No. 11-9900

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

IN RE: FCC 11-161

**On Petition for Review of
an Order of the Federal Communications Commission**

UNCITED INTERVENORS' BRIEF SUPPORTING RESPONDENTS RE: THE JOINT UNIVERSAL SERVICE FUND PRINCIPAL BRIEF

SCOTT H. ANGSTREICH
BRENDAN J. CRIMMINS
JOSHUA D. BRANSON
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL, P.L.L.C.
1615 M Street, NW, Suite 400
Washington, D.C. 20036
(202) 326-7900

MICHAEL E. GLOVER
CHRISTOPHER M. MILLER
CURTIS L. GROVES
VERIZON
1320 North Courthouse Road, 9th Floor
Arlington, Virginia 22201
(703) 351-3071

Counsel for Verizon and Verizon Wireless

JONATHAN E. NUECHTERLEIN
HEATHER M. ZACHARY
KELLY P. DUNBAR
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

CATHY CARPINO
GARY L. PHILLIPS
PEGGY GARBER
AT&T SERVICES, INC.
1120 20th Street, NW
Washington, DC 20036
(202) 457-3058

Counsel for AT&T Inc.

April 24, 2013

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

ROBERT ALLEN LONG, JR.
GERARD J. WALDRON
YARON DORI
MICHAEL P. BEDER
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
Washington, DC 20004
202-662-6000

Counsel for CenturyLink, Inc.

HOWARD J. SYMONS
ROBERT G. KIDWELL
ERNEST C. COOPER
MINTZ LEVIN COHN FERRIS
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20004
(202) 434-7300

RICK CHESSEN
NEAL M. GOLDBERG
STEVEN MORRIS
JENNIFER MCKEE
THE NATIONAL CABLE &
TELECOMMUNICATIONS ASSOCIATION
25 Massachusetts Avenue, NW
Suite 100
Washington, DC 20001
(202) 222-2445

Counsel for NCTA

CHRISTOPHER J. WRIGHT
BRITA D. STRANDBERG
WILTSHIRE & GRANNIS LLP
1200 18th St., N.W.
Washington, DC 20036

BRENDAN KASPER
SENIOR REGULATORY COUNSEL
VONAGE HOLDINGS CORPORATION
23 Main Street
Holmdel, NJ 07733

Counsel for Vonage Holdings Corporation

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Intervenors in Support of Respondents Re: The Joint Universal Fund Principal Brief submit this Corporate Disclosure Statement.

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 ten percent or more of its stock.

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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.*)
CAF Phase II	Phase II of the Connect America Fund
Communications Act	Communications Act of 1934, as amended (47 U.S.C. § 151 *et seq.*)
ETC	eligible telecommunications carrier
FCC or Commission	Federal Communications Commission
ILEC	incumbent local exchange carrier
Order	Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17663 (2011)
USF	Universal Service Fund
VoIP	Voice over Internet Protocol

SUMMARY OF ARGUMENT

The FCC persuasively rebuts petitioners' challenges to the universal service components of the *Order*.[1] Intervenors write separately to stress several points.

1. Petitioners challenge the FCC's authority under subsections 254(c) and (e) to condition receipt of federal high-cost support on a recipient's commitment to deploy "dual-use" facilities that can be used to provide both voice and broadband Internet access services. But with petitioners' encouragement, the FCC has long *permitted* recipients to use federal support for that purpose, and no party challenges the lawfulness of that "no-barriers" policy. The *Order* here simply makes that permissive policy mandatory for any provider that accepts high-cost funding. The result is every bit as consistent with subsections 254(c) and (e) as the traditional no-barriers policy is. Indeed, if petitioners' statutory rationale for challenging the broadband condition had merit, the no-barriers policy—a cornerstone of federal broadband policy for ten years—would itself be unlawful.

Petitioners separately argue that, by allowing funding for interconnected VoIP providers without resolving the statutory classification of particular VoIP

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[1] Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17663 (2011) ("*Order*"). Except where otherwise indicated, citations below of the parties' briefs refer to the "Joint Universal Service Fund Principal Brief" of petitioners and the FCC's brief in response.

services, the FCC has triggered a chain of events that may someday lead to the disbursement of universal service funds to "non-telecommunications carriers," which, petitioners contend, cannot lawfully receive such funding. As a threshold matter, that claim presents no justiciable case or controversy. Petitioners lack Article III standing to challenge this aspect of the *Order* because they have not shown—or even alleged—that it has caused them "injury in fact" that is "actual or imminent" rather than "conjectural or hypothetical." Indeed, petitioners have not identified a single "non-telecommunications carrier" that is receiving federal support. For similar reasons, petitioners' claim is also unripe.

In any event, petitioners' statutory-authority claim would lack merit even if it were justiciable. First, as the FCC concluded, its authority under section 254(e) "to support the deployment of broadband networks" does not turn on the classification of particular VoIP *services* offered over those networks. *Order* ¶ 63 n.67. Second, section 706(b) of the Telecommunications Act of 1996 provides independent authority in the narrow context presented here. Although section 706(b) is tightly circumscribed, it provides that, upon an appropriate finding of inadequate deployment, the FCC shall take "action to accelerate deployment" of broadband infrastructure to areas that would otherwise lack it. 47 U.S.C. § 1302(b) (codifying section 706(b)); *see also id.* § 1302(c) (directing the FCC to identify "geographical areas that are not served by any [broadband] provider"). That is exactly what the FCC has done by providing universal service support for broadband in those areas. Thus, although petitioners are correct that reading section 706(b) more broadly would be legally untenable, they are wrong to challenge the FCC's application of that provision in this narrow context.

