NO. 11-9900

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: FCC 11-161

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

UNCITED BRIEF OF INTERVENORS IN SUPPORT OF FEDERAL RESPONDENTS IN RESPONSE TO THE AT&T PRINCIPAL BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Intervenors submit the following Corporate Disclosure Statement through their counsel:

Comcast Corporation ("Comcast") is a publicly held corporation. Comcast has no parent corporation, and no publicly held corporation holds 10% or more of the stock of Comcast.

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.

HyperCube Telecom, LLC ("HyperCube") is a privately held company that is wholly owned by its parent HyperCube, LLC. HyperCube, LLC is an indirect wholly owned subsidiary of West Corporation ("West"). West is a publicly traded company. According to filings made with the Securities and Exchange Commission as of April 23, 2013, the following persons and entities hold a direct interest of 10% or more in West: Thomas H. Lee Equity Fund VI, L.P., 18.0%; and Thomas H. Lee Parallel Fund VI, L.P., 12.2%. The general partner of Thomas H. Lee Equity Fund VI, L.P. and Thomas H. Lee Parallel Fund VI, L.P. is THL

Equity Advisors VI, LLC. Thomas H. Lee Partners, L.P. is the sole member of THL Equity Advisors VI, LLC. No other person or entity holds a direct 10% or greater interest in West.

Level 3 Communications, LLC ("Level 3") is a wholly-owned subsidiary of Level 3 Financing, Inc. Level 3 Financing, Inc. is a wholly-owned subsidiary of Level 3 Communications, Inc. Level 3 Communications, Inc. has no parent corporation and no publicly held corporation owns 10% or more 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 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.

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GLOSSARY

AT&T Letter	Letter from Robert Quinn, Jr. (AT&T) to Marlene Dortch (FCC), CC Docket No. 01-92 et al., at 2-5 (Oct. 21, 2011)
IP	Internet Protocol
LEC	Local Exchange Carrier
Order	In re Connect America Fund, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011)
VoIP	Voice over Internet Protocol

SUMMARY OF THE ARGUMENT

Providers of fixed Voice over Internet Protocol ("VoIP") service[1] assess charges on long-distance carriers to complete their calls. They do so either by operating as Local Exchange Carriers ("LECs") and filing tariffs, or by completing calls in partnership with LECs that file tariffs. Before the FCC issued the *Order*,[2] AT&T had begun to challenge the validity of the partnership model, arguing that LECs cannot tariff charges for functions provided by their VoIP partners. The FCC never accepted AT&T's theory, and, prior to the *Order*, LEC partners of VoIP providers generally continued to collect access charges for VoIP calls.

The *Order* resolved this dispute by phasing out access charges while, during the transition, implementing what it termed the "VoIP Symmetry Rule," which treats VoIP providers operating under the partnership model identically to those operating as LECs.[3] AT&T made only a cursory argument below that this transitional treatment would competitively harm wireless carriers, and the Commission fully articulated why its historical refusal to allow wireless carriers to

[1] "Fixed" VoIP providers (some of which are affiliated with cable companies) use their own facilities to transmit calls to retail end-users. *See Qwest Corp v. FCC,* 689 F.3d 1214, 1221 n.4 (10th Cir. 2012). "Over-the-top" VoIP providers transmit calls via public-Internet connections provided by third parties. *Id*. AT&T's challenge involves fixed VoIP providers; over-the-top services are not at issue here. *See* AT&T Brief at 2 n.2.

[2] *In re Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) ("*Order*").

[3] 47 C.F.R. § 51.913(b).

tariff access charges (either directly or through a LEC) should not prevent parity as between the two types of VoIP providers. The FCC's decision should be upheld.

