In The United States Court Of Appeals

FOR THE TENTH CIRCUIT

NO. 11-9900

IN RE: FCC 11-161

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

UNCITED JOINT INTERCARRIER COMPENSATION REPLY BRIEF OF PETITIONERS

(DEFERRED APPENDIX APPEAL)

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Glossary

Access Charges	Fees charged to IXCs by LECS for exchange access, i.e., charged for toll calls that "begin and end in different calling areas."
1996 Act	Telecommunications Act of 1996
Act, or 1934 Act	Communications Act of 1934, as amended
ARC	Access Recovery Charge
Board, Joint Board	Federal-State Joint Board on Separations
BOC	Bell Operating Company
CLEC	Competitive Local Exchange Carrier
CMRS	Commercial Mobile Radio Service
FCC, Commission	Federal Communications Commission
ICC	Intercarrier Compensation
ILEC	Incumbent Local Exchange Carrier
IRB	Uncited Intervenor Brief Supporting Respondent
ISP	Internet Service Provider
IXC	Interexchange (or Long Distance) Carrier
LEC	Local Exchange Carrier
PB	Petitioners Uncited Joint Intercarrier Compensation Principal Brief
RB	Uncited Response of Respondents to the Joint Intercarrier Compensation Brief
RLEC	Rate-of-Return ILEC
Respondent	FCC, Federal Communications Commission
TELRIC	Total Element Long-Run Incremental Cost
USF	Universal Service Fund
VoIP	Voice over Internet Protocol

ARGUMENT

Respondent's Brief (*RB*), at 10-41, disregards the Act's structure[1] and text,[2] precedent, and a specific instruction to avoid preemptive constructions. As *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 n.9 (1984) states:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention . . . that intention is the law.

Respectfully, this Court: "cannot accept . . . argument[s] that the FCC may . . . take action which it thinks will best effectuate a

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1 "[I]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context." *Dolan v. United States Postal Service*, 546 U.S. 481, 486 (2006). The purpose of the 1996 Act was to open "local" markets, not to open already competitive toll markets.

2 *Secretary of Labor v. Excel Mining, LLC*, 334 F.3d 1, 7 (D.C. Cir. 2003) (Court prefers agency interpretations made "when the origins of both the statute and the finding were fresh . . . over a subsequent interpretation."); *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 371-2 (1986) ("[T]echnical terms of art should be interpreted by reference to the trade or industry to which they apply.") *U.S. v. Lachman*, 387 F.3d 42, 53 (1st Cir 2004) (There "are instances where a statutory or regulatory term is a technical term of art, defined more appropriately by reference to a particular industry usage.")

federal policy. An agency may not confer power upon itself."[3] The issue is "whether the statutory text forecloses the agency's assertion of authority, or not." *City of Arlington v. FCC*, 569 U.S. __ (2013) confirms, slip op. at 9. Respondent lacks authority. The *Order*[4] must be vacated.

I. Respondent's §251(b)(5) claims are irreconcilable with the Act and the facts.

Respondent invents a construction that cannot be squared with the plain text because (1) §251(b)(5) is limited to traffic exchanged between two carriers and excludes toll service; (2) §251(d)(3) preserves State intrastate access and interconnection authority; (3) §252(d)(2) sets a pricing standard States must use to set rates when carriers cannot agree so Respondent cannot set a "default" rate; and (4) §251(g) cannot justify preemption of intrastate access rates because they were not subject to FCC authority in 1996.

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3 *Louisiana*, 476 U.S. at 374-5; *Petitioners' Brief (PB)* at 19.

4 *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*Order*).

No authority exists for the *Order's* ICC-related preemption of State authority to set intrastate rates (access and local service) and specific §251(b)(5) rates.[5] The *Order*, on these issues, must be vacated.

A. *Preemption is not to be implied.*

Congress imposes an explicit rule of statutory construction in §601(c)(1): where a provision can be read in several ways, it must be construed to avoid preemption. The FCC's prior construction of §251(b)(5), which predates the *Order* by 15+ years, reconciles §251(b)(5) with State authority over intrastate access and complies with §601. *RB* at 28-29 (1) contends that no party raised §601 below and (2) cites two inapplicable cases.

The applicability of §601(c) was raised below. See, e.g., *Comments of the Pennsylvania Public Utilities Commission*, (Aug. 24, 2011) Legal Memorandum at 20; *Reply Comments of the Nebraska Rural Independent Companies* (Sept. 6, 2011) at 33; *Comments of the Nebraska Rural Independent Companies* (Aug. 14, 2011), at 17;

[5] Respondent's claim Petitioners "do not challenge the need for ICC reform or dispute the benefits of …bill-and-keep," *RB* at 5, is wrong. Petitioners and the record dispute both. But agreement on need says nothing about *what* reforms are *legal*.

