**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 ADDITIONAL INTERCARRIER COMPENSATION ISSUES REPLY BRIEF

(DEFERRED APPENDIX APPEAL)

*Counsel for Petitioners Listed in Alphabetical Order
on Following Pages*

June 12, 2013

Core Communications, Inc.*

By Its Counsel

James C. Falvey, Esq.
Charles A. Zdebski, Esq.
Eckert Seamans Cherin & Mellott, LLC
1717 Pennsylvania Ave., NW
12th Floor
Washington, D.C. 20006
ph: (202) 659-6655
fax: (202) 659-6699
jfalvey@eckertseamans.com
czdebski@eckertseamans.com

*Core Communications, Inc. does not join in Parts I and II of the Brief.

National Telecommunications Cooperative Association, and U.S. TelePacific Corp.*

By Their Counsel

Russell Blau
Tamar Finn
Bingham McCutchen LLP
2020 K Street, NW
Washington, DC 20006
Tel: 202-373-6000
russell.blau@bingham.com
tamar.finn@bingham.com

*National Telecommunications Cooperative Association, and U.S. TelePacific Corp do not join in Parts I and III of the Brief.

North County Communications Corp.*

By Its Counsel

R. Dale Dixon, Jr.
Law Offices of Dale Dixon
1155 Camino Del Mar, #497
Del Mar, CA 92014
tel: 858.925.6074
cel: 858.688.6292
fax: 888.677.5598
email: dale@daledixonlaw.com

*North County does not join in Part I of the Brief.

Rural Independent Competitive Alliance*

By Its Counsel

David Cosson
2154 Wisconsin Avenue, N.W.
Washington, DC 20007
Tel: 202-333-5275
dcosson@klctele.com

H. Russell Frisby, Jr.
Dennis Lane
Harvey Reiter
Stinson Morrison Hecker LLP
1775 Pennsylvania Ave., NW
Suite 800
Washington, DC 20006
Tel: 202-785-9100
rfrisby@stinson.com
dlane@stinson.com
hreiter@stinson.com

*RICA does not join in Parts II and III of the brief

Table of Contents

Table of Authorities

Cases

Rules

Agency Decisions

Glossary

AT&T *Ex Parte*	*Ex Parte* Letter from Brian J. Benison, AT&T, WC Docket No. 01-92 *et al.* (Dec. 3, 2009)
Bluegrass Comments	Comments of Northern Valley Communications, LLC and Bluegrass Telephone Company (April 1, 2011)
Core Comments	Comments of Core Communications, Inc. (April 1, 2011)
Free Conferencing Comments	Comments of Free Conferencing Corporation (April 1, 2011)
Hazzard Letter	*Ex Parte* Letter from M. Hazzard, Counsel for Pac-West Telecomm, Inc., WC Docket No. 01-92 *et al.* (July 19, 2010)
ICC	Intercarrier Compensation
Jones Letter	*Ex Parte* Letter from T. Jones, Counsel for Integra and Time Warner Telecom, Inc. *et al.*, WC Docket 01-92 *et al.* (Dec. 19, 2011)
Lubamersky Letter	*Ex parte* Letter from N. Lubamersky, U.S. TelePacific Corp., to M. Dortch, FCC, WC Docket 01-92 *et al.* (Dec. 22, 2011)

Mid-Size ILEC Letter	*Ex Parte* Letter from K. Brinkmann, Counsel for CenturyLink; FairPoint Communications, Inc.; Frontier Communications Corp. and Windstream Communications, Inc., to M. Dortch, FCC, WC Docket 10-90 *et al.* (Dec. 14, 2011)
NTCA Dec. 20 Letter	*Ex Parte* Letter from M. Romano, NTCA to M. Dortch, FCC, WC Docket 10-90 *et al.* (Dec. 20, 2011)
PB	Petitioners' Additional Intercarrier Compensation Issues Principal Brief (Nov. 6, 2012)
RB	Federal Respondents' Response to Petitioners' Additional Intercarrier Compensation Issues Principal Brief (Mar. 20, 2013)
TDS Dec. 1 Letter	*Ex Parte* Letter from N. Kennard, Counsel to TDS Telecom, Missouri Small Telephone Company Group, Texas Statewide Telephone Cooperative, Inc. and the Texas Telephone Association *et al.*, WC Docket No. 10-90 *et al.* (Dec. 1, 2011)

I. THE ORDER IMPROPERLY DENIES RURAL CLECS, BUT NOT ILECS, USF SUPPORT TO OFFSET LOST ICC REVENUES

A. The FCC Arbitrarily Ignored Arguments That Rural CLECs, Concededly Lacking Market Power, Are, By Definition, Powerless to Raise End User Rates to Make Up for Lost ICC Revenues.

