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 INTERVENORS' BRIEF IN SUPPORT OF THE RESPONSE OF THE RESPONDENTS TO THE ADDITIONAL INTERCARRIER COMPENSATION ISSUES BRIEF

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, the Intervenors joining this brief hereby submit these disclosure statements in connection with the above-captioned case.

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 ten percent or more of its stock.

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' knowledge, no publicly-held company holds more than ten percent of its stock.

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 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.

Sprint Nextel has no parent corporation, and no publicly-held corporation owns 10% or more of Sprint Nextel's stock.[1]

T-Mobile, USA, Inc., a Delaware corporation, is 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.

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

[1] On October 15, 2012, SoftBank Corp. and certain of its wholly-owned subsidiaries and Sprint Nextel entered into an Agreement and Plan of Merger ("Merger Agreement"), which is currently subject to shareholder and regulatory approval. If the Merger Agreement is consummated, SoftBank – a publicly-held corporation – will own 10% or more of Sprint Nextel's stock. *Sprint Nextel's 10Q* at page 1 (filed Feb. 28, 2013) *available at* http://www.sec.gov/Archives/edgar/data/101830/000010183013000006/sprint2012 10-k.htm.

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 ten 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.

TABLE OF CONTENTS

Page

Table of Authorities v

Glossary vi

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. Intervenors Offer No Additional Argument on the First Point Raised in Petitioners' Additional ICC Brief 2

II. The Commission has Unquestioned, Plenary Authority Over Intercarrier Compensation for all LEC-CMRS Traffic 2

III. The Commission's Access Stimulation Rules Are a Reasonable Response to a Widespread Problem of Traffic Pumping Schemes 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases and Other Administrative Decisions

Iowa Utilities Board v. *FCC*,
120 F.3d 753 (8th Cir. 1997) 4

Local Competition Order, 11 FCC Rcd. 15499 (1996) 3

MetroPCS California, LLC v. FCC, 4
644 F.3d 410 (D.C. Cir. 2011) 4

Qwest Corporation v. *FCC*,
252 F.3d 462 (D.C. Cir. 2001) 4

Statutes and Other Authorities

47 U.S.C. §152(b) 3

47 U.S.C. §251(b)(5)..1, 2, 5, 6

47 U.S.C. §252(d)(2)..1, 5

47 U.S.C. §332 ....*passim*

47 C.F.R. §51.701(b)(2)..3

H.R. Conf. Rep. No. 103-213 (Aug. 4, 1993)..3

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.*)
Communications Act ('the Act")	Communications Act of 1934, as amended (47 U.S.C. §151 *et seq.*)
CLEC	Competitive Local Exchange Carrier
CMRS	Commercial Mobile Radio Service
FCC	Federal Communications Commission
FCC Prin. Br.	Federal Respondents' Response to the Joint Intercarrier Compensation Principal Brief of Petitioners (filed Mar. 6, 2013)
ICC	Intercarrier Compensation
LEC	Local Exchange Carrier
MTA	Major Trading Area
Order	Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd. 17663 (2011)
Pet. Add. Br.	Additional Intercarrier Compensation Brief of Petitioners (filed November 6, 2012)
USF	Universal Service Fund

INTRODUCTION AND SUMMARY OF ARGUMENT

I. The FCC's Response to Petitioners' Additional Intercarrier Compensation Brief concisely demonstrates the flaws in Petitioners' first argument—that the Commission improperly denied USF support to rural CLECs—and Intervenors offer no further argument.

II. Petitioners' second argument, that the Commission erred by implementing bill-and-keep for CMRS-LEC Traffic and in doing so more rapidly than for LEC-LEC traffic, is wrong for the following reasons:

A. Petitioners err in arguing that the Commission's new wireless regulations are "dependent upon the validity" of the wireline rules. Pet. Add. Br. 22. The Commission has *independent* (and plenary) statutory authority under Section 332 to establish and oversee the intercarrier compensation regime for all wireless traffic without regard to its authority under Section 251(b)(5).

B. Petitioners' claim that bill-and-keep infringes on the authority of state commissions under Section 252(d)(2) is irrelevant with respect to LEC-CMRS traffic. Again, the Commission has unquestioned authority over intercarrier compensation for wireless traffic under Section 332 and that authority extends to adoption of bill-and-keep for wireless traffic.