2. Petitioners fare no better when challenging the FCC's decision to adopt a fixed budget for federal high-cost funding. The FCC reasonably balanced the benefits of such funding against the inevitable costs to consumers, who must underwrite any increase in fund size by paying higher line-item fees on their phone bills. The FCC also closely analyzed the practical effect of its budgetary decisions on fund recipients and took steps to cushion recipients against any abrupt shortfalls. The FCC thus reasonably faced up to the relevant trade-offs, and its resolution of competing interests falls within the heartland of its administrative discretion.

3. Finally, the FCC reasonably decided to use competitive bidding to distribute CAF Phase II support to carriers serving price-cap areas. Contrary to petitioners' claim, an auction mechanism does not usurp any statutory powers of the states; the states will continue to perform their statutory role of designating providers as eligible telecommunications carriers ("ETCs"), and no carrier may

receive high-cost support *without* an ETC designation. There is also no merit to petitioners' arguments that the FCC inadequately considered concerns that competitive bidding mechanisms will lead to poor service quality or disadvantage small carriers. Those arguments are unripe because the FCC has not yet adopted any auction structure for CAF Phase II or any mechanism for enforcing service commitments by auction winners. There is thus no final agency action to challenge. In any event, the FCC has shown that it will be fully capable of addressing petitioners' concerns when it formulates the relevant rules.

ARGUMENT

I. THE FCC HAS AUTHORITY TO REORIENT THE FOCUS OF THE UNIVERSAL SERVICE FUND FROM NARROWBAND TO BROADBAND TECHNOLOGIES

In their lead argument (*see* Br. 11-28), petitioners challenge two distinct aspects of the *Order*. First, they challenge what they call the "broadband condition": the FCC's decision to predicate universal service support on a recipient's commitment to deploy networks capable of providing robust broadband Internet access services. *See Order* ¶¶ 60-73. Second, petitioners challenge the FCC's separate decision to define the class of supported "voice telephony" services in a technologically neutral manner that includes interconnected VoIP services in addition to conventional circuit-switched telephony. *See id.* ¶ 62. Although petitioners sometimes conflate these two policy decisions, they are separate. The first decision imposes obligations on federal high-cost support recipients, whereas the second concerns which services and carriers are eligible to receive support in the first place. Petitioners' challenges to both decisions are without merit, and their challenge to the second is non-justiciable as well.

A. The FCC Is Authorized To Condition Funding On The Deployment Of Broadband-Capable Facilities

As the FCC explains (Br. 12-22), it has statutory authority to require high-cost support recipients to invest in broadband-capable networks and to demonstrate their compliance with that funding condition by providing specified broadband services. Rather than repeat the FCC's arguments in full, intervenors will focus on a revealing anomaly at the heart of petitioners' position: they avidly support a program—the "no-barriers" policy—that would logically be unlawful if their rationale for challenging the *Order*'s broadband condition were valid. *See id.* at 17 & n.2 (citing petitioners' comments). But because that rationale is invalid, both the no-barriers policy and the broadband condition are lawful.

Section 254(b) directs the Commission to use federal universal service programs to promote access to broadband services. It requires that "the Commission shall base policies for the preservation and advancement of universal service on" six principles, two of which concern access to information services. 47 U.S.C. § 254(b). Specifically, section 254(b)(2) states that "[a]ccess to advanced telecommunications *and information services* should be provided in all regions of the Nation." *Id.* § 254(b)(2) (emphasis added). And section 254(b)(3) provides that "[c]onsumers in all regions of the Nation, . . . should have access to telecommunications *and information services* … that are reasonably comparable to those services provided in urban areas." *Id.* § 254(b)(3) (emphasis added). These principles impose a "mandatory duty" on the FCC. *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001) ("*Qwest I*").

Throughout the decade preceding the *Order*, the FCC promoted these statutory goals in part by implementing its no-barriers policy. In its pre-*Order* form, that policy permitted, but did not require, carriers to use federal funds to invest in dual-use facilities in order to provide broadband Internet access and other information services alongside traditional telephone services. *See* FCC Br. 12; Fourteenth Report and Order, *Federal-State Joint Board on Universal Service*, 16 FCC Rcd 11244, 11322-23 ¶¶ 199-201 (2001). The FCC found that the "use of support to invest in infrastructure capable of providing access to [such] advanced services" comports with section 254(e). *Id.* at 11322 ¶ 200. As it reasoned, the statute permits support for facilities as well as particular services, and it thus permits initiatives to spur "the deployment of modern *plant* capable of providing access to advanced services," including "data" and "video" services. *Id.* (emphasis added). That legal determination was plainly correct, and petitioners do not even challenge it. To the contrary, as the FCC shows, petitioners' ranks include some of the chief proponents of the no-barriers policy and some of its greatest beneficiaries. *See* FCC Br. 17 & n.2.