*Initial Comments of the National Association of Regulatory Utility Commissioners (*Apr. 18, 2011), at 13. Moreover, both cited cases are distinguishable. *Qwest Corp. v. Minnesota PUC*, 684 F.3d 721, 731 (8th Cir. 2012) involved the interplay between §271 and §601(c), where Congress granted Respondent exclusive jurisdiction under §271, specifying *no* State role in setting prices, and there was no pre-existing State law to preserve because the 1996 Act created §271 elements. Id. at 729-30. But Congress assigned States the responsibility to set §252(d) reciprocal compensation rates and State access charges predate the 1996 Act, so §601(c) applies to preserve State authority. *Farina v. Nokia Inc.*, 625 F.3d 97, 116 (3d Cir. 2010) started "with the basic assumption that Congress did not intend to displace state law," but refused to construe §601(c) to preserve State law that was in direct conflict with existing FCC standards. Id. at 131. No direct conflict exists here. Intrastate access charge regimes have been in place since the mid-1980s with no conflict with the 1934 or 1996 Act. This is precisely the circumstance where §601(c) applies to forestall any FCC attempt to preempt authority Congress reserved to States.

B. *The Order illegally requires interstate costs to be recovered through local service rates over which Respondent has no jurisdiction.*

Respondent "sidesteps" *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 188 (1980), by contending that the *Order* complies with jurisdictional separations and federal mechanisms permit carriers to recover lost revenues. *RB* at 48-49. These arguments fail. The *Order* requires local end-user rates for non-access services to recover interstate costs. Respondent fails to square the requirements of *Smith* and related precedent -- that cost recovery be effectuated for amounts subject to separation -- with the *Order*'s requirement that ultimately no interstate cost recovery will be allowed.

First, the *Order* requires local end-user rate increases ("benchmarks") to obtain revenues from the federal mechanism. *RB* at 47. Intercarrier compensation (ICC) costs assigned to the interstate jurisdiction and formerly recovered through federal ICC charges are reduced to zero. Under the new regime, with recovery mechanisms that decline automatically over time, carriers ultimately must recover costs assigned to the interstate jurisdiction through local end-user rates. Because those rates are subject to the intrastate jurisdiction, the effect of the ICC rules is the same as the result invalidated in *Smith*. Interstate costs subject to the FCC's exclusive jurisdiction must be recovered through State rates for intrastate services.[6]

Second, Respondent's attempt to construe *Smith* as merely requiring jurisdictional separations is incorrect. *Smith* and related precedent link separated costs and recovery of these costs. *PB* at 49-53. The *Order* does not permit such recovery because the new federal mechanisms are "truly temporary in nature", *Order* ¶905, and the recovery mechanism is to be eliminated "in its entirety." Id.

Third, Respondent lacks authority to direct interstate cost recovery through local end-user rates. Relying on §251's grant of federal jurisdiction over "local telecommunications competition," *RB* at 26-27, Respondent argues it may adopt a "methodology" that requires recovery of §251(b)(5) costs through end-user rates rather than intercarrier charges. *RB at* 38-39. But the dual regulatory regime that governs local competition between carriers does not

[6] The ARC presents a similar *Smith* violation as intrastate costs are collected via an interstate surcharge.

grant Respondent jurisdiction to mandate Local Exchange Carrier (LEC) recovery of costs arising from the exchange of traffic through local telephone rate increases.

C. Section 251(d)(3) preserves State access charge authority.

Respondent claims the reference in §251(d)(3) to "access and interconnection standards" is limited to unbundling of network elements addressed in §251(d)(2). *RB* at 29-30. Section 251(d)(2) "Access Standards" references "subsection (c)(3)" related to network unbundling requirements for incumbent LECs (ILECs). In contrast, §251(d)(3) references the "requirements of this section" (§251 in its entirety), meaning that the reference to "access and interconnection obligations of [LECs]" (a class of carriers larger than just ILECs) in §251(d)(3)(A) cannot be limited to unbundling elements.

Moreover, as Respondent did not rely on this argument below, it cannot do so now. *Motor Vehicle Manufacturers Ass'n v. v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 50 (1983). Respondent's reliance on a single declaratory ruling is also misplaced. See *RB* at 29. The cited ruling held only that §251(d)(3) does apply to State regulation of network elements (*BellSouth*

Telecommunications, 20 FCC Rcd 6830 (2005) at ¶23) but nowhere addresses the question of the overall scope of "access and interconnection obligations" §251(d)(3) reserves to States.[7]

Respondent claims because intrastate access involves "telecommunications" exchanged with a LEC, "the statute itself preempts states' intrastate access charge regimes, except as temporarily preserved by [§]251(g) ."[8] This circular "argument" effectively writes §251(d)(3)'s reservation of authority out of the statute.