The *Order* allows ILECs, but not CLECs to replace lost ICC revenues with some USF support. The FCC devotes much of its responsive brief, not to justification for this facially disparate treatment, but to defense of the strawman argument that it is empowered to prevent the distribution of "unnecessary" or "duplicative" USF support. RB at 15-16. But the principle that the Commission should not disburse duplicative or unnecessary USF support is not the issue. Rather, the fault in the *Order* is its failure to tackle objections to the only two proffered justifications for the agency's actions – that CLECs can simply raise their rates to cover any shortfall from lost ICC revenues or limit their services to profitable customers. USF support to rural CLECs to make up for lost ICC revenues is not "unnecessary" or "duplicative" if these carriers cannot make up lost ICC revenues by raising their rates or selectively serving only profitable customers. *Order*, ¶864.

The Court will search the FCC's brief in vain, however, for any response to RICA's argument that, by the FCC's own account, CLECs, lacking market power, have no ability to raise their rates. The brief instead reiterates the FCC's assertion that CLECs, unlike ILECs, have such pricing flexibility, but ignores the words of the Order itself: "If carriers were unconstrained in their ability to increase particular rates, it is not clear why they would not already have set them at the profit maximizing level, such that further increases would not be profitable." *Id.*, n.1816.

Nor will this court find any meaningful response to RICA's argument that rural CLECs are not free to withdraw service to unprofitable customers or refrain from entering unprofitable markets. *See* PB at 14-19. On the contrary, the FCC ignores entirely the fact that, to receive USF CLECs must be ETCs and therefore must serve all comers, *id.* at 15, reiterating instead the *Order*'s erroneous conclusion that rural CLECs are free to target "only the lowest cost customers." RB at 16. In arguing that USF support to rural CLECs is unnecessary, its brief actually reinforces the point that they are *not* free to do so. RICA's opening brief noted the Commission's observation in *Access Charge Reform*, 16 FCC Rcd

9923 (2001), that, unlike their ILEC counterparts, CLECs do not have a low cost customer base against which to average their higher cost rural operations. PB at 15. The FCC's brief, citing the same order, explains that this predicament, which it earlier found to justify an upward adjustment to rural CLEC access charges,[1] still justifies that adjustment, at least during the transition to bill and keep. RB at 20-21.

On brief, FCC counsel characterizes the access charge adjustment as a "benefit" to rural CLECs, presumably rendering USF support unnecessary. *Id.* The governing *Order*, however, makes no such claim. That, itself is legally decisive, as reviewing courts are barred from relying on *post hoc* rationale of counsel to sustain an otherwise deficient agency order. *Haga v. Astrue*, 482 F.3d 1205, 1208 (10th Cir. 2007), *citing SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). It is plain, in any event, that what FCC counsel characterizes as a "benefit" to rural CLECs is not a preference at all, much less a "benefit" that offsets the need for USF support as ICC

---

1 More specifically, "rather than benchmarking their [access charge] rates to those of the local ILEC [who may have a substantial low cost urban customer base], they could use as their guidepost the rates of the nation's smallest, highest cost ILECs." RB at 20.

revenues decline. Rather the access charge adjustment was intended as a make whole mechanism that would allow rural CLECs to compete on even terms with ILECs that, as the FCC's brief notes, could otherwise use their "low-cost urban and suburban operations to subsidize their higher cost, rural operations." RB at 20, *citing Access Charge Reform*, ¶¶64, 66. By retaining the access charge adjustment during the transition to bill-and-keep the FCC is merely maintaining *ICC rate* parity between ILECs and rural CLECS, not providing parity for the *USF* support it arbitrarily extends solely to ILECs.

B. The FCC's Assertion That Rural CLECs Will Not Be Adversely Affected By Lost ICC Revenues Because Their Access Charges Are Not Based On Their Individual Costs Is Both Impermissible *Post Hoc* Rationale of Counsel and Unsupportable.

On brief, the FCC advances a new argument: reducing access charges will not have an adverse impact on rural CLECs because their access charges were never set based on their individual costs, but benchmarked to ILEC rates. RB at 18. The Court should dismiss this argument out of hand. It is not a rationale for the disparate treatment of rural CLECs found in the *Order* itself and therefore is impermissibly *post hoc*. *SEC v. Chenery Corp.*, *supra*, 318 U.S. at 88.