The *Order*, however, simply converts the no-barriers policy from a permissive program to a mandatory one. The FCC reasonably concluded that section 254 authorizes it to "go beyond the 'no barriers' policy" and to "require carriers receiving universal service support to invest in modern broadband-capable networks." *Order* ¶ 65. "[N]othing in section 254," the FCC explained, "requires [it] simply to provide federal funds to carriers and hope that they will use such support to deploy broadband facilities." *Id.* Indeed, that reading would conflict with the FCC's "mandatory duty" (*Qwest I*, 258 F.3d at 1200) to promote the availability of broadband networks and services under section 254(b).

The problem for petitioners is that if the no-barriers policy they champion is lawful (as indeed it is), their statutory logic for challenging the mandatory broadband condition must fail, because that logic would apply equally to prohibit *any* expenditure of federal funds for broadband, whether compulsory or voluntary. *See* FCC Br. 17. Petitioners argue at length (Br. 14-24) that the FCC lacks statutory authority under subsections 254(c) and (e) "to include [broadband

Internet access] on the list of supported services" (*id.* at 14). As a threshold matter (and as the FCC has explained), that argument simply misreads the *Order:* although the FCC could have designated broadband Internet access as a supported service,[2] it elected instead to support the deployment of dual-use, broadband-capable *facilities*. *See Order* ¶¶ 64-65; FCC Br. 20-21.

But even if the FCC had made broadband Internet access itself a supported service—or even if supporting broadband *facilities* were somehow equivalent to supporting broadband *services*—that support could not violate section 254 under petitioners' statutory logic unless the "voluntary" no-barriers policy itself would also violate section 254 under the same logic. Suppose, counterfactually, that petitioners were correct and that spending universal service money on broadband facilities were unlawful on the theory that section 254 permits funding only for "telecommunications services." If so, it would not matter whether a funding recipient puts the money to the prohibited use voluntarily or instead in response to a mandatory funding condition. Either way, the money would be spent for an unlawful purpose. *See* FCC Br. 17-18.

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[2] *See, e.g.*, AT&T Comments, WC Docket No. 10-90, at 112-20 (filed Apr. 18, 2011) ("AT&T 4/18/2011 Comments") (JA__-__) (explaining that sections 254 and 706(b) each independently authorize direct support for broadband Internet access services).

In short, any judicial holding that invalidates the broadband funding condition in question here would disrupt existing business plans under the no-barriers policy, threaten to undermine rural broadband deployment more generally, and subvert Congress's objective, codified in section 254(b), to promote universal "[a]ccess to advanced telecommunications and information services." 47 U.S.C. § 254(b)(2), (b)(3). As the FCC explains, nothing in the Communications Act requires that anomalous result, much less unambiguously so.

B. Petitioners' Complaint About Hypothesized Future Support For "Non-Telecommunications Carriers" Is Both Nonjusticiable And Without Merit

As noted, the FCC elected not to make broadband Internet access a supported service; instead, it designated "voice telephony" as the only such service. *See Order* ¶¶ 62-63. Thus, "[a]s a condition of receiving support," ETCs must "offer voice telephony as a standalone service throughout their designated service area." *Id.* ¶ 80. To ensure technological neutrality, the FCC defined the category of "voice telephony" services broadly to include interconnected VoIP in addition to conventional circuit-switched voice services. *Id.* ¶ 63. The FCC has not identified any VoIP services that would qualify as "telecommunications services" rather than "information services." *See id.* ¶ 718.[3] But the FCC left intact the underlying requirement that, to receive funding, a state commission must designate the provider as an "eligible telecommunications carrier" within the meaning of sections 214 and 254. *See* Order on Reconsideration, *Federal-State Joint Board on Universal Service*, 27 FCC Rcd 15383, 15384 ¶ 3 (2012) (confirming that states retain "the primary responsibility for performing ETC designations" under 47 U.S.C. § 214(e)(2)).

Petitioners nonetheless speculate that the FCC's approach might someday lead to violations of section 254. They argue that, by allowing funding for

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[3] The definitions of "telecommunications service" and "information service" are "mutually exclusive": a service can be either one or the other but cannot be both. Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14862, 14911 ¶¶ 12 n.32, 105 (2005), *aff'd*, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007); Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11830, 11520 ¶ 39 (1998). A "telecommunications carrier" is defined as a "provider of telecommunications services." 47 U.S.C. § 153(51). A provider that offers only information services cannot be a "telecommunications carrier" within the statutory meaning because, by definition, it is not providing any telecommunications services. That said, a provider may voluntarily divide its operations into a retail entity that provides information services to end users and a wholesale affiliate that provides transmission inputs to the retail entity. If the affiliate (or any unaffiliated wholesale provider) offers those inputs in the form of generally available telecommunications services, *it* can qualify as a "telecommunications carrier," even though the retail entity might not. *See generally Order* ¶¶ 968-970; *see also id.* ¶ 71 & n.99.

interconnected VoIP providers without resolving the statutory classification of particular VoIP services, the FCC has opened the door to disbursement of universal service funds to "non-telecommunications carriers." Br. 18; *see id.* 5, 17, 22. That claim presents no justiciable case or controversy and lacks merit in any event.