C. Petitioners' argument that the Commission's bill-and-keep implementation schedule for wireless traffic is "arbitrary and capricious" is

incorrect. The Commission fully articulated compelling reasons for the difference between the wireless and wireline schedules.

III. Petitioners' argument that the Commission's new access stimulation rules are arbitrary and capricious also lacks merit. Those rules are a reasonable response to a widespread problem of traffic pumping schemes. Such schemes pose particular problems in the wireless context, which fully justifies retaining the new wireless rules without regard to the Commission's authority under Section 251(b)(5).

ARGUMENT

I. Intervenors offer no additional argument on the first point raised in Petitioners' Additional ICC Brief.

II. The Commission has Unquestioned, Plenary Authority Over Intercarrier Compensation for all LEC-CMRS Traffic.

A. Petitioners' primary ICC argument in this appeal—that the FCC lacks authority under §251(b)(5) to preempt state regulation of intrastate access charges—is meritless for the many reasons the FCC and intervenors have explained in separate briefs. Furthermore, the Commission's separate authority under §332 over intercarrier compensation for *all* wireless traffic was unquestioned in the FCC proceeding and remains so before this Court. Accordingly, "[w]ith respect to traffic exchanged with wireless carriers," §332 "provide[s] ... independent authority for the FCC to adopt its reforms." FCC Prin. Br. 6.

The Commission's reliance on its §332 authority to establish and oversee the intercarrier compensation regime for all wireless traffic is well founded. In 1993, Congress limited the states' historical authority over intrastate rates by prohibiting them from exercising "any authority to regulate" wireless entry and rates. *See* 47 U.S.C. §332(c)(3)(A). At the same time, the 1996 Act made clear that it was the FCC, not the states, that has authority over intercarrier compensation for wireless traffic by *exempting* the amended §332 from the restrictions that §2(b) of the Act, 47 U.S.C. §152(b), had imposed on FCC jurisdiction over intrastate traffic, *see also* H.R. CONF. REP. NO. 103-213, at 497 (Aug. 4, 1993). Finally, the 1993 Act empowered the FCC to order any LEC to interconnect with a wireless carrier and to establish the terms and conditions for the exchange of all traffic. *See id.* §332(c)(1); *see also Order,* ¶834.

Significantly, "[t]he Eighth and D.C. Circuits have confirmed that 47 U.S.C. § 332 provides the FCC with independent authority to establish reciprocal compensation terms with respect to wireless traffic exchanged with a LEC." FCC Prin. Br. 24. In 1996, the Commission's *Local Competition Order,* 11 FCC Rcd. 15499 (1996), adopted the "intraMTA rule," *see* 47 C.F.R. §51.701(b)(2), which had the effect of prohibiting LECs from imposing access charges (including *intrastate* access charges) on mobile-to-land calls that originate and terminate within the same Major Trading Area ("MTA"). LECs argued on appeal that the

FCC did not possess the authority to eliminate intrastate access charges. In *Iowa Utilities Board* v. *FCC*, 120 F.3d 753, 900 n.21 (8th Cir. 1997), the Eighth Circuit rejected this LEC argument based on the statutory provisions discussed above. No one challenged this portion of this Eighth Circuit ruling in the subsequent appeal of this decision to the Supreme Court.

The D.C. Circuit has twice acknowledged the Commission's plenary authority over all intercarrier compensation for LEC-CMRS calls. First, in *Qwest Corporation* v. *FCC*, 252 F.3d 462 (D.C. Cir. 2001), Qwest appealed an FCC order enforcing one of the wireless rules the Eighth Circuit had affirmed in *Iowa Utilities Board*. The D.C. Circuit ruled that, because "[t]he Petitioners did not seek certiorari as to the Eighth Circuit's holding on § 332," the decision was a "final judgment with preclusive effects." 252 F.3d at 466. More recently, the D.C. Circuit's decision in *MetroPCS California, LLC v. FCC*, 644 F.3d 410, 414 (D.C. Cir. 2011), also acknowledged that the Commission has broad §332 authority to preempt state authority over intrastate rates affecting wireless companies but has no duty to do so, thus upholding the Commission's election at the time to delegate to state regulators certain rate-setting responsibilities. The *Order* fully justified the FCC's decision to alter that decision and to establish a federal bill-and-keep methodology for LEC-wireless traffic. *Order*, ¶ 993.

In sum, the FCC has authority under §332 and D.C. Circuit precedent to impose the *Order*'s reforms of wireless intercarrier compensation, including establishing a default bill-and-keep regime.