But even if the *Order* had included this explanation for denying USF support to rural CLECs, it is not a sustainable rationale. It is true, as the FCC notes, that the access charges of rural CLECs are not based on their individual costs. But it does not follow that the loss of ICC revenues would therefore have no adverse effect on those carriers and the consumers they serve. By the FCC's own account, the ILEC access charges are not based on their own costs either, but include "implicit subsidies for their local telephone network." RB at 18. CLEC access charges are designed to serve the same purposes, but CLECs use the charges of their ILEC counterparts as a *proxy* for recovering their own costs and implicit support. *Access Charge Reform*, ¶75. It makes no sense to assume that rural carriers -- by definition dependent on access charge revenues like their ILEC counterparts -- would not be adversely affected by the loss of ICC revenues, while their similarly affected ILEC competitors, but not them, are allowed USF support to offset the loss.[2]

C. The FCC's Argument That Its Order Strikes A Reasonable Balance Between Avoiding Waste in Distribution of USF Support And The Goal of Advancing Broadband Poses A False Dichotomy.

RICA argued that by denying USF support to rural CLECs, the FCC had departed without explanation from its own finding that rural CLECs were more likely than ILECs to deploy advanced services to rural consumers. PB at 18-19. The FCC responds with a *non sequitur*: its *Order* reasonably balances the advancement of universal service against the need to avoid unnecessary subsidies. RB at 21. But these are complementary, not competing objectives. Indeed, the ostensible purpose of avoiding unnecessary subsidies is to advance universal service. If, in fact, making USF available to rural CLECs would promote deployment of advanced services, then, by definition, doing so is essential, not wasteful or unnecessary.

---

[2] The FCC also maintains that ILECs get no USF support if their ARC end user charges are sufficient. RB at 17. The *Order*, however, still assumes and funds a substantial level of ILEC USF support. Given those assumptions it cannot justify a *categorical* denial of USF support to rural CLECs.

II. THE FCC'S SWIFTER TRANSITION FOR COMPENSATION FOR CMRS-LEC TRAFFIC IS ARBITRARY AND CAPRICIOUS

A. Summary of Argument

Petitioners contend that the *Order (*including the December 23, 2011 *Sua Sponte Reconsideration Order)* ("*Reconsideration Order*") does not justify the six-month transition to bill-and-keep for CMRS-LEC intraMTA traffic ("CMRS-LEC traffic") when the FCC adopted a six or nine-year transition to bill-and-keep for other terminating traffic. *Order*, ¶801. In response, the FCC claims unlimited discretion to adopt transitional rates; that the shorter transition guards against traffic stimulation (RB at 31); and that because there was no pricing methodology for intraMTA calls, CLECs could not rely on ICC revenue for such calls. RB at 32. Supporting Intervenors claim that CLEC arguments opposing the six-month transition are internally inconsistent. In each instance, the FCC and its supporting Intervenors' justifications lack merit.

Deferential review of the FCC's transition regime cannot be unlimited. *See NetworkIP v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008) ("even deference has limits."). The difference between the transitional regimes for CMRS-LEC versus wireline traffic is so stark — a 1200-1800% longer transition for wireline traffic — that it cannot survive even the most deferential review. Further, the FCC's claims regarding traffic stimulation do not support this discrimination: LECs sought compensation for intraMTA traffic at the same rates applicable to local wireline calls, and the FCC's different transitions for different traffic leads to more not less arbitrage. Finally, the FCC unreasonably discounted LECs' reliance on compensation by claiming a prerequisite of a pricing methodology and ignoring evidence regarding the rates in LEC agreements. In short, the FCC cannot justify a decision to discriminate against CMRS-LEC traffic by permitting a 1200-1800% longer transition to bill-and-keep for wireline traffic.

B. The Deference Owed the FCC Has Limits

The FCC asks the Court to overlook its discriminatory treatment of CMRS-LEC traffic because its "transitional" regime is owed an "especially deferential" review. RB at 27-28. But the FCC fails to explain where that deference ends. According to the FCC, anytime its action is "transitional" it is unbounded by meaningful review. This cannot be so. While it is sensible to afford the FCC some discretion when adopting transitions to new regulatory regimes, its action must still satisfy the Administrative Procedures Act. Adopting a transition for wireline traffic that is 1200-1800% longer than the transition for CMRS-LEC traffic is discriminatory and exceeds the bounds of deference.