D. The Act differentiates access charges and reciprocal compensation

Respondent's arguments why §251(b)(5) encompasses local <u>and</u> exchange access traffic must be rejected. Respondent, *RB* at 6, ignores its prior interpretation,[9] and contends the Court should ignore the obvious "historical distinctions based on the interstate or intrastate nature of the traffic." Although Respondent argues the

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7 Petitioners explained why State regulations comply with the second and third prongs of §251(d)(3). *PB* at 16-19.

8 Section 251(g) does not make <u>any</u> reference to intrastate access regimes.

9 *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, et al.*, First Report and Order, 11 F.C.C.R. 15499, at 16013 ¶1034 (1996) (*Local Competition Order*).

term "telecommunications," is, "in no way limited to local traffic," *RB* at 13, §251(b)(5) is so limited - as confirmed repeatedly by the FCC, Courts, and State Commissions.[10] Respondent urges this Court to ignore other terms in §251(b)(5) and overlook the fact that a toll call does not *"originate on the network facilities of the other carrier,"* (§252(d)(2)(A)(i))(emphasis added)) since the "other carrier" is the LEC providing exchange access to the IXC providing the toll service to the calling customer. Moreover, unlike a local call, toll calls have three distinct parts often provided by distinct carriers: originating access, transport, and terminating access. Unlike reciprocal compensation, the FCC has determined that *exchange access charges* were "developed to address a situation in which three carriers ... collaborate to complete a long-distance call" and in which the IXC compensates the originating and terminating LECs. *Local Competition Order,* ¶1034.

RB at 14-15 also contends that "reciprocal compensation" does not have to be "reciprocal", e.g., that traffic and compensation

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10 The term "telecommunications" limits - not expands - the universe of traffic subject to §251(b)(5), distinguishing "telecommunications" from other types of traffic (*e.g.*, information services traffic).

obligations do not have to flow in both directions between carriers. However, the cited *Local Competition Order* did not discuss that paging traffic can be one-way, finding only that carriers are entitled to reciprocal compensation if they offer telephone exchange service and exchange access, both "telecommunications." Id., ¶¶34, 1008. Likewise, the Ninth Circuit determined that one-way paging carriers "terminate" traffic locally within the meaning of §251(b)(5) and then-current FCC rules and "[t]he Act forbids originating carriers from refusing to pay compensation to terminating carriers." *Pacific Bell v. Cook Telecom, Inc.*, 197 F.3d 1236, 1241-42, 1245 (9th Cir. 1999).

Respondent, *RB* at 15, effectively concedes the term "reciprocal compensation" was widely used by State regulators before, and the FCC *after* 1996, to cover only local traffic exchanged by local competitors that terminated locally. Respondent suggests the accepted meaning of "reciprocal compensation" at enactment should be ignored. Courts disagree.[11] That accepted meaning cannot be ignored, since it is clear from both the statute and

[11] See citations, *supra*, n.2.

legislative history that Congress understood the difference between *access charges* and *reciprocal compensation*.[12]

Respondent erroneously claims, *RB* at 16-17, to have "fully explained that change[] [departing from its prior statutory analysis] more than a decade ago" in the *2001 ISP Remand Order*. In remanding the cited 2001 FCC order in 2002 because of its flawed legal analysis, the Court did not "decide the scope of the 'telecommunications' covered by §251(b)(5)." *Worldcom Inc. v FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002). Subsequent decisions affirmed State jurisdiction to set rates for calls that terminate outside the local calling area, but within the State.[13]

The conflicting legal analyses of ISP traffic that culminated in Respondent's 2008 decision,[14] cannot support the action taken in the *Order*. The Court found dial-up internet traffic was jurisdictionally <u>inter</u>state and because it involves <u>inter</u>state

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12 See, *PB* at 11 n.8 quoting *Conference Report*, H.R. Rep. No. 104-458, 117, 123 (1996) (Senate explanation of its §251 proposal covered reciprocal compensation and explained "nothing in this section is intended to affect the Commission's access charge rules.")

13 See, e.g., *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 72 (1st Cir. 2006) ("ambiguity is not enough to preempt state regulation here.")

14 *Developing a Unified Intercarrier Compensation Regime*, 24 FCC Recd 6475 (2008).

communications delivered through <u>local</u> calls "terminating" locally; internet traffic simultaneously implicates the regimes of "both §201 and of §§251–252."[15] Unlike dial-up internet traffic, intrastate toll calls are jurisdictionally intrastate and not "delivered" though local calls otherwise subject to reciprocal compensation. Also unlike dial-up internet traffic, intrastate toll calls do not originate and terminate in the same local calling area. Under *Core*, intrastate toll (and associated access charge regimes) fall outside of the intersection between §§251-52 and §201.

Finally, *RB* at 18, before instructing the Court it should treat §601(c)(1) as a nullity, Respondent argues Petitioners' "narrow reading" of §251(b)(5) renders §251(g) a nullity. But Petitioners' reading does not make §251(g) superfluous. Indeed, the DC Circuit rejected this same FCC argument "finding that §251(g) was 'worded simply as a transitional device' and thus could not be relied on for authority to promulgate new regulations."[16] Any examination of §251(g) shows it preserves only the specified requirements that applied to carriers "on the date *immediately preceding the date of*

[15] *Core Communications v. FCC*, 592 F3d 139, 143-44 (D.C. Cir. 2010.