COUNTERSTATEMENT

A. Business Structure of VoIP Providers.

Providers of fixed VoIP services use two business models. Some are certified as LECs, providing both retail VoIP service and interconnecting with other carriers (the "unitary" model). Others are structured as partnerships between two entities: a non-LEC that provides retail VoIP service, and an affiliated or unaffiliated LEC that interconnects with other carriers on behalf of the retail entity (the "partnership" model). Although AT&T asserts that "[a]lmost all cable companies that offer voice telephone services today choose not to offer those services as regulated LECs," AT&T Br. at 10, both models are common even among cable companies. For example, both Cox Communications (the third-largest cable company in America) and Charter Communications (the sixth-largest) use the unitary model, as does Time Warner Cable (the second-largest) in some markets.[4]

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[4] *See, e.g.*, *In re Sprint Nextel Corp.*, Order, 26 FCC Rcd 2216, 2218 ¶ 4 (2011) (Cox Communications as a LEC); *In re Charter Communications*, Order, 27 FCC Rcd 7300, 7302 ¶ 4 (2012) (same as to Charter); *Petition of Time Warner Cable Information Services (New York), LLC for Modification of Its Existing Eligible Telecommunications Carrier Designation*, Order Approving Designation As A Lifeline-Only Eligible Telecommunications Carrier, Case 12-C-00510 (N.Y. Pub. Serv. Comm'n Mar. 14, 2013), *available at* http://documents.dps.ny.gov/

The two different business models largely stem from uncertainty as to whether retail VoIP service is a "telecommunications service" that is appropriately provided by a LEC or an "information service" that can be provided by a non-LEC – an issue the FCC has not resolved.[5] Yet the different models have little practical significance to either subscribers or interconnecting carriers.

B. Access Charge Tariffing by VoIP Providers and AT&T's Challenge.

In the years prior to the *Order*, LECs partnering with retail VoIP providers had filed tariffs with the FCC and state commissions assessing charges for connecting calls to their retail VoIP partners' subscribers.[6] LECs operating under such tariffs routinely collected access charges.[7] AT&T's assertion that the *Order*

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public/Common/ViewDoc.aspx?DocRefId={5667A04D-7CA6-43B6-A352-0927793BFE20}.

[5] *See* 47 U.S.C. § 153(24); *id.* §§ 153(53)-(54).

[6] *See, e.g.*, Cablevision Lightpath, Inc., Tariff F.C.C. No. 4 (2004), *available at* https://apps.fcc.gov/etfs/public/view_a_128329.action?id=128329; Bright House Networks Information Services F.C.C. Tariff No. 1 (2007), *available at* https://apps.fcc.gov/etfs/public/view_a_129518.action?id=129518; Comcast Phone, LLC Tariff FCC No. 1 (2003), *available at* https://apps.fcc.gov/etfs/public/view_a_127852.action?id=127852.

[7] *See, e.g.*, JA__, Letter from Daniel Brenner to Marlene Dortch, Sept. 28, 2011 (Bright House, a partnership VoIP provider, would lose "tens of millions in lost revenues" from being unable to continue collecting access charges during transition); JA__, Letter from Samuel Feder to Marlene Dortch, April 6, 2012, (noting that it is "not accurate" that clarifying rights of VoIP providers to collect certain access charges would result in new charges, since Cablevision, a partnership provider, had "historically assessed" such charges, and until very

gave such LECs the right to tariff "for the first time," AT&T Br. at 9, is thus a misstatement.

Long prior to the *Order*, the FCC had expressly "endorsed" the VoIP partnership model for purposes of interconnection.[8] The FCC also had approved the common practice of a LEC's tariffing for functions performed by another provider; carriers can use "joint billing arrangements," and a carrier can bill "on behalf of itself and another carrier for jointly provided access services." *In re Access Charges Reform*, *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Fifth Order on Reconsideration and Eighth Report and Order, 19 FCC Rcd 9108, 9115-16 ¶ 16 (2004).

Notwithstanding the above, AT&T's theory has been that the VoIP partnership model is analogous to two past circumstances in which the FCC had not permitted certain charges to be tariffed. *See* JA__ (Letter from Robert Quinn,

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recently, Verizon, one of the nation's largest interexchange carriers, "had paid them"); JA__, Letter from Samuel Feder to Marlene Dortch, March 12, 2012, at 2 (noting that Cablevision had already "suffered revenue losses" amounting to "several million dollars annually" from reduction of access charges in *Order*); JA__, Letter from Matthew Brill to Marlene Dortch, October 21, 2011, at 2 (*ex parte* by Time Warner, at the time a partnership provider, noting that VoIP providers already had "existing tariff language describing access services" that should "remain in force").

[8] JA__ (*Order* ¶ 970); *see also, e.g., In re Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2006).