It is also inconsistent with the FCC's historical treatment of rule 47 C.F.R. §20.11(b) requiring that CMRS carriers and LECs reasonably compensate each other for calls terminating on each other's network and §251(b)(5) of the Act requiring carriers to enter into reciprocal compensation agreements for telecommunications. PB at 21, 23. Before November 2011, the FCC treated rule 20.11(b) and §251(b)(5) as coextensive. *Order,* ¶994; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499, 16058 ¶1118 (1996). *See also Intercarrier Compensation for ISP Bound Traffic,* 16 FCC Rcd 9151, 9194 ¶90 (2001) (refusing to adopt different §251(b)(5) compensation rates for two sub-classes of §251(b)(5) traffic). And this continues when the transition ends. *Reconsideration Order*, ¶¶5-6.

For the first time, however, during the pendency of the transition, the FCC will *not* treat rule 20.11(b) and §251(b)(5) as coextensive. Under the transitional regime, wireline §251(b)(5) traffic is subject to existing rates until July 1, 2015 and additional annual adjustments until rates reach bill-and-keep. *Order*, ¶801. But CMRS-LEC traffic is bill-and-keep effective July 1, 2012. *Reconsideration Order*, ¶6. No amount of deference can save this discriminatory rule.

C. The FCC's Justifications For Different Treatment Are Unsound

Although the FCC and supporting Intervenors claim that the *Order* reasonably explained the shorter transition to bill-and-keep for CMRS-LEC traffic, RB at 28-30, they did not address Petitioners' arguments that the explanation was internally inconsistent and therefore unreasonable. The FCC and Intervenors also claim that Petitioners did not explain why the FCC's six-month transition is insufficient. RB at 33. Petitioners' brief explains that the six-month transition denies LECs "sufficient time to adjust to marketplace changes" regarding CMRS-LEC traffic that is available for wireline traffic (PB at 21) and it creates new arbitrage opportunities. PB at 24.

1. Concerns Regarding Traffic Stimulation Do Not Justify A Shorter Transition

The FCC claims that the shorter transition combats traffic stimulation. RB at 30. But the FCC's treatment of wireline traffic stimulation underscores that traffic stimulation does not justify imposing bill-and-keep immediately.

The FCC rejected both immediate adoption of bill-and-keep and a shorter transition, *Order*, ¶¶687, 692, for wireline traffic, instead allowing LECs engaged in traffic stimulation to continue "stimulating" traffic but at adjusted rates. *Id.*, ¶¶680, 684, 688 (allowing ILECs to revise cost and demand projections to lower rates and allowing CLECs to benchmark rates using the lowest price-cap ILEC rate in the state). This "reduce[s] the effects of access stimulation significantly." *Id.*, ¶692. The FCC fails to explain why this would not also reduce CMRS-LEC traffic stimulation.

The FCC's principal concern regarding CMRS-LEC traffic stimulation was that CLECs proposed "high" rates. RB at 31. But this concern could have been addressed by subjecting CMRS-LEC compensation to the same transitional rates applicable to wireline traffic, Lubamersky Letter, at 2, and does not apply to incumbent LEC traffic exchanged with CMRS providers.

The FCC's concern that CLECs' proposed rates were "high," RB at 31, is dubious. These rates were not only subject to state commission review, *Order,* ¶991, but were similar to rates in existing ILEC agreements which were well-above $0.0007. Hazzard Letter, Attachment A (identifying agreements with terminating rates between $0.005 and $0.0175 per-minute).

Until the *Order*, the FCC consistently viewed state commissions as "the more appropriate venue for determining what constitutes a 'reasonable compensation' rate under rule 20.11 for [a LEC's] termination of intrastate traffic originated by [a CMRS provider]." *North County Communications Corp v. MetroPCS California, LLC*, 24 F.C.C.R. 14036, 14041 ¶14 (2009) *aff'd MetroPCS California, LLC v. FCC*, 644 F.3d 410 (D.C. Cir. 2011). The FCC held "states have authority to establish rates charged by LECs for termination of intrastate traffic from CMRS providers, and … the [FCC] has not preempted such … authority." *Id.* at 14309 ¶10 and n.39 (citing FCC decisions explaining state role in setting compensation for CMRS-LEC traffic); *Metro PCS California,* 644 F.3d at 413 (citing FCC decisions holding that states should determine compensation required under 20.11(b) and acknowledging this was how the rule "has worked from the start."). The *Order* fails to explain the FCC's sudden lack of confidence in states to set reasonable rates.