[16] <u>Id</u>. at 142.

enactment . . . under any court order, consent decree, or *regulation, order, or policy of the Commission*." (Emphasis added). Respondent claims that the "very existence of [§]251(g)" suggests that Congress envisioned interstate and intrastate reform." *RB* at 18. But the reference to the "*Commission's*" regulations, orders, or policies suggests that only inter state reform was anticipated.

Before passage of the 1996 Act, Respondent did not set reciprocal compensation rates, nor have they ever had a role in intrastate rate design as States oversaw implementation of intrastate exchange access rates. LECs, whether subject to any antitrust consent decrees (See *PB* at 23 n. 21) or not, do not pay intrastate access charges "under" any such decree. State access charge regimes are products of State law expressly preserved at §251(d)(3) and elsewhere in the 1996 Act. Under Respondent's interpretation, §251(d)(3) is both superfluous and violates §601(c)(1). As *Core states*,[17] §251(g) is, on its face, a reservation of existing federal authority, not a grant of new.

Respondent contends "if the absence of an express reference to intrastate access in [§]251(g) were read to imply anything, it would

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17 Id. at 142.

be that Congress intended the broad language of [§]251(b)(5) to displace the intrastate access regime immediately – without a transitional period." *RB* at 19. This *post hoc* and illogical construction rests on the flawed assumption that §251(b)(5) is as broad as the agency chooses which conflicts with the specific text of §251(g).

E. Congress specified States arbitrate specific intrastate §251(b)(5) rates.

Respondent erroneously suggests, *RB* at 88, that adoption of bill-and-keep is consistent with the pricing requirements of §252(d). But Congress directed that rates for §251(b)(5) traffic are set through carrier negotiations, and if such negotiations fail, pursuant to State arbitration.[18] Section 252(d) unequivocally applies "[f]or the purposes of compliance by an [ILEC] with [§]251(b)(5)." A State may not find arbitrated rates just and reasonable unless they are reciprocal and meet the pricing standard.

Respondent attempts to evade this jurisdictional limitation by claiming it only established a methodology, not specific rates. *RB* at 14. This characterization places form over substance. Respondent

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[18] These arbitration decisions are appealable to a U.S. district court, <u>not</u> to the FCC. 47 U.S.C. §252(e)(6).

established a series of interim rates with an end-rate of zero. Under the *Order*, there is nothing left for companies to negotiate or for States to arbitrate as required by §252. If Congress intended to allow the *Order's* preemptive approach, it would not have limited Respondent's rate-setting role to where States "fail to act." 47 U.S.C. §252(e)(5). While Respondent assumes, with no explicit record justification, that "most" of the traffic is not controlled by subsection 252(c) and (d), RB at 44-45, the Court cannot ignore §252's pricing requirements for traffic that is subject to §252. Claims these "interpretations" are necessary to avoid "absurd consequences/balkanization" (*IRB* at 13-14) are policy arguments that can be made to Congress but have no bearing on interpreting the existing statute. Nothing in the Act supports finding that Congress intended to require uniform intercarrier compensation rates.

Nor can the agency avoid application of *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000) (*Iowa*). *IRB* at 15-16. The Eighth Circuit vacated the proxy prices set by the FCC – including the transitional reciprocal compensation rates pending final rates to be set by States – for several reasons, including because they were unlawful under the Supreme Court's holding that reserved to States the ability to regulate interconnection prices under §252(c)(2). Id. at 757 (vacating 51.707). *Iowa* precludes the FCC's bill-and-keep prescription.

Respondent also claims that the statute's "reciprocity" provision does not require that rates be paid by the interconnecting carrier, but can instead be recovered from end-users. *RB* at 33-34. "Reciprocal end-user rates" is an oxymoron; end-users by definition do not "reciprocate" traffic. Moreover, the logical consequence of Respondent's argument is that States "arbitrate" such arrangements, a concept both impractical and obviously not the procedure Congress intended. Instead, the FCC arrogates to itself the power to regulate the end-user "Access Recovery Charge" (ARC) which includes a local rate floor requirement that intrudes on States' reserved authority to set end-user local service rates. *Order*, ¶852.

II. Respondent lacks authority to mandate bill-and-keep or regulate intrastate originating access.

Assuming *arguendo* the FCC has authority to adopt a uniform ICC regime that includes intrastate traffic, a zero rate is unlawful and the FCC cannot regulate intrastate originating access.