1. Petitioners' Challenge Presents No Article III Case Or Controversy

A party invoking judicial review bears the burden of proving that its challenge to an agency rule satisfies Article III requirements. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-104 (1998); *Qwest Commc'ns Int'l, Inc. v. FCC*, 240 F.3d 886, 892-893 (10th Cir. 2001). Here, petitioners have not even tried to carry that burden with respect to their complaints about hypothesized future support for entities that are not "telecommunications carriers." Although the FCC presents that Article III defect in terms of ripeness (Br. 25), it could be phrased in terms of either ripeness or standing, given the close relationship between those two doctrines in this context. *See, e.g.*, *Southern Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1157 (10th Cir. 2013) ("doctrines of standing and ripeness substantially overlap in many cases," including where "the question of whether [a party] faces an imminent injury involves similar concerns as whether [the] suit is ripe for adjudication"). Under either articulation, petitioners have not alleged individualized harms sufficient to satisfy threshold jurisdictional requirements for judicial review.

To satisfy Article III *standing* requirements, petitioners must establish that the relevant FCC decision causes them "injury in fact" that is "actual or imminent, not conjectural or hypothetical." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (internal quotation marks omitted). Presumably, petitioners would assert that, if the FCC does someday provide support to a provider that is not a "telecommunications carrier," that might mean more competition and less funding for them. But no petitioner has submitted any affidavit or made any other effort to substantiate that any such injury is either likely or imminent.

That failure of proof is unsurprising because the chain of causation that petitioners would have to establish is long, tenuous, and highly speculative. Before any petitioner could possibly suffer a cognizable injury, each of the following events would have to occur. *First*, a retail VoIP provider must apply for ETC status while offering only interconnected VoIP as its "voice telephony" service. *Second*, that provider's VoIP service (and any other relevant service) must be deemed an "information service" and therefore not a "telecommunications service." *Third*, that VoIP provider must nonetheless win an ETC designation from the relevant state commission. *Fourth*, any funding that the provider receives must threaten to harm a specific petitioner in a concrete and identifiable way—for example, by increasing competitive pressure on that petitioner in a discrete geographic area where they both operate. *See Sherley v. Sebelius*, 610 F.3d 69, 73, 74 (D.C. Cir. 2010) (competitor standing doctrine requires "actual or imminent increase in competition" and "actual, here-and-now injury").

Petitioners make no effort to substantiate the likelihood of any of these preconditions to a finding of injury-in-fact; indeed, they fail to identify even a *single* current recipient of universal service support that, although designated as an ETC, is providing only information services. That evidentiary default is fatal. The conjecture that petitioners "might, at some time in the future and under certain conditions," be injured by an "FCC rule with which it disagrees" "is clearly insufficient to establish standing." *U.S. West, Inc. v. FCC*, 173 F.3d 856 (unpublished), 1999 WL 147342, at *3 (10th Cir. Mar. 18, 1999). And any interest petitioners may have "in the Commission's legal reasoning and its potential precedential effect does not by itself confer standing where, as here, it is 'uncoupled' from any injury in fact caused by the substance of the FCC's adjudicatory action." *Telecommunications Research & Action Ctr. v. FCC*, 917 F.2d 585, 588 (D.C. Cir. 1990). Indeed, "mere precedential effect within an agency is not, alone, enough to create Article III standing, no matter how foreseeable the future litigation." *Wisconsin Pub. Power, Inc. v. FERC*, 493 F.3d 239, 268 (D.C. Cir. 2007) (per curiam) (internal quotation marks omitted).

For similar reasons, petitioners' challenges to this aspect of the *Order* are also *unripe*, as the FCC explains (Br. 25). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted). That principle is dispositive here. Again, petitioners have not attempted to show, nor could they show, that the speculative prospect that non-telecommunications carriers could someday receive universal service support has "an immediate and ongoing impact" on them. *Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1232 (10th Cir. 2005) ("*Qwest II*") (challenge to universal service funding was ripe where petitioners "have adequately stated an immediate and ongoing impact in the face of allegedly dwindling" universal service support); *see also Utah v. U.S. Dept. of Interior*, 210 F.3d 1193, 1198 (10th Cir. 2000) (claims based on harms that were "contingent, not certain or immediate," were not ripe). If a state commission someday confers ETC status on a provider that offers only information services, petitioners might then be able to present a challenge to that ETC designation. But they have no basis for challenging that hypothetical future designation now.

2. Petitioners' Challenge Is Flawed On The Merits

Quite apart from these threshold Article III defects, petitioners lack any basis on the merits for challenging the FCC's decision to include interconnected VoIP within the class of supported "voice telephony services" while deferring judgment on the statutory classification of those services. As the *Order* explains, the FCC's authority to promote universal service through that inclusive approach "does not depend on whether interconnected VoIP services are telecommunications services or information services." *Order* ¶ 63. In particular, if a given voice offering is a telecommunications service, the FCC has indisputable authority to support that service directly, and if it is an information service, the FCC may "support the deployment of broadband *networks* used to provide such services." *Id.*¶ 63 n.67 (emphasis added). The FCC's brief (at 26-27) rebuts petitioners' arguments to the contrary.[4]

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[4] *See also* AT&T 4/18/2011 Comments at 113-14 (JA __-__) (explaining that the language of section 254(c)(2) would authorize the FCC, if it chose, to designate information services as supported *services*, even outside the schools-and-libraries context addressed in section 254(c)(3)).