The CLECs' proposed rates were in line with the rates CMRS carriers negotiated with ILECs and were frequently the same rates ordered by state commissions as reciprocal compensation for local calls under §251(b)(5). Contrary to the FCC's claims (RB at 31), the record does not show that "most ILECs" terminate CMRS traffic for $0.0007 or less. ILECs (who also suffered from the flash cut of CMRS-LEC rates) explained to the FCC that "their reciprocal compensation rates for CMRS-LEC intraMTA traffic are much higher than $0.0007." Mid-Size ILEC Letter at 2. NTCA also explained that among 331 surveyed RLECs "the weighted average net reciprocal compensation rate … was 0.064 per minute." NTCA Dec. 20 Letter at 2. Of those surveyed, "90%…have reciprocal compensation rates higher than $0.0007 per minute and more than 75% of the companies have rates greater than $0.01 per minute." *Id.* In comparison, the New York Commission set $0.001/per-minute as reasonable compensation for CMRS-LEC traffic. PB at 27. CLECs also informed the FCC that their agreements contained rates above $0.0007. Hazzard Letter, Attachment B at 13 (Xchange Telecom Inc.'s terminating rate for intraMTA CMRS-LEC traffic set at $0.001069 per-minute); Jones Letter, at 2 (rates for intraMTA CMRS-LEC traffic "substantially higher than $0.0007"); Lubamersky Letter, at 1-2 (rates in CMRS agreements above $0.0007).

2. The "Swifter" Transition Promotes Arbitrage

Although the FCC claims that Petitioners did "not attempt to show a swift transition to bill-and-keep would encourage arbitrage," RB at n.24, Petitioners cited ¶808 of the *Order* where the FCC explained how "new arbitrage opportunities could arise" from having different transitions for different forms of traffic. The *Order* is littered with similar concerns. ¶752 (where ICC "rates apply differently across providers, … le[a]d[s] to significant marketplace distortions"); ¶950 (transition "for VoIP-PSTN traffic [where such traffic was rated lower than similar non-VoIP traffic for a period] could lead to further arbitrage.").

Parties below warned that a "swifter" transition would promote arbitrage by carriers disguising wireline traffic as wireless to avoid compensation. TDS Dec. 1 Letter at 4. The FCC heard that because CMRS-LEC traffic would be "zero-rated several years before any other traffic," NTCA Dec. 20 Letter at 3, "dishonest carriers delivering traffic will be motivated to classify that traffic as CMRS-LEC intra-MTA traffic." Mid-Size ILEC Letter at 3. The record contains examples of such arbitrage, including how one company seeking to avoid access charges for wireline traffic delivers wireline-originated traffic to LECs claiming it is CMRS-originated and subject to bill-and-keep as intraMTA traffic. *See* TDS Dec. 1 Letter at 2-3. Even after the FCC resolved the legal question regarding so called "CMRS-in-the-middle" traffic, *Order*, ¶1005, the arbitragers have failed to pay, fulfilling the prediction that the "swifter" transition for CMRS traffic exacerbates not alleviates arbitrage. *See* TDS Waiver Petition at 12 (explaining how TDS could not collect unpaid compensation because the billed party "continue[s] to fail to pay for intrastate access even after the [FCC] specifically addressed (and rejected) its claims.").

3. The Order Unreasonably Marginalized LEC Reliance on CMRS-LEC Compensation

The *Order* found that CLECs could not rely on ICC payments for CMRS-LEC traffic because there was "no pricing methodology applicable" to such traffic. RB at 32, *citing* ¶996. But LECs' right to collect compensation for terminating CMRS-originated traffic was never predicated on an FCC pricing methodology. Instead, the "reasonable compensation" requirements of the pre-*Order* rule 20.11(b) were self-executing and not dependent on an agreement. *See Airtouch Cellular v. Pacific Bell*, 16 F.C.C.R. 13502, 13508 ¶16 (2001) (holding that mutual compensation was mandatory even where "the Interconnection Agreement was silent regarding mutual compensation."). The FCC had declined to mandate a methodology, leaving the rate-setting to state commissions. *See North County*, 24 F.C.C.R. 14036. At no time did the FCC predicate a LEC's right to compensation on an FCC pricing methodology.