A. A zero rate is arbitrary and inconsistent with the Act.

Respondent's invocation of §252(d)(2)(B)(i) to justify a zero rate is contrary to the evidence in the record and inconsistent with the statutory text. *RB* at 33; *IRB* at 8. Respondent seeks to dismiss concerns about its zero rate for potentially imbalanced traffic with a blithe assurance that the difference in incremental[19] termination costs is "very near $0," yet the record shows costs are above zero and significant. Respondent's selective quote of §252(d)(2)(B), *RB* at 33, cannot supplant the fact that bill-and-keep arrangements are limited by the Act to those "*that afford the **mutual recovery of costs through the offsetting of reciprocal obligations,** including arrangements* that waive mutual recovery (such as bill-and-keep arrangements)." §252(d)(2)(B)(i) (emphasis added). Until the *Order*,

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[19] For smaller ILECs, just using "incremental costs" is inconsistent with Respondent's Part 69 rules.

Respondent correctly interpreted §252(d)(2)(B) to permit bill-and-keep ***only*** when balanced traffic flows ensure "the mutual recovery of costs through the offsetting of reciprocal obligations." *Local Competition Order*, ¶1116 and n.2721. Congress meant "bill-and-keep" to mean that one carrier could recover costs from another through the mutual exchange of equal and "offsetting" amounts of termination services in lieu of compensation.[20] But the *Order* defines "bill-and-keep" to mean something radically different—a *prohibition* on one carrier collecting compensation from another carrier, regardless of whether one carrier would be imposing costs on the other through unequal traffic flows.

In the *Local Competition Order,* at ¶1112, Respondent recognized what the statute unambiguously provides: "when States impose symmetrical rates for the termination of traffic, payments from one carrier to the other can be expected to be offset by payments in the opposite direction when traffic from one network to the other is approximately balanced." Respondent found

[20] "As Congress recognized, bill-and-keep arrangements allow each carrier compensation "in-kind" in the form of access to the other carrier's network." *Local Competition Order*, ¶ 1116 and n. 2721.

mandatory bill-and-keep arrangements in asymmetrical traffic settings were *not* consistent with §252(d)(2)(A). Id. Respondent now rejects this analysis by claiming carriers can recover these costs from end-users. *RB* at 33-35. But that fails to rebut the analysis, *supra*, and in *PB* at 33-35. Bill-and-keep fails the statutory requirement that costs be recovered in an equal amount and exchanged. See also *PB* at 19-21. While the Commission can change its mind, it must identify sound reasons to do so. *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009). The agency fails to provide any sound reasons for its actions.

Respondent would then render §251(b)(5) a nullity by setting a termination rate of zero, even when traffic is imbalanced. Respondent concedes the incremental cost is positive[21] but claims it is "very near $0." *RB at 35-36*. This "conclusion," based on a "hypothetical calculation" from "one study" (*Order*, ¶752), glosses over substantial record evidence that incremental costs are above zero. See, e.g., *Reply Comments of the Wisconsin PSC* (May 19,

[21] Respondent previously stated that "as long as the cost of terminating traffic is positive, bill-and-keep arrangements are not economically efficient because they distort carriers' incentives." *Local Competition Order*, ¶1112.

2011) at 4; *Comments of XO Communications* (Aug. 25, 2011) at 5-6; *Comments of U.S. TelePacific* (Apr. 1, 2011) at 38-42 (summarizing evidence that termination costs exceeds $0.0007/minute). One proposal endorsed a $.0007 rate.[22] Many pre-*Order* State-set rates were higher.[23] Given the massive volume of traffic exchanged (315.7 billion ILEC interstate switched access minutes in 2008)[24] that rate is commercially and legally significant. Respondent's declaration of a zero rate is arbitrary. It cannot ignore record evidence that such rates are clearly above zero and significant.

Additionally, Respondent erroneously claims bill-and-keep is consistent with "models used for wireless and IP networks." *RB* at 35. First, this policy argument is irrelevant to statutory interpretation. Second, the record rebuts Respondent's conclusion that bill-and-keep is widely used in IP and wireless networks where traffic is imbalanced. Verizon, a leading IP network provider, stated that "networks generally enter into settlement-free arrangements for

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22 *Letter from Robert W. Quinn, Jr., AT&T, et al. to Marlene Dortch, FCC*, WC Docket 10-90 et al., at 9 (July 29, 2011) (*ABC Plan*); *Comments of CTIA-The Wireless Trade Association*, WC Docket 10-90 et al., at 3, 13 (Feb. 24, 2012)(supporting the $0.0007 proposal).

23 *Letter from Brad Mutschelknaus, Counsel to NuVox, to Marlene Dortch, FCC*, WC Docket 10-90 et al., (Oct.2, 2008) Exh. 2.

24 *ABC Plan, White Paper Attachment* at 23.