B. With respect to LEC-LEC traffic, Petitioners argue in their Principal ICC Brief that the Commission's adoption of bill-and-keep infringed on the authority of state commissions under §252(d)(2). With respect to LEC-CMRS traffic, that claim is irrelevant—again, the Commission has unquestioned authority over intercarrier compensation for wireless traffic under §332.

Several Petitioners—in an argument not joined by the vast majority of the Petitioners in this appeal—argue that the Commission elected to move to bill-and-keep for LEC-CMRS traffic *because* it had imposed that regime on LEC-LEC traffic under §251(b)(5). Pet. Add. Br. 21. But there is nothing in the *Order* that suggests that the Commission intended the adoption of bill-and-keep for LEC-CMRS traffic to hinge on the adoption of bill-and-keep for LEC-LEC traffic. Indeed, the reasons the Commission articulated in the *Order* for moving to bill-and-keep apply equally to LEC-LEC and CMRS-LEC traffic, including that bill-and-keep:

- "brings market discipline to intercarrier compensation because it ensures that the customer who chooses a network pays the network for the services the subscriber receives" (¶742);
- is "less burdensome" than other options because it "reduces significant regulatory costs" (¶743);

- "eliminates arbitrage and marketplace distortions" (¶752);
- ensures that "success in the marketplace will reflect a carrier's ability to serve customers efficiently, rather than its ability to extract payments from other carriers" (¶756); and
- is "most consistent with the models used for wireless and IP networks, models that have flourished and promoted innovation and investment" (*id.*).

In addition, the Commission did not simply adopt bill-and-keep generically—it did so specifically for "wireless traffic exchanged with a LEC," including for both "interstate and intrastate traffic." ¶779. Moreover, the Commission did so pursuant to "separate authority under sections 201 and 332(c)," quite apart from its §251(b)(5) authority over LEC-LEC traffic. *Id.*

C. Certain Petitioners present a jumble of arguments to the effect that the FCC's bill-and-keep implementation schedule for wireless traffic is "arbitrary and capricious" because it is different from the one the Commission adopted for landline traffic. These arguments may be simplified to the claims that: (1) the "FCC's dissimilar treatment of similar traffic is arbitrary and capricious," Pet. Add. Br. 22; and (2) the agency's approach unlawfully "reverses" prior FCC findings without acknowledgment or explanation, *id.* at 23. These claims are erroneous.

First, the argument that the *Order* treats LEC-LEC and LEC-CMRS traffic differently for no reason is incorrect. In fact, the Commission gave sensible reasons for the difference in treatment, including:

- The "need for immediate application of a bill-and-keep methodology in [the] context" of LEC-CMRS non-access traffic is greater than for LEC-LEC traffic because of "a significant and growing problem of traffic stimulation and regulatory arbitrage" for "LEC-CMRS non-access traffic" (¶995); and

- Because the Commission "until recently had no pricing methodology applicable to competitive LEC-CMRS traffic," CLECs "had no basis for reliance on such a [non-bill-and-keep] methodology in their business models." (¶996).

The *Order* thus appropriately treats LEC-CMRS traffic differently because of an irrefutable record of new, growing arbitrage problems, and because the Commission is not "transitioning" from an existing regime at all, but rather filling a void as to which CLECs had no detrimental reliance interests.

In attempting to refute the FCC's conclusion that a quicker transition for CMRS-LEC traffic would cause fewer market disruptions, Petitioners present contradictory arguments: that CLECs' inability to collect compensation results from the FCC's inaction, and that CLECs in fact have been collecting considerable compensation. Pet. Add. Br. 26-28. Petitioners cannot have it both ways. In any event, neither of these arguments undermines the FCC's reasoned justifications for treating LEC-CMRS traffic differently. Moreover, as the FCC pointed out, *see* FCC Add. Br. at 28, many of Petitioners' arguments stem from their mistaken belief that the Commission adopted a "flash cut" to bill-and-keep for LEC-CMRS traffic. In fact, the Commission declined to abrogate existing interconnection agreements, and extended the implementation deadline by six months for carriers

with existing agreements—the "effect of that change was to ensure no such carrier would be required to convert to bill-and-keep" without a further "transition" period. *Id.* at 28-29.