LECs argued to the FCC that they "had a basis for reliance" on revenue from CMRS-LEC compensation, Lubamersky Letter, at 2; they relied upon the FCC's orders allowing states to set reasonable compensation under Rule 20.11(b)(2) and were pursuing collection actions, PB at 27-28; additional time was needed to adjust commercial contracts with customers to reflect increased costs, *see* Jones Letter at 2; and the "swifter" transition posed significant problems in rating calls where the CMRS carrier connects through an IXC or the calling/called parties lack telephone numbers that are easily identifiable as associated with CMRS calling, Jones Letter at 3. The FCC ignored these issues.

The Intervenors' (at 7) claim that CLECs cannot have it both ways is misleading. LECs argue that the FCC's reluctance to clarify the applicable rate methodology allowed some CMRS carriers to delay negotiations and resist LEC attempts to bill and collect reasonable compensation, thereby delaying state proceedings to set rates and limiting LECs' revenues. PB at 27-28. Nevertheless, LECs contend that the *Order* understates the level of compensation LECs were collecting, as some CMRS carriers entered agreements, *see* Lubamersky Letter at 1-2; Jones Letter at 2. After years of delay and unpaid bills to CMRS carriers, it is capricious for the FCC to downplay the impact of a near immediate transition to bill-and-keep.

III. THE FCC'S ACCESS STIMULATION RULES ARE IRRATIONAL AND DISCRIMINATORY AS APPLIED TO CLECS

The FCC promulgated "access stimulation" rules to remedy certain CLECs' charging high rural LEC rates when their traffic volumes were too large to sustain those rates. *Order*, at ¶662. *See* RB at 6 ("As the LECs terminate more traffic … the LECs' average termination cost per minute drops sharply."). But the FCC went too far when it required *any* CLEC with a revenue-sharing agreement (and either of two other conditions having nothing to do with actual traffic volumes) to lower its rates statewide to the lowest ILEC rate (generally that of AT&T or Verizon) in each state. Commenters proposed that the FCC permit CLECs meeting the FCC's broad access stimulation triggers to submit data to demonstrate actual costs and traffic volumes "to establish its interstate switched access rates if the price cap LEC rates would not adequately compensate the competitive LEC." *Order*, ¶694. The FCC brushed aside this proposal and instead imposed "one-size-fits-all" triggers which have no rational relationship to the problem it identified.

The FCC claims special deference is due when "crafting appropriate remedial measures to enforce [the] Act," citing *American*

Tel. & Tel. Co. v. FCC, 454 F.3d 329,344 (D.C. Cir. 2006)("*AT&T*"). RB at 22. There, "[t]he Commission action constituted adjudication," *AT&T*, at 331, of the FCC's existing rules. Accordingly, the court upheld the FCC's imposition of penalties for violations of those rules. Here, the FCC issued *new* rules, and petitioners seek judicial review under the *Chevron* framework. *See* Uncited Joint Preliminary Brief of the Petitioners, at 39-43. No further deference is due.

The FCC justifies its access stimulation rules based on "record evidence submitted by AT&T showing that in several states, traffic-pumping CLECs were terminating three-to-five times as much traffic as the largest ILEC in the state." RB at 23. The AT&T Ex Parte focused on "12 pumping CLECs" (out of "700+" nationwide), operating in three rural states, terminating on average "750,000,000" minutes-of-use annually and accounting for "40%" of AT&T's "total expenses" nationwide. AT&T December 3, 2009 Ex Parte, at 4-6.

The AT&T Ex Parte describes the traffic pumping practices which inspired the FCC's rulemaking, but it does not support the expansive triggers the FCC ultimately chose. There is no rational relationship between the activities of AT&T's "12 pumping CLECs" in the upper Midwest and, for example, Bluegrass' operations in Kentucky. Bluegrass, a CLEC which entered into a revenue sharing agreement with one or more high volume access customers, noted that it handled a "total of 9,015,882 minutes of traffic" per month, whereas larger incumbent LECs in Kentucky (which presumably did not share revenues) terminated as much as "144,237,852 minutes of traffic per month." Bluegrass Comments, at 11-12.