Internet traffic only where the traffic flows between the networks are roughly in balance" and that where traffic is "significantly asymmetrical, it is common for one provider to pay for the exchange of traffic, either through paid peering or transit."[25] Wireless carriers similarly do not always rely on bill-and-keep arrangements because of traffic imbalances.[26] In the wireline context, traffic imbalance is well documented.[27]

Intervenors claim Respondent has authority to regulate ICC charges for everything but "the narrow category of intrastate traffic" subject to §252(d)(2). *IRB* at 10-13. That claim understates the scope of §252(d)(2), which *under* Respondent's view of §251(b)(5) necessarily includes local and intrastate access charges.

[25] See *Comments of Verizon and Verizon Wireless*, WC Docket 10-90 et al., at 14 (April 18, 2012) see also *Reply Comments of Windstream Communications, Inc.*, WC Docket 10-90 et al., at 23 (Mar. 30, 2012) (discussing commercial arrangements for IP traffic exchange in the typical situation where traffic is or becomes imbalanced).

[26] See, e.g., *Reply Comments of Verizon and Verizon Wireless*, WC Docket 10-90 et al., at 15 (Apr. 18, 2011) (Verizon Wireless "entered into a number of publicly filed interconnection agreements that established terminating rates at or below $0.0007 per minute").

[27] See *Comments of NTCA*, WC Docket 10-90 et al., at 40 (Oct. 26, 2008) (a single rate structure cannot account for out-of-balance traffic).

Regardless, §201 demands "just and reasonable" rates but a zero rate where traffic is imbalanced fails that test.[28]

B. FCC lacks authority over intrastate originating access.

Respondent's efforts to expand §251(b)(5) to preempt originating intrastate access charges also conflicts with the sections' explicit reference to "transport" and "termination." The *Local Competition Order,* at ¶1039-40, defined both transport and termination "for purposes of §251(b)(5)" explicitly in terms of terminating traffic. "[T]ransport" means "the transmission of terminating traffic subject to §251(b)(5) from the interconnecting point between the two carriers to the terminating carrier's end office switch that directly serves the called party." Id., ¶1039. "[T]ermination" means "the switching of traffic that is subject to §251(b)(5) at the terminating carrier's end office switch . . . and delivery of that traffic from that switch to the called party's premises." Id., ¶1040.

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[28] Section 201 by definition only applies to traffic that meets the 47 U.S.C. §153(22) definition of "interstate communications."

Respondent now asserts those definitions were not intended "to narrow the scope of §251(b)(5) traffic." *RB* at 22. Yet neither "transport" nor "termination," as so defined can refer to originating traffic if Respondent is correct that "[n]either in form nor substance does the *Order* repeal those definitions." *RB* at 22. Which means §251(b)(5) cannot confer authority to eliminate intrastate originating access charges.

Respondent previously acknowledged that §251(b)(5) "does not address charges payable to a carrier that originates traffic." *Local Competition Order*, ¶1042; *Order*, ¶817. There, the FCC interpreted this silence to indicate that an originating LEC may not charge a CMRS provider or other carrier for LEC-originated *local traffic*. Courts accepted that interpretation within the existing ICC paradigm premised on Respondent's prior view that §251(b)(5) was limited to *local traffic*. See IRB at 16-17. However, given the FCC's new interpretation, the cases cited by Intervenors lose persuasiveness when divorced from the FCC's prior finding: that the originating LEC recovers the costs of origination in a local call flow from its end-user customer that places the call. Neither the *Order* nor the briefs explain how §251(b)(5) confers authority to prohibit originating access charges.

III. Respondent's efforts to pre-judge ILEC avenues for relief specified in 252(f) must be vacated.

Regardless of whether Respondent possesses §201 authority to promulgate "rules to guide State judgments," the §251(f)(2) judgment belongs to States. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 385 (1999). Yet the *Order* goes beyond providing guidance, warning States that modifying the FCC's pricing formula is inconsistent with the "public interest." *Order*, ¶824. The *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) *(USTA II)* decision is inapplicable, *RB* at 56-57, since that decision concerned the FCC's §251(c) impairment findings and afforded parties the right to petition the FCC for a declaratory ruling preempting a <u>State</u> unbundling rule. The Court found the FCC had only predicted a result as being "'unlikely' to be found consistent with the Act," but had taken no preemptive action, *USTA II*, 359 F.3d at 594.

That Court's finding rested on the proposition that the FCC could overrule a State unbundling decision. The duty to decide §251(f)(2) petitions, in contrast, falls exclusively to States. *PB* at 48.

The statement in ¶824 is more than mere guidance as it strips away State §251(f)(2) authority to modify the FCC's pricing formula. *New Cingular Wireless v. Finley*, 674 F.3d 225, 249-50 (4th Cir. 2012). This "warning" is an overreach to dissuade States from exercising the authority delegated by Congress and should be vacated.