Moreover, section 706(b) of the Telecommunications Act of 1996 gives the FCC independent authority in this limited context to provide universal service support for broadband deployment in areas where broadband would otherwise not exist. *See Order* ¶¶ 66-73.[5] Petitioners do not claim that the triggering conditions for section 706(b) have not been met; instead, they argue (Br. 26) that construing the provision to apply here would give the FCC unbounded new powers. That is incorrect: in fact, section 706(b) is exceedingly narrow. By its terms, that provision states simply that, upon a finding of inadequate deployment, the FCC shall take "action to accelerate deployment" of broadband to areas that would otherwise lack it. 47 U.S.C. § 1302(b) (codifying section 706(b)); *see also id.* § 1302(c) (directing the FCC to identify "geographical areas that are not served by any [broadband] provider"). That is exactly what the FCC has done by granting universal service support to promote deployment in the limited high-cost areas that are unserved or that would be unserved absent such support.

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[5] The Commission chose for policy reasons to require funding recipients to "comply with the same universal service rules and obligations set forth in sections 254 and 214." *Order* ¶ 73. But because section 706(b) is an independent source of authority, the FCC could eliminate that requirement if necessary to fund broadband in unserved areas. *See* FCC Br. 27 n.6; *cf. WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002) (remanding without vacating an FCC order where the court found "a non-trivial likelihood that the Commission has the authority" to reach its policy objectives through an alternative legal rationale).

Although section 706(b) is very narrow, petitioners are wrong to claim (Br. 25-26) that section 706(b) grants *no* independent authority for broadband funding in unserved areas and merely exhorts the FCC to exercise the powers it derives from other provisions. That argument ignores the fundamental differences between the terms of sections 706(a) and 706(b). As petitioners correctly observe, section 706*(a)* contains only aspirational language and confers no authority on the FCC. In contrast, section 706*(b)* expressly directs that, when statutory preconditions are met, the FCC "shall take immediate action" to "remov[e] barriers to infrastructure investment" in those limited and specific areas where such investment is lacking. 47 U.S.C. § 1302(b).[6] As the *Order* explains, "one of the most significant barriers to investment in broadband infrastructure" in unserved areas "is the lack of a business case for operating a broadband network." *Order*

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[6] Petitioners conflate the distinction between these two provisions throughout their brief. For example, they assert that, in 1998, the FCC construed section 706 not to grant it independent authority and that it has articulated an inadequate rationale for reversing course. Br. 24-25. But the 1998 order on which petitioners rely analyzed only whether the FCC has regulatory authority under section 706*(a)*, not section 706*(b)*. *See* Memorandum Opinion and Order, *Deployment of Wireline Servs. Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012, 24044-48 ¶¶ 69-77 (1998). The distinction between these two provisions is critical because section 706(b) is far more targeted in its focus and is a straightforward grant of very limited—but independent—broadband funding authority for unserved areas.

¶ 67 (internal quotation marks omitted). Universal service support is a key traditional means of alleviating such barriers to infrastructure investment in high-cost areas. Those considerations amply distinguish the FCC's universal service initiative here from petitioners' speculation (Br. 26) that the FCC might someday invoke section 706(b) to negate "securities and banking" requirements.

There also is no merit to petitioners' claim (Br. 27-28) that the FCC's use of section 706(b) to extend broadband service and networks to unserved areas undermines some congressional policy judgment embodied in section 254. To be sure, it would be inappropriate to rely on section 706(b) to evade explicit congressional policy choices that are embodied in other sections of the Communications Act or to impose involuntary regulatory burdens on broadband providers, given that section 706(b) specifically directs the FCC to *remove* barriers to infrastructure investment. But those concerns do not arise here because the FCC's funding program presents no conflict with section 254 or any other provision. When Congress enacted section 254 in 1996, virtually all consumers had to rely on conventional telecommunications services for all voice and data services, such as regular circuit-switched telephony for voice and dial-up technologies for access to the Internet. Not until the late 1990s did cable and telephone companies begin widely offering broadband Internet access as a bundled information service, and VoIP services did not become common until the first years of the new millennium. *See Order* ¶ 71. In short, the category of "telecommunications services" accounted for virtually all consumer voice and data services in 1996, yet Congress nonetheless drafted section 254 to encompass support for both "telecommunications and information services." 47 U.S.C. § 254(b)(2), (b)(3).

That historical context refutes any suggestion that Congress somehow considered and rejected plans to fund the most important communications technology of the 21st century: broadband Internet access, which has supplanted dial-up as the predominant means of accessing any information service. *See generally Order* ¶ 71. In particular, nothing in section 254 could be construed as an affirmative congressional policy choice against promoting broadband through the disbursement of universal service support. On the contrary, by using the specialized term "advanced telecommunications capability" in section 706(b), Congress directed the Commission to accelerate broadband infrastructure deployment in unserved areas whether the ensuing broadband services are classified as "telecommunications services" or as "information services" instead. Section 706(b) thus authorizes the FCC to fund broadband providers that offer only information services. *See Order* ¶ 71; FCC Br. 27 n.6.