Yet, because Bluegrass had entered into a revenue sharing agreement, it was limited to charging rates far lower than its traffic volumes warranted, under the FCC's proposed rules. *Id.*, at 12-13 ("The flawed logic in this assumption … force[s] CLECs to mirror carriers that have vastly different volumes and cost structures …. Consider… a rural CLEC that seeks to serve its first high volume customer. According to the proposed rules, the moment that carrier enters into a revenue sharing agreement, it would be forced to drop its tariffed rate, even though traffic volumes may be quite low at that time and for the foreseeable future.").[3]

---

[3] The FCC ultimately selected two alternative triggers in addition to a revenue sharing agreement. However, as noted herein, neither

Respondents ask the court to disregard comments proposing that CLECs (like ILECs) be permitted to demonstrate actual traffic volumes and have their rates set accordingly. Respondents argue that "[t]he FCC was not required to… respond to an argument that a commenter hardly bothered to develop." RB at 23. In reality, commenters made the point quite clearly:

> Under the proposed rules, CLECs who have revenue sharing agreements would be required to file a revised tariff mirroring the RBOC or largest ILEC in the state.The Commission suggests this is the appropriate benchmark based on an assumption that a carrier that meets the trigger would have comparative volumes of traffic. This assumption, however, is invalid, as discussed above. And, as such, a CLEC that meets the trigger, but otherwise maintains relatively low volumes of traffic, should have an alternative avenue available for determining its rates.
>
> Specifically, Northern Valley and Kentucky Telephone submit that (assuming the Commission moves forward), it should allow CLECs to make an election. If the CLEC desires to avoid the "burden that would be imposed on competitive LECs from implementing detailed accounting and ratemaking requirements associated with using historical or projected costs as a basis for their interstate access rates," they may choose to file a revised tariff that utilizes some form of benchmarking or industry-wide rate. Alternatively, if the volumes of traffic and associated costs do not actually reflect the RBOC/ILEC costs and traffic volume, the CLEC should be entitled to accept the burden of filing its tariff with rates that conform to the

---

of those triggers measures actual traffic volumes.

> requirement of section 61.38, which the Commission recognizes as among the available options to establish just and reasonable rates.

Bluegrass Comments, at 14-15. Indeed, other commenters made similar observations and proposals.[4]

The cases cited by Respondents bear no resemblance to this appeal. In *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000), the court found that "AT&T's late *ex parte* comment does not seem to us to be forceful enough to have obliged the Commission to squarely confront it." *Id.* Here, commenters proposed that "CLEC[s] should be entitled to accept the burden" of filing cost and volume data in a timely response to the FCC's request for comments on its proposed access stimulation rules. It is hard to imagine what more these commenters might have done to make their point.

In *Ark Initiative v. U.S. Forest Service*, 660 F.3d 1256, 1262

---

[4] *See, e.g.*, Core Comments, at 15-16 ("[I]t is neither fair, nor good economics, to benchmark the access rates of a facilities-based CLEC operating in rural territories to those of the three largest telecommunications companies in the nation .... A better proposal would be to benchmark the rates of a CLEC that meets the trigger to those of any incumbent LEC (rural or not) with revenues greater than that of the CLEC."); *see also In the Matter of Establishing Just & Reasonable Rates for Local Exch. Carriers*, 22 F.C.C.R. 17989, 18003-04, ¶35 (2007) (describing Verizon proposal to tie CLEC rates directly to traffic volumes).

(10th Cir. 2011), this Court found that petitioners failed to exhaust administrative remedies when they "merely mention[ed] broad categories of potential impacts with little or no analysis." That is clearly not the case here. Commenters' proposal was neither "included in long lists without expounding" nor "described vaguely." *Id*. Indeed, the FCC acknowledged this specific proposal, *Order*, ¶694, n.1172, before dismissing it with the *non sequitur* that it did not wish to *impose* new regulatory burdens on *unwilling* CLECs. *Id.*

Respondents justify the FCC's discriminatory treatment of CLECs on three grounds:

1. Respondents argue that the lowest price-cap LEC rate "is appropriate and reasonable based on the volume of traffic that traffic-pumping CLECs generate." RB at 24. But as the comments demonstrated, a CLEC may enter into a revenue sharing agreement but not terminate anywhere close to the volume of traffic associated with the lowest price cap LEC rate in its state. The FCC's additional triggers, a 3-to-1 ratio of terminating to originating traffic or a 100% growth in minutes, have nothing to do with actual volumes.

2. Respondents state that "the burden" of cost studies would not just fall on the CLECs themselves, but also on the FCC

and the IXCs that would have to review the studies carefully." RB at 24. There is no evidence in the *Order* that the FCC was concerned with burdens placed on itself or on IXCs. The only burden the FCC considered was "the burden that would be imposed on competitive LECs to start maintaining regulatory accounting records." *Order*, ¶694. This argument is nothing more than *post-hoc* justification for a badly-reasoned rule.

