curiam) ("One factor we consider in exercising . . . discretion [to remand without vacating] is the potential for disruption that might be caused by vacating the order."). Accordingly, if the Court were to grant the petitions for review in any respect, it should remand without vacating the ICC regulations.

B. The USF Reforms Are Severable from the ICC Reforms

However this Court resolves the separate challenges to the FCC's USF reforms, it should not vacate the ICC regulations promulgated in the *Order*. The Court "may partially set aside a regulation if the invalid portion is severable." *Arizona Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1122 (10th Cir. 2009). A regulation is severable if "the severed parts 'operate entirely independently of one another'" and "the circumstances indicate the agency would have adopted the regulation even without the faulty provision." *Id.* (quoting *Davis County Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (per curiam)).

First, the FCC's ICC reforms "operate entirely independently of" the agency's separate decision to condition receipt of USF subsidies on deployment of broadband networks. To be sure, the ICC reforms will result in some lost ICC revenue for carriers, and the agency suggested that the availability of USF support may in some circumstances serve as a backstop for carriers to recover their costs. *See Order* ¶¶ 34, 742 n.1294, 757 (JA___, ___, ___). But the availability of USF funding to replace lost ICC revenue does not depend on the validity of the aspects of the FCC's USF reforms that petitioners principally challenge here — namely, the broadband condition and certain *reductions* in USF support provided for in the *Order*. *See generally* Pet'rs Joint USF Br. If the FCC needed to make adjustments to USF funding to accommodate a ruling from this Court on petitioners' challenges to the USF reforms, it could do so.

Second, there is no "'substantial doubt' that the agency would have adopted" the ICC reforms on their own. *Davis County*, 108 F.3d at 1459. The *Order* expressly states the agency's "intent that each of the rules adopted herein shall be severable" because "each of the separate universal service and intercarrier compensation reforms . . . serve[s] a particular function toward the goal of ubiquitous voice and broadband service." *Order* ¶ 1405 (JA___).

CONCLUSION

For the foregoing reasons, and those set forth in the FCC's brief, the Court should reject the challenges presented in the Joint Intercarrier Compensation Brief.

Respectfully submitted,

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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 4,863 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).

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/s/ Scott H. Angstreich
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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 Joint Intercarrier Compensation 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