Jr. (AT&T) to Marlene Dortch (FCC), CC Docket No. 01-92 et al., at 2-5 (Oct. 21, 2011) ("*AT&T Letter*")). AT&T's first analogy is to the wireless context. JA__ *AT&T Letter* at 4 n.17. The FCC has long prohibited wireless carriers from tariffing access charges; the FCC thus also prohibited a LEC partnering with a wireless carrier from tariffing services performed by the wireless carrier that the wireless carrier could not itself have tariffed. *See* Eighth Report and Order, *Access Charge Reform*, 19 FCC Rcd at 9115-16 ¶ 16.

AT&T's second analogy is to the scenario in which multiple wireline LECs are involved in completing a call. *AT&T Letter* at 2-3 & n.8. There, the FCC ruled that a LEC cannot tariff services it does not provide, to ensure that multiple LECs cannot impose multiple charges for the same function. *See* Eighth Report and Order, *Access Charge Reform*, 19 FCC Rcd at 9115-16 ¶ 16.

Prior to issuance of the *Order*, the FCC had not addressed AT&T's claims about whether these purportedly analogous situations should apply to the VoIP partnership model. Thus, while AT&T argues that the law was "settled" on this point, *see* AT&T Br. at 11, there was at most a "dispute" on the issue, largely created by AT&T itself. JA__ (*Order* ¶ 968).

C. The FCC's *Order*.

In addressing the larger intercarrier compensation issue surrounding VoIP, the *Order* decided on a course of allowing for the collection of gradually-reduced

access charges on VoIP traffic, balancing the objective of reforming access charges with a competing objective of avoiding substantial disparities between VoIP and traditional wireline traffic during the transitional period. *See* JA__ (*Order* ¶¶ 933-953). The *Order* recognized, however, that its "symmetrical approach to VoIP-PSTN intercarrier compensation" could be undercut if some VoIP providers were excluded from the access charge regime because they used the partnership model instead of the unitary model. JA__ (*Order* ¶ 970).

In deciding to avoid this result by treating both types of VoIP providers the same during the transition, the *Order* considered, and rejected, AT&T's claimed analogies. *See* FCC Br. at 6-10. In the wireless context, the prohibition on tariffing by a partner LEC for functions performed by a wireless carrier followed directly from the prohibition on tariffing by wireless carriers themselves. JA__ (*Order* ¶ 970 n.2024). In contrast, there has never been any prohibition on tariffing by VoIP providers; unitary VoIP providers can and do tariff. Thus, where a VoIP provider uses a LEC partner, it does so not to circumvent a prohibition on tariffing, but rather to obtain essential services. JA__ (*Order* ¶ 970).

Likewise, unlike the "multiple LECs" scenario, under the VoIP Symmetry Rule, only one party – the LEC partner – can charge, and it can charge only once, for services supplied via the partnership arrangement. JA__ (*Order* ¶ 970). This eliminates the double-billing scenario that had troubled the FCC in the "multiple

providers" context. *Id*. As the *Order* notes, the absence of concerns about gamesmanship and double billing makes the VoIP partnership context "distinct" from AT&T's analogies. *Id*.

ARGUMENT

I. THE FCC'S TRANSITIONAL RULE IS SUBJECT TO HEIGHTENED DEFERENCE.

AT&T does not even acknowledge, much less challenge, the FCC's decision that unitary VoIP providers should be placed on a gradual "glide path" of steadily reducing access charges, like traditional wireline providers. *See* JA__ (*Order* ¶ 969). AT&T challenges only the FCC's subsidiary decision that VoIP providers that use a partnership model should be treated no differently from unitary VoIP providers. AT&T Br. 16.

AT&T's challenge is subject to "arbitrary and capricious" review under 5 U.S.C. § 706, which is "highly deferential to the agency's determination." *Aviva Life & Annuity Co. v. FDIC*, 654 F.3d 1129, 1131 (10th Cir. 2011); *WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178, 1183 (10th Cir. 2013). The "'arbitrary and capricious' standard is particularly deferential in matters implicating … interim regulations," *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009), because "[a]voidance of market disruption pending broader reforms is, of course, a standard and accepted justification for a temporary rule." *Competitive Telcomms. Ass'n v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002); *see also*

Sorenson Commc'ns, Inc. v. FCC, 659 F.3d 1035, 1046 (10th Cir. 2011) ("[T]he FCC is entitled to substantial deference when adopting interim rates"); *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410 (D.C. Cir. 2002); *Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068, 1073-75 (8th Cir. 1997); *MCI Telecomms. Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984).