Petitioners are also wrong to argue (Br. 27) that FCC action under section 706(b) would "overrid[e] Section 254 limitations" on the theory that section 254, as a more specific provision, controls over the general authority provided by section 706(b). As the D.C. Circuit explained in an analogous context, "[w]hen two statutes apply to intersecting sets [of issues], neither is more specific." *Core Commc'ns, Inc. v. FCC*, 592 F.3d 139, 143 (D.C. Cir. 2010) (internal quotation marks and alterations omitted). That is the case here. Section 254 equips the Commission with authority with respect to universal service in general. Section 706(b) directs the Commission to accelerate broadband deployment in particular by removing barriers to infrastructure investment in those limited geographic areas where the FCC finds that broadband has not been deployed in a reasonable and timely fashion. In deciding whether and how to promote broadband deployment through universal service mechanisms, neither section 254 nor section 706(b) is more specific than the other.

II. THE FCC REASONABLY LIMITED THE SIZE OF THE FUND TO AVOID UNDULY BURDENING THE CONSUMERS WHO MUST PAY FOR THE FUND

Like any funding program, the universal service fund presents difficult trade-offs. Choosing an overall size for the fund is the most fundamental of these, and the *Order* strikes an appropriate balance between competing interests. On the one hand, the FCC wished to create a fund large enough to bring some form of broadband—whether fixed, mobile, or satellite-based—to as many unserved areas as possible. On the other hand, the money in the fund does not appear from nowhere; it comes from "assessments paid by interstate telecommunications service providers," who "almost always pass their contribution assessments through to their customers." *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1099 (D.C. Cir. 2009) ("*RCA I*").

The FCC thus wished to avoid creating a fund so large that it would harm consumers, who must pay for any increase through higher line-item fees on their phone bills. As the D.C. and Fifth Circuits have explained, "excessive funding may itself violate" section 254 by "causing rates unnecessarily to rise, thereby pricing some consumers out of the market [altogether]." *RCA I*, 588 F.3d at 1103 (quoting *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000)); *see Qwest I*, 258 F.3d at 1200. In statutory terms, the FCC recognized that it must ensure not only that support will be "specific, predictable, and sufficient," 47 U.S.C. § 254(b)(5), but also that services for consumers throughout the country—including those who do not benefit from universal service programs—will be "available at just, reasonable, and affordable rates," *id.* § 254(b)(1). *See generally Qwest II*, 398 F.3d at 1234 (FCC is "compelled to balance the § 254(b) principles to the extent that they conflict").

Weighing these competing principles, the FCC adopted a fixed budget for the high-cost program. This budget, supported by a "broad cross-section of interested stakeholders," is crucial to "ensure that [the FCC] ha[s] in place 'specific, predictable, and sufficient' funding mechanisms to achieve [its] universal service objectives." *Order* ¶¶ 122-123 & n.192. In particular, the fixed budget the FCC chose, which it based on FY2011 support levels, will "stabilize the contribution burden," *id.* ¶ 14, will "minimize disruption" in the administration of the fund, *id.* ¶ 125, and will suffice to meet funding needs "given the substantial reforms" the *Order* adopts "to address long-standing inefficiencies and wasteful spending," *id.* The Commission "enjoys broad discretion when conducting exactly this type of balancing" between competing statutory objectives. *RCA I*, 588 F.3d at 1103.

Petitioners nonetheless argue (Br. 31) that the FCC "improperly limited its analysis to whether, without reform, USF support would be *excessive*" and ignored the statutory direction to ensure sufficient support for rate-of-return carriers. That is not a defensible reading of the *Order*, as the FCC's brief explains (at 33-34). The FCC carefully considered the impact of its reforms on rate-of-return carriers, such as petitioners here, to ensure sufficient funding levels for rural areas. *See Order* ¶¶ 285-294. It pared back legacy funding for rate-of-return carriers "in a gradual manner" so as not to "jeopardize service to consumers or investments made consistent with existing rules." *Id.* ¶ 285. And it established a waiver mechanism to address unforeseen funding shortfalls. *See id.* ¶¶ 126, 294.[7] The FCC's "balancing calculus" with respect to rate-of-return carriers thus "t[ook] into account the full range of principles Congress dictated to guide the Commission in its actions." *Qwest II*, 398 F.3d at 1234.

Petitioners' real complaint is thus not that the FCC failed to consider the "sufficiency" of support levels at all, but that it struck what they consider a suboptimal balance between "sufficiency" of support and competing statutory objectives. That challenge is untenable. As used in section 254, the term "sufficient" is "ambiguous as to what constitutes 'sufficient' support." *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 425 (5th Cir. 1999). And whether the FCC "has sufficiently and explicitly supported universal service" "go[es] directly to the heart of FCC expertise." *Alenco*, 201 F.3d at 620.

Petitioners do not begin to overcome the "substantial judicial deference," *Alenco*, 201 F.3d at 620, that the FCC receives for such judgment calls. They

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[7] The D.C. Circuit has twice held that the existence of such safety valves answers charges that interim caps for funding violated the section 254 sufficiency criterion. *See Rural Cellular Ass'n v.* FCC, 685 F.3d 1083, 1095 (D.C. Cir. 2012); *RCA I*, 588 F.3d at 1104; *see also* FCC Br. 35 & n.7.

contend, for example, that the FCC failed to "quantify[] the substantial added cost[s] of satisfying the broadband condition" imposed on rate-of-return carriers. Br. 30, 32. But the FCC made a reasonable predictive judgment that it could ensure sufficient support by (1) building substantial flexibility into those carriers' broadband service obligations, *e.g.*, *Order* ¶¶ 206, 533, (2) adopting various funding reforms that will yield substantial savings and efficiencies, *id.* ¶¶ 194-279, and (3) creating a new explicit recovery mechanism to replace gradual reductions in intercarrier compensation revenues, *id.* ¶ 291. *See generally id.* ¶¶ 287-288. The FCC, moreover, made uncontested findings that "9 out of 10 rate-of-return carriers" will see funding increase, stay the same, or decrease "less than 20 percent annually." *Id.* ¶ 290. Finally, petitioners identify "no cost data showing they would, in fact, have to leave customers without service as result" of the *Order*, and for that reason alone, there is no "valid reason to believe the principle of 'sufficiency' … will be violated." *RCA I*, 588 F.3d at 1104.