3. Respondents argue that the FCC reasonably concluded that access stimulation was not a sufficient reason to depart from the previous practice of benchmarking CLEC rates to ILEC rates, without cost studies. But commenters only asked that CLECs be given the *option* to submit its own data, instead of accepting a discriminatory benchmark that "would not adequately compensate the competitive LEC." *Order*, ¶694. The CLEC comments cited by the FCC do not address the proposal of an election, but rather the imposition of a mandatory cost filing. Free Conferencing Comments, at 35.

Respondents argue that "[t]he FCC was entitled to draw an adverse inference from the fact that [Petitioners] declined to provide" evidence about their own traffic volumes. Given that there was no definition of "traffic pumping CLECs" at the time comments were solicited, it is not clear who Respondents are labeling as such, nor where the omission arose. Clearly, some (but not all) CLECs handled traffic volumes that exceeded the level traditionally associated with the rates they charged. Given that the FCC's concern was these high traffic volumes, it should have (1) established triggers that targeted high traffic volumes, or (2) granted CLECs, like ILECs, "the opportunity to show, and the Commission to review, any projected increase in costs, as well as to consider the higher anticipated demand in setting revised rates." *Order*, ¶685.

Finally, Respondents offer three cases to buttress their case. The first two, *IMC Kalium Carlsbad, Inc. v. Interior Bd. Of Land Appeals*, 206 F.3d 1003, 1011 (10th Cir. 2000) and *Worley Mills, Inc. v. NLRB*, 685 F.2d 362, 365 (10th Cir. 1982), stand for the principle that an agency decision shall not be overturned if there is a rational basis supported by substantial evidence. Here, the evidence shows that, while some CLECs with revenue sharing agreements handled immense volumes of traffic, others with such agreements handled very modest volumes. Further, the evidence showed that some

CLECs with revenue sharing agreements had traffic volumes far less than the price cap incumbent in their state. Given this, there was no rational basis for the FCC to impose the lowest possible rate (based on the largest carriers' costs) on all revenue-sharing CLECs, regardless of their actual traffic volumes.

Covad Commc'ns v. FCC, 450 F.3d 528, at 541 (D.C. Cir. 2006) holds that, while the FCC has "wide discretion" to "draw administrative lines," it may not draw lines that are "patently unreasonable, having no relationship to the underlying regulatory problem."[5] The FCC's access stimulation rules are indeed "patently unreasonable" as applied to CLECs because they afford CLECs no opportunity to charge rates consistent with their actual traffic volumes, even though the entire premises of the rules was that some CLECs were charging rates that their traffic volumes did not support. Further, the rules are discriminatory because they afford

---

5 Respondents' claim that CLECs should be happy with the rules because they might have been "stricter" is beside the point. The FCC rejected "declar[ing] revenue sharing to be a *per se* violation of section 201(b) of the Act," RB at 27, n.19, based on the reasonable finding that "[a] ban on all revenue sharing arrangements could be overly broad, and no party has suggested a way to overcome this shortcoming," *Order*, ¶672. No petitioner challenged that finding.

rural ILECs precisely that opportunity.

Commenters identified the problem with the FCC's proposed rules and suggested a reasonable solution. But the FCC ignored it, as does Respondents' brief.[6] In these circumstances, the court should vacate the rules as they apply to CLECs, or at the very least remand with instructions for the FCC to permit CLECs that meet the current triggers to demonstrate actual traffic volumes and charge an appropriate, nondiscriminatory ILEC rate in the territories in which they operate.

Respectfully submitted,

On behalf of Petitioners listed inside the cover.

BY: /s/ James C. Falvey

June 12, 2013

---

6 Intervenors simply second Respondents' arguments, and offer no response to Petitioner's initial arguments on this issue. *See* Intervenors' Response Brief, at 8-10 (addressing the alleged "problem of traffic stimulation in the CMRS market"). No reply is necessary here.

CERTIFICATE OF COMPLIANCE

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

1. This filing complies with the type-volume limitation of the Amended First Briefing Order because it contains 6,942, excluding the parts of the filing exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This filing complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 10th Cir. R. 32(a) and the type style requirements of Fed. R. App. P. 32(a)(6) because this filing has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Bookman Old Style font.

3. All required privacy redactions have been made.

4. This filing was scanned for viruses with Symantec AntiVirus, version 10.1.5000.5, updated on June 10, 2013, and according to the program is free of viruses.

/s/ James C. Falvey

June 12, 2013

CERTIFICATE OF SERVICE

I hereby certify that, on June 12, 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 Uncited Additional Intercarrier Compensation Issues Principal 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 C. Falvey

June 12, 2013