II. THE FCC ARTICULATED MULTIPLE, INDEPENDENTLY REASONABLE GROUNDS FOR ITS INTERIM RULE.

The *Order* "examined the relevant data and articulated a rational connection between that data and its decision," *WildEarth*, 703 F.3d at 1182-83, in three independent ways: (1) allowing the market gradually to adjust to the new bill-and-keep regime; (2) ensuring parity among VoIP providers and between VoIP and wireline LECs; and (3) preserving incentives to invest in IP during the transition. None of these reasons applies to wireless carriers, and the Commission justifiably declined AT&T's assertion – which it made only in the most cursory fashion below – that competitive considerations required parity with wireless carriers.

A. Allowing the Market Gradually to Adjust.

The primary rationale behind the FCC's *Order* is straightforward: a gradual reduction of access charges for VoIP providers accounts for existing reliance on such revenues and allows for a "measured transition." JA__ (*Order* ¶ 952). AT&T does not dispute the *Order*'s factual finding that, notwithstanding some disputes, it had been "in the aggregate" the practice in the industry for LECs

involved in the provision of VoIP service to receive tariffed access charge revenues. JA__ (*Order* ¶¶ 952 & 948 n.1917); *see also* JA__ (*In re Connect America Fund*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4748 ¶ 614 (2011)). The record before the Commission showed that both VoIP providers operating under the partnership model and those operating as unitary providers received such revenues prior to the *Order*. *See* n.7 *supra*.

This alone explains the FCC's refusal of AT&T's demand that VoIP partnerships be treated like wireless carriers during the transition. Wireless carriers had been prohibited from tariffing access charges for years. *See In re Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd 13,192, 13,199 ¶ 15 (2002), *appeal dismissed, AT&T Corp. v. FCC*, 349 F.3d 692 (D.C. Cir. 2003); JA__ (*Order* ¶ 970 n.2024). Wireless carriers thus were differently situated from VoIP providers: they had no expectation of access charge revenues to begin with.

This rationale did not require the FCC to decide AT&T's claims about the propriety of access charges by VoIP partnerships in the past, only to acknowledge that VoIP partnerships were in fact receiving access charge revenues at the time of the *Order* and that it made sense to allow them to adjust gradually to losing them. AT&T may have preferred either a regime in which wireless carriers received a

windfall or VoIP partnerships lost revenues immediately, but interim solutions reasonably may "consider the past expectations of parties and the unfairness of abruptly shifting policies." *MCI Telecommc'ns Corp.*, 750 F.2d at 141. That is exactly what the FCC did here.

B. Parity Among Wireline Providers.

The *Order* also is backed by a second rationale: parity among wireline providers, including both among LEC and non-LEC VoIP providers and between VoIP and traditional providers. The *Order* articulates a broader policy of symmetry between VoIP and traditional providers. *See* JA__ (*Order* ¶¶ 968-969). The "Commission has traditionally viewed facilities-based VoIP services as 'sufficiently close substitutes for local service to include them in the relevant product market,'" but not treated wireless carriers as competing in the same market. *Qwest Corp. v. FCC*, 689 F.3d 1214, 1221 n.4 (10th Cir. 2012) (internal citation omitted). As the *Order* explains, this policy would be undermined if some VoIP providers were cut off from access charges based on an unrelated distinction about how they had structured their businesses. Some VoIP providers have used the unitary model and some the partnership model "[b]ecause the Commission has not broadly addressed the classification of VoIP services…," and because of the Commission's "endorsement of [VoIP partnership] arrangements." JA__ (*Order* ¶ 970 & n.2024). It would be arbitrary to penalize providers that chose the

partnership model endorsed by the Commission when their business structure does not reflect any relevant difference in their services. *Id.*

AT&T argues that the parity sought by the *Order* is irrational because the retail provider in a VoIP partnership is situated similarly to a wireless carrier, in that neither tariffs access charges. AT&T Br. at 18-20. As detailed above, however, the FCC articulated valid reasons for looking beyond this superficial similarity. And as the Commission explained, wireless carriers' inability to tariff arises out of the Commission's long-standing policy of allowing market conditions to govern wireless compensation, whereas VoIP *can* be tariffed and a non-LEC VoIP provider's inability to file a tariff arises solely from its business structure. *See* p. 6 *supra*. In the end, the *Order* had to choose an access charge transition that aligned VoIP partnerships either with other wireline providers (both unitary VoIP providers and traditional wireline providers) or with wireless providers. The FCC made a rational election as to which kind of parity to maintain during the transition.[9]

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[9] While the Commission established a slightly different compensation scheme for VoIP-PSTN traffic than for non-VoIP traffic during the transition, both kinds of traffic are subject to access charges; the only difference is the appropriate level of those charges, which the FCC has explained. *See* FCC Resp. Br. in Resp. to Windstream 23-27.