III. THE FCC IS AUTHORIZED TO USE A REVERSE-AUCTION MECHANISM TO ALLOCATE CAF PHASE II FUNDING IN PRICE-CAP AREAS

The incumbent local exchange carriers ("ILECs") eligible for universal service funding fall into two main categories. Some ILECs, including the smallest ones, are subject to traditional *rate-of-return* regulation, which allows carriers to charge rates designed to ensure a reasonable return on the prudently incurred investments recorded in their accounting books. Other ILECs are subject to *price-cap* regulation, which provides no similar assurance of cost recovery and, over the long term, prescribes rate caps mainly on the basis of non-carrier-specific criteria, such as the rate of inflation. Price-cap regulation gives carriers additional incentives to increase their efficiency because, unlike rate-of-return carriers, they have no guaranteed margins but *can* retain any extra profits they obtain through diligent cost-cutting. *See generally National Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 177-178 (D.C. Cir. 1993).

As the *Order* explains, "[m]ore than 83 percent of the approximately 18 million Americans who lack access to fixed broadband live in price cap study areas," *Order* ¶ 127, yet such areas accounted for only 25% of high-cost support in 2010, *see id.* ¶ 158. The *Order* reorients the universal service fund to correct this anomaly and establishes two phases of augmented funding for carriers that agree to serve areas traditionally subject to price-cap regulation, including price-cap ILECs as well as non-ILECs that are not themselves subject to price-cap regulation. Petitioners object mainly to the Commission's use of reverse auctions ("competitive bidding" mechanisms) for determining who will receive support during the second of these phases: CAF Phase II, which has not yet begun. *See* Br. 48-51. As petitioners acknowledge (*id.* at 48 n.26), auctions are likely to play a major role in distributing universal service support only after the initial five-year period of CAF Phase II.[8]

Petitioners argue that the use of auctions for allocating universal service support will "unlawfully strip[]" state commissions of their role under section 214(e) "of deciding *who* would receive universal service support." Br. 40. That is incorrect. Section 214(e) provides only that state commissions shall "designate" carriers as "eligible" to receive support. 47 U.S.C. § 214(e)(2). The *Order* fully accommodates that authority: under the *Order*, no carrier may participate in an auction unless it has been designated as an ETC by the relevant commission. *See, e.g.*, *Order* ¶ 1199; *see generally* FCC Br. 61.

Petitioners also claim (Br. 48-51) that the FCC inadequately considered concerns that competitive bidding mechanisms will result in poor service quality and disadvantage small carriers. As an initial matter, these claims are unripe

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[8] The FCC has granted each price-cap ILEC a "right of first refusal" to receive five years of support within a given state if it agrees to offer, among other things, a defined level of broadband service to all designated areas in that state by the end of the five-year term. *Order* ¶ 160. During that period, therefore, auctions will be held only insofar as ILECs opt out of this arrangement and the FCC needs to identify substitute providers. Auctions are expected to play a greater role after that period, when the right of first refusal expires and the opportunity to provide supported services will likely be opened up more broadly to competitive bidding. *Id.* ¶ 178.

because there is no final agency action to challenge. *See Schanzenbach v. Town of La Barge*, 706 F.3d 1277, 1281 (10th Cir. 2013) (the "requirement of final agency action is a general requirement for ripeness"). Despite petitioners' contrary suggestion, the FCC did not adopt (and still has not adopted) any particular auction structure for use in CAF Phase II or any mechanism for ensuring compliance with performance commitments. Instead, it issued a further notice of proposed rulemaking and invited comment on how to design such an auction. *See Order* ¶ 1190. And the FCC expressly sought comment in an *FNPRM* on the very topics that petitioners claim it ignored: service performance requirements for auction winners, *see id.* ¶¶ 1203-1204, and various issues concerning auction design, including the role of "small businesses" in the auction process, *e.g.*, *id.* ¶ 1213. As the FCC explains, any review of the FCC's CAF Phase II auction mechanism must await the future order that will create that mechanism. *See* FCC Br. 53-54.

In any event, the FCC's discussion of the auction mechanism that it *did* establish in the *Order*—in connection with the separate Mobility Fund—demonstrates that the FCC is acutely aware of the need to structure competitive bidding to address the concerns petitioners raise prematurely here. Petitioners assert, for example, that the FCC "ignored" arguments that "[b]idders in an auction system will face significant cost pressure to construct facilities meeting minimal performance specifications." Br. 48, 49. But the FCC acknowledged that concern in connection with the Mobility Fund and explained that the solution lies in "defin[ing] clear performance standards and effective enforcement of those standards, as is prudent when seeking any commitment for specific performance." *Order* ¶ 325. As the *FNPRM* confirms, the Commission will be every bit as focused on that concern when it designs the auction mechanism for CAF Phase II. *See, e.g.*, *id.* ¶ 1203.