Second, there is no unexplained reversal of course here. Petitioners' arguments that the Commission declined to "singl[e] out LEC-CMRS traffic and subject[] it to bill-and-keep" in 1996, and that "it was unwilling to adopt" bill-and keep for ISP-bound traffic in 2001, Pet. Add. Br. 23, are "true, but irrelevant," FCC Add. Br. 30. As the Commission explained, those earlier decisions declined to mandate bill-and-keep for wireless traffic in light of the Commission's overall policy at the time of *not* adopting a bill-and-keep framework more broadly. *See id*. "Here, by contrast, the FCC adopted the same regime—bill-and-keep—as the end point for *all* traffic exchanged with a LEC," and the only issue was the "pace of ... reform during the transition period" for LEC-CMRS versus LEC-LEC traffic. *Id*. With respect to *that* issue, the Commission has reasonably explained that it makes sense to move more quickly with respect to LEC-CMRS traffic.

III. The Commission's Access Stimulation Rules Are a Reasonable Response to a Widespread Problem of Traffic Pumping Schemes.

Only two petitioners—Core Communications, Inc. and North County Communications Corp.—claim that the FCC acted arbitrarily in addressing the problem of traffic pumping (or "access stimulation"). They challenge only one aspect of the FCC's new traffic pumping rules: the FCC's refusal to permit CLECs

to submit cost studies to support higher rates for their pumped traffic. The FCC ably responds to those claims and correctly notes that its "findings about the detrimental effects of access stimulation" are "undisputed." FCC Add. Br. 22.

However, in the course of challenging the FCCs's bill-and-keep implementation schedule for wireless traffic, the petitioners joining the Additional ICC Brief *do* dispute the existence of traffic pumping. To the contrary, the record is replete with evidence of serious, systematic traffic pumping schemes involving multiple carriers and multiple states. *See Order* ¶ 663-66; *see also* Comments of MetroPCS Communications, Inc. (April 18, 2011) (JA __-__) (referencing traffic pumping disputes plaguing CMRS providers before at least six state PUCs and at least three federal courts); CTIA Ex Parte at 1-2 & Attach. at 1-8 (Nov. 24, 2010) (JA __-__) (listing pending disputes); Verizon and Verizon Wireless Ex Parte at 5-7 (June 28, 2010) (JA __-__) (identifying recent increase in disputes). Moreover, the record reflects that these problems were by no means limited to interstate traffic—traffic pumping was equally prevalent for intrastate traffic. *See, e.g.,* Reply Comments of MetroPCS (Feb. 21, 2012) (JA __-__).

Given their denial of the existence of traffic pumping, Petitioners do not even attempt to offer any public interest justification for revenue sharing schemes that stimulate traffic. But the very existence of these schemes demonstrates that the termination charges of traffic pumpers are excessive. Traffic-pumping CLECs

can only afford to pay third parties to drive traffic to the carriers for termination *because* there is substantial excess intercarrier compensation revenue—so much so that the terminating carrier is able to "share" its revenues with its business partners. *See* FCC Add. Br. 31-32 (CLECs sought rates as high as "$0.011 or $0.015" for "non-access wireless traffic," which in some cases was likely 10,000 times higher than necessary rates).

This problem of traffic stimulation in the CMRS market led the Commission to conclude that the "need for immediate application of a bill-and-keep methodology in [the] context" of LEC-CMRS non-access traffic is greater than for LEC-LEC traffic because of "a significant and growing problem of traffic stimulation and regulatory arbitrage" for "LEC-CMRS non-access traffic." *Order* ¶995. The FCC-recognized need for an accelerated glide path to a bill-and-keep regime for LEC-CMRS traffic further justifies retaining the Commission's new intercarrier compensation rules governing wireless under its §332 authority regardless of whether it is sustained for all other services resulting in a uniform regime.

CONCLUSION

For the foregoing reasons, and those set forth in the FCC's brief, the Court should deny the petitions for review insofar as they relate to issues presented in the Additional ICC Issues brief.

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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 2,211 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 2010 in 14-point Times New Roman font.

3. All required privacy redactions have been made.

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/s/
Christopher J. Wright

April 24, 2013

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2013 I caused the foregoing Uncited Intervenors' Brief in Support of the Response of the Respondents to the Additional Intercarrier Compensation Issues 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 documents will be furnished by the Court through (ECF) electronic service to all parties in this case through a certified CM/ECF user. This document will be available for viewing and downloading on the CM/ECF system.

/s/
Christopher J. Wright

April 24, 2013