C. Incentives to Invest in IP Technology.

The FCC also backed its decision with a third rationale that independently justifies the *Order*: avoiding penalizing investments in Internet Protocol ("IP").

"[O]ne of the goals of" the *Order* was to "promote investment in and deployment of IP networks." JA_ (*Order* ¶ 968). If the FCC had put in place a transitional regime where VoIP providers operating under a partnership model could not assess access charges (but others could), it would "disadvantage providers that have already made [IP] investments," *id*., merely because they chose a particular business model – one that the Commission had endorsed. The FCC reasonably articulated that such a state of affairs would not only be arbitrary, but could be counterproductive to its IP deployment objectives. *Id*.

Again, wireless providers were not similarly situated to VoIP providers: they could not have made investments in reliance on access charges, as they were not receiving any.

D. The *Order* Does Not Disregard AT&T's Claims of Competitive Harm.

The rule the FCC adopted has nothing to do with wireless providers. It neither changes the rights of wireless providers to collect access revenues nor uniquely affects their obligation to pay access charges to others. AT&T's repeated suggestion that the *Order* "imposed…regulatory disadvantage" on "wireless carriers," AT&T Br. 9, 18, bears little resemblance to the rule the *Order* actually

implemented. In any event, AT&T's claim of "competitive harm," which it barely articulated below, was fully addressed by the *Order*.

AT&T principally argued below that letting VoIP partnerships tariff access charges was inconsistent with AT&T's view of then-prevailing law and could have unanticipated consequences on compensation for other kinds of services. JA__, __ (*AT&T Letter* at 2-4, 5-6). AT&T raised the argument on which it relies now – the claimed "competitive harm" to wireless providers, *see* AT&T Br. at 18 – only at the last minute (the last day party submissions were allowed) and in the most cursory statements, claiming that it would "arbitrarily pick winners and losers in the marketplace," JA__ (AT&T Letter at 4-5), but never explaining how that would be the case.[10]

The economic reasoning argued without citation in AT&T's brief – that the rule somehow forces wireless carriers to charge higher "retail prices" AT&T Br. at 6 – is nowhere to be found in AT&T's arguments to the Commission. In any case, the Commission's analysis fully disposes of AT&T's claim. The FCC, as explained *supra*, considered the possibility of doing what AT&T wanted: "to immediately adopt a bill-and-keep methodology for VoIP traffic," thereby

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[10] Given how generic and inchoate AT&T's claims of "competitive harm" were before the Commission, it is questionable whether AT&T preserved this particular issue for review at all. *See MCI Worldcom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000).

equalizing the treatment of VoIP and wireless providers for intercarrier compensation purposes right away. JA__ (*Order* ¶ 952). The Commission acknowledged that this would "clearly facilitate the Commission's transition" to a regime in which all carriers are treated identically, but the Commission concluded that an immediate switch would not "appropriately balance[] other competing policy objectives." *Id.* AT&T may disagree with the FCC's judgment as a policy matter, but that judgment was the FCC's to make.

CONCLUSION

Intervenors respectfully request that the Court deny the petition.

Respectfully submitted,

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April 24, 2013

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, TYPE STYLE REQUIREMENTS, PRIVACY REDACTION REQUIREMENTS, AND VIRUS SCAN

1. This brief contains 3,179 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 Malwarebytes' Anti-Malware (version 1.51.2.1300, updated on April 24, 2013) and, according to the program, is free of viruses.

/s/ Luke C. Platzer

April 24, 2013

CERTIFICATE OF SERVICE

Hereby certify that on April 24, 2013 I caused the foregoing Uncited Intervenors' Brief in Opposition to AT&T's 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/_Luke C. Platzer________

April 24, 2013