More generally, petitioners' concerns about incentives to "skimp on service quality" (Br. 50) are hardly specific to auctions. Regulators began implementing the price-cap approach in the 1980s and 1990s to avoid the perverse incentives that rate-of-return regulation gives carriers to "gold-plat[e]" their networks, safe in the expectation that they "can pass any cost along to ratepayers (unless it is identified as imprudent)." *National Rural Telecom Ass'n*, 988 F.3d at 178. At the time, some parties claimed that the shift to price-cap (or "incentive") regulation would present the same "race to the bottom" service quality concerns that petitioners raise here. There was no basis for such concerns then, and there is even less of a basis now. Competitive bidding for universal service support involves a standard offer-and-acceptance arrangement whereby providers agree to serve a particular area in exchange for meeting certain terms and conditions, including service quality provisions. And there will be defined consequences for failure to comply. The same issues are presented in virtually all government contracts, which are nearly always subject to competitive bidding. The FCC is fully competent to address those issues here.

Finally, there is no basis for petitioners' claim that the FCC improperly disregarded their concerns that "an auction system would unduly favor large carriers over smaller carriers." Br. 49, 51.[9] As noted, the FCC did not disregard petitioners' arguments; instead, it sought additional comment on the role of small businesses in the CAF II auction process, *Order* ¶ 1213, and petitioners' challenge is thus unripe. In any event, the FCC *did* address "small business" concerns in the context of the separate Mobility Fund, and it found no evidence there that "small businesses are unable to meaningfully participate in a well-designed and executed reverse auction." *Id.* ¶ 326. Petitioners do not dispute that analysis on the merits;

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[9] Petitioners complain that "[i]f a carrier with existing networks in rural areas is a large one," it will likely enjoy "natural advantages" in a reverse auction because it can bid to provide service at a lower cost than alternative providers with smaller (or no) existing networks in those areas. Br. 51 (internal quotation marks omitted). Petitioners apparently wish to neutralize these "natural advantages" by making it more difficult to win a reverse auction with a low bid; under their approach, a higher bidder could win simply by virtue of being small, even if it would need to extract more money from the fund. That outcome would undermine a central goal of the universal service program: providing affordable service to the greatest number of households at the lowest cost to consumers in general.

instead, they respond only that, "[s]ince such an auction was not part of the *Order*, it is not susceptible to judicial review." Br. 51. Of course, that is our point: judicial review would be premature precisely because the FCC has not yet issued a final order adopting any CAF Phase II auction mechanism.

CONCLUSION

For the reasons stated above and in the FCC's brief, the relevant petitions for review should be denied.

Respectfully submitted,

/s/ Scott H. Angstreich
SCOTT H. ANGSTREICH
BRENDAN J. CRIMMINS
JOSHUA D. BRANSON
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL, P.L.L.C.
1615 M Street, NW, Suite 400
Washington, D.C. 20036
(202) 326-7900

MICHAEL E. GLOVER
CHRISTOPHER M. MILLER
CURTIS L. GROVES
VERIZON
1320 North Courthouse Road, 9th Floor
Arlington, Virginia 22201
(703) 351-3071

Counsel for Verizon and Verizon Wireless

/s/ Jonathan E. Nuechterlein
JONATHAN E. NUECHTERLEIN
HEATHER M. ZACHARY
KELLY P. DUNBAR
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

CATHY CARPINO
GARY L. PHILLIPS
PEGGY GARBER
AT&T SERVICES, INC.
1120 20th Street, NW
Washington, DC 20036
(202) 457-3058

Counsel for AT&T Inc.

April 24, 2013

* *Additional counsel on next page*

/s/ Robert Allen Long, Jr.
ROBERT ALLEN LONG, JR.
GERARD J. WALDRON
YARON DORI
MICHAEL P. BEDER
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
Washington, DC 20004
202-662-6000

Counsel for CenturyLink, Inc.

/s/ Howard J. Symons
HOWARD J. SYMONS
ROBERT G. KIDWELL
ERNEST C. COOPER
MINTZ LEVIN COHN FERRIS
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20004
(202) 434-7300

RICK CHESSEN
NEAL M. GOLDBERG
STEVEN MORRIS
JENNIFER MCKEE
THE NATIONAL CABLE &
TELECOMMUNICATIONS ASSOCIATION
25 Massachusetts Avenue, NW
Suite 100
Washington, DC 20001
(202) 222-2445

Counsel for NCTA

/s/ Christopher J. Wright
CHRISTOPHER J. WRIGHT
BRITA D. STRANDBERG
WILTSHIRE & GRANNIS LLP
1200 18th St., NW
Washington, DC 20036

BRENDAN KASPER
SENIOR REGULATORY COUNSEL
VONAGE HOLDINGS CORPORATION
23 Main Street
Holmdel, NJ 07733

Counsel for Vonage Holdings Corporation

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 6713 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/ Kelly P. Dunbar
Kelly P. Dunbar

April 24, 2013

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2013, I caused the foregoing Uncited Brief of Intervenors Supporting Respondents Re: The Joint Universal Service Fund 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/ Kelly P. Dunbar
Kelly P. Dunbar

April 24, 2013