IV. The Constitutional and due process violations warrant vacatur.

Federalism[29] limits Congress and agency action.[30] Constitutional and due process challenges are reviewed *de novo.*[31] Rules violating due process are vacated.[32]

A. The Order unlawfully conscripts State Commissions.

Respondent asserts plenary authority over all telecommunications notwithstanding federalism limits in statute and precedent. Petitioners challenge more than just the *Order's* infidelity to the Act: the *Order* constitutes coercion and imposes regulatory mandates violating federalism. Compare *RB* at 2, 12 and

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29 William E. Thro, *That Those Limits May Not Be Forgotten: An Explanation of Dual-Sovereignty*, 12 Widener L.J. 567 (2003)

30 *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2601-09 (2012) (*NFIB*).

31 *North American Coal v. O.W.C.P.*, 854 F.2d 386, 388 (10th Cir.1988); *US West v. FCC*, 182 F.3d 1224, 1231 (10th Cir 1999).

32 *Prometheus Radio Project v. FCC*, 652 F.3d 431, n. 25 (3rd Cir. 2011).

65 with *NFIB*, 132 S. Ct. at 2602-06 and *Louisiana*, 476 U.S. at 368-79.

Respondent unlawfully "conscript[s] states into the [agency's] national bureaucratic army" and "require[s] the states to regulate" by (1) replacing State laws with federal rules and rates, Compare *RB* at 64 and *Order*, ¶¶35, 575, 609 and 776 with *New York v. United States*, 505 U.S. 144, 174-75 (1992) (*New York*) and 66 Pa. C.S. §2251.1; (2) requiring States to certify carrier compliance with federal requirements, Compare *Order*, ¶¶609, 880, and 896 with *Printz v. United States*, 521 U.S. 898, 933 (1997); (3) divorcing intrastate rates-setting from political accountability, Compare *Order*, ¶776 with *NFIB*, 132 S.Ct. at 2601-2609; (4) mandating State-set network edges, Compare *Order*, ¶771 with *New York*, 505 U.S. at 178; and (5) imposing a zero rate on intrastate telecommunications. Compare *Order*, ¶¶35, 94, 788, 951, and 975 with 66 Pa.C.S. §§3012; 66 Pa.C.S. §2251.1. The *Order* is *ultra vires* because it constitutes coercion akin to undue influence using federal spending portrayed as conditions for support that are actually mandates States and carriers have no choice but to follow. Compare *RB* at 2-3 with *NFIB*, 132 S.Ct at 2604-05.

B. Respondent failed to provide due process.

Respondent fails to rebut Petitioner's argument that it violated due process by pointing to the large record as if due process were measured in pounds. *RB* at 58-59. Due process consists of notice and a meaningful opportunity to be heard. *Vermont Yankee vs. NRDC,* 435 U.S. 519 (1978). *Ex Parte* is prohibited in adjudications but permitted in rulemakings. *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. 1981) (*Sierra*). Statements are not adequate public notice. *North American Coal v. O.W.C.P.*, 854 F.2d 386, 388 (10th 1988); *Prometheus Radio v. FCC*, 652 F.3d 431, 446 (3rd 2011). Prior FCC administrative practices have earned appellate reproach. *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. 1959); *Home Box Office v. FCC*, 567 F.2d 9, 53, 55-56 (D.C. 1977).

Respondent points to 650 filings and 400 meetings as if quantity establishes adequate notice. *RB* at 58-59. Petitioners challenge the adequacy of the August 3, 2011 FCC *Further Inquiry into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding,* 76 Federal Register 49401 (August 10, 2011)(*ABC Notice*). The industry's July 29th *ABC Plan* was noticed

August 3rd. However, that notice offered no proposed rules and no statement of agency views. <u>Compare</u> *Owners v. Fed. Motor Carrier Administration*, 494 F.3d 188, 209 (D.C. Cir. 2007); *Home Box Office v. FCC*, 567 F.2d 9, 36 (D.C. 1977).

Respondent cites four notices in defense. But, that three notices issued *before* the *ABC Notice* cannot cure the *ABC Notice* deficiencies. The *ABC Notice* required comments in 21 days (August 24) and replies 14 days later (September 6). Routinely, on complex items, the agency sets 30 and 45-day comment cycles. The FCC and others then inundated the record with *ex parte* submissions up to, and on, the blackout date of October 21. The FCC adopted the *Order* October 27th but the text was not released until November 18.

Assuming *arguendo* the *ABC Notice* was adequate, the truncated filing periods and *ex parte* practice precluded any meaningful opportunity to be heard. Respondent's exculpatory *ex parte* rules, which allow limited responses a day or two after the "sunshine" blackout for filings made near that deadline, cannot remedy these violations. *RB* at 61-62. The frequency, intensity and scope of *ex parte* submissions increased as the October 21 blackout loomed. The plethora of filings on the October 21 blackout, just six days before the *Order's* adoption October 27 provided no meaningful opportunity to be heard.

From the end of the comment period (September 7) to the blackout (October 21), there were about 680 filings. Carriers and associations filed hundreds, often containing significant quantitative or policy analysis. Some were confidential and only redacted versions were publicly available. Approximately 354 were filed the last week before blackout, i.e., between October 14th and 21st. Over 100 were filed on October 21st alone. No affected stakeholder could possibly have addressed all those *ex partes* in the time allowed. Nor is it likely the FCC decision-makers would have given all the responses *equal* attention. The submission of 100 filings on October 21, the failure to post 8 until October 24, and timing of the adoption of the October 27 *Order* precluded a meaningful opportunity to be heard. Given the volume and complexity of the filings, the truncated period from *ABC Notice* (August 3) to the end of comment period (September 7) and up to the blackout (October 21) provided no meaningful opportunity to be heard.

Stakeholder submissions aside, the agency itself violated due process by inserting over 100 items into the record, including an analysis of mobile service, just before the blackout deadline: 35 on October 7, 63 on October 17, and 16 more items two days before the October 21 blackout. See, *Kennecott v. EPA*, 684 F.2d 1007, 1019 (D.C. Cir. 1982). (Placing economic forecast data in the record one week before final regulations issue is reversible error.)

The FCC also violated due process by relying on *ex parte* ratemaking and holding company submissions filed just before October 21 in the *Order*. Some stakeholders apparently had foreknowledge of the *Order* on circulation sufficient to file responsive alternatives that the *Order* adopts. For example, an October 20 Verizon *ex parte* addressed ARC surcharges by holding companies. Holding company surcharges are not mentioned in the *ABC Notice* but were included in the *Order*. ARCs are surcharges on consumers that fund partial recovery of lost revenues for some carriers but deny it to others. Compare *ABC Notice* and *Order* at ¶910 with *Letter from Chris Miller, Verizon to Marlene Dortch, FCC*, WC Docket 10-90 et al. (October 20).

Other appellees engaged the FCC on rates/preemption based on the similar foreknowledge. Verizon addressed VoIP jurisdiction, a matter under adjudication in Docket No. 10-60, in October 18 and 21 filings. See, e.g., *Letter from Chris Miller, Verizon to Marlene Dortch*, *FCC*, WC Docket 10-90 et al. (October 18, 2011) (*Verizon October 18 Ex Parte*). An AT&T *ex parte* posted October 20 also addressed the legality of FCC regulation of VoIP and rates, matters under adjudication in Docket No. 10-60.[33] The October 27 decision adopted these October 21 *ex partes* virtually *in toto*. Only *vacatur* can remedy this disregard for due process.

Respondent erred in allowing *ex parte* submissions in this rulemaking addressing issues disputed in open *adjudicatory* proceedings. Compare *Sierra*, 657 F.2d at 400 nn. 500-502 (D.C. Cir 1981) with *Order*, ¶975. *Ex parte* submissions filed close to the blackout date addressed preemption and rates, including the disputed VoIP preemption. Compare RB at 61-63 and *Verizon October 18 Ex Parte*, *AT&T Ex Parte*, and another Verizon filing

[33] *Letter from Heather Zachary, for Verizon et al., to Marlene Dortch*, *FCC*, WC Docket 10-90 et al. (October 19, 2011) (*AT&T Ex Parte*).

October 20th[34] with *Order,* ¶951 (preemption with new VoIP rules and rates) and 975 (adjudication between Global Naps and three states involving VoIP) and *Sierra*, 657 F.2d at 400 and nn. 500-02.

Such error must be corrected or it will become standard practice and produce more arbitrary decisions. No incentives will exist to disclose positions in formal filings. Instead, filers can wait until just before the blackout and inundate the record with *ex partes*. This denies due process. It is detrimental to judicial review because no Court can determine if the agency's actions were reasonable or provided proper protections to stakeholders. *Vacatur is* the only proper remedy. Respectfully submitted,

On behalf of Joint Petitioners and Intervenors listed inside the cover.

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May 29, 2013

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[34] *Letter from Chris Miller, Verizon to Marlene Dortch, FCC*, WC Docket 10-90 et al. (October 20, 2011)

CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limitations, Typeface Requirements, Type Style Requirements, Privacy Redaction Requirements, and Virus Scan

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/s/ James Bradford Ramsay

May 29, 2013

CERTIFICATE OF SERVICE

I hereby certify that, on May 29, 2013, consistent with the Court's October 17, 2012 filed "Order Governing Procedures for the Electronic Filing of All Briefs in the Consolidated Proceeding," I caused the foregoing document to be sent electronically to FCC_briefs_only@ca10.uscourts.gov in Adobe format with the subject line containing the 11-9900 case number and specifying that this is the Joint Uncited Intercarrier Compensation Reply Brief of Petitioners. I also certify, that, consistent with that October order, this document will be furnished through ECF electronic service to all parties in this case through a registered CM/ECF user. This document is available for viewing and downloading on the CM/ECF system.

/s/ James Bradford Ramsay

May 29, 2013