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

JOINT INTERCARRIER COMPENSATION PRINCIPAL BRIEF OF PETITIONERS

(CONFORMED)

Counsel for Petitioners Listed in Alphabetical Order on Following Pages

July17, 2013

Allband Communications Cooperative

By Its Counsel

Don L. Keskey
Public Law Resource Center PLLC
139 W. Lake Lansing Rd, Suite 210
East Lansing, MI 48823
Tel: 517-999-7572
donkeskey@publiclawresourcecenter.com

Arizona Corporation Commission

By Its Counsel

Maureen A. Scott
Wesley Van Cleve
Janet F. Wagner
Arizona Corporation Commission
Legal Division
1200 West Washington
Phoenix, AZ 85007
Tel: 602-542-3402
mscott@azcc.gov
wvancleve@azcc.gov
jwagner@azcc.gov

CenturyLink*

By Its Counsel

Robert Allen Long, Jr.
Gerard J. Waldron
Yaron Dori
Mark W. Mosier
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: 202-662-6000
rlong@cov.com
gwaldron@cov.com
mmosier@cov.com

*CenturyLink joins Part I.B.2 and Part C.2, except for the two paragraphs of the §201 discussion on pp. 38-40, and the §205 discussion

Choctaw Telephone Company

By Its Counsel

Benjamin H. Dickens, Jr.
Mary J. Sisak
Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP
2120 L Street, NW, Suite 300
Washington, DC 20037-1563
Tel: 202-659-0830
bhd@bloostonlaw.com
mjs@bloostonlaw.com

Craig S. Johnson
Johnson & Sporleder, LLP
304 E High St., Suite 200
P.O. Box 1670
Jefferson City, MO 65102
Tel: 573-659-8734
cj@cjaslaw.com

Connecticut Public Utilities Regulatory Authority* (Intervenor)

By Its Counsel

Clare E. Kindall
Assistant Attorney General
Department Head, Energy
Office of the Attorney General
10 Franklin Square
New Britain, CT 06051
Tel: 860-827-2683
Fax: 860-827-2893
Clare.Kindall@ct.gov

*Connecticut Public Utilities Regulatory Authority takes no position on Part II.

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
Tel: 202-659-6655
Fax: 202-659-6699
jfalvey@eckertseamans.com

Gila River Indian Community and Gila River Telecommunications, Inc.*

By Their Counsel

Patricia A. Millett
James E. Tysse
Sean Conway
John B. Capehart
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, N.W.
Washington, DC 20036
Tel: 202-887-4000
Fax: 202-887-4288

Michael C. Small
2029 Century Park E. Suite 2400
Los Angeles, Ca 90067
Tel: 310-229-1000
Fax: 310-229-1002

*Gila does not join Section I or Section III.B.

Kansas Corporation Commission

By Its Counsel

Robert A. Fox
Senior Litigation Counsel
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, Kansas 66604
Tel: 785-271-3118
b.fox@kcc.ks.gov

Montana Public Service Commission* (Intervenor)

By Its Counsel

Justin Kraske
Chief Legal Counsel
Montana Public Service Commission
1701 Prospect Avenue
PO Box 202601
Helena MT 59620-2601
Tel: 406-444-6376
JKraske@mt.gov

*Montana takes no position on Part II.

National Association of Regulatory Utility Commissioners*

By Its Counsel

James Bradford Ramsay
General Counsel
Holly Rachel Smith
Assistant General Counsel
National Association of Regulatory Utility Commissioners
1101 Vermont Avenue, Suite 200
Washington, DC 20005
Tel: 202.898.2207
jramsay@naruc.org
hsmith@naruc.org

*NARUC takes no position on Part II.

North County Communications Corporation

By Its Counsel

R. Dale Dixon, Jr.
Law Offices of Dale Dixon
1155 Camino Del Mar, Suite 497
Del Mar, California 92014
Tel: 858-925-6074
dale@daledixonlaw.com

National Association of State Utility Consumer Advocates*

By Its Counsel

Paula M. Carmody, NASUCA President
Maryland People's Counsel
Office of People's Counsel
6 St. Paul Street, Suite 2102
Baltimore, MD 21202
Tel: 410-767-8150
paulaC@opc.state.md.us

David C. Bergmann
Counsel for NASUCA
3293 Noreen Drive
Columbus, OH 43221-4568
Tel: 614-771-5979
david.c.bergmann@gmail.com

Christopher J. White
Deputy Rate Counsel
New Jersey Division of Rate Counsel
P.O. Box 46005
Newark, NJ 07101
Tel: 973-648-2690
cwhite@rpa.state.nj.us

*NASUCA does not sign on to Part II of this brief.

Consolidated Communications Holdings, Inc., 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

*Consolidated Communications Holdings, Inc., National Telecommunications Cooperative Association, and U.S. TelePacific Corp do not join Part III of the Brief.

Pennsylvania Public Utility Commission*

By Its Counsel

Bohdan R. Pankiw
Kathryn G. Sophy
Joseph K. Witmer
Shaun A. Sparks
Pennsylvania Public Utility Commission
400 North Street, 3rd Floor
Harrisburg, PA 17120
Tel: 717-787-5000
bpankiw@pa.us
ksophy@pa.gov
joswitmer@pa.gov
shsparks@pa.gov

*Pennsylvania Public Utility Commission takes no position on the financial impact on any individual or group of carriers.

Public Utilities Commission of Ohio*

By Its Counsel

John H. Jones
Assistant Attorney General
Office of the Ohio Attorney General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215-3793
Tel: 614-466-4395
john.jones@puc.state.oh.us

*Public Utilities Commission of Ohio joins only in Part I. C, D, E, and takes no position on Part I. A, B, and Parts II and III.

Rural Telephone Service Company, Inc.; Adak Eagle Enterprises LLC, Adams Telephone Cooperative, Alenco Communications, Inc., Arlington Telephone Company, Bay Springs Telephone Company, Inc., Big Bend Telephone Company, Inc., The Blair Telephone Company, Blountsville Telephone LLC, Blue Valley Telecommunications, Inc., Bluffton Telephone Company, Inc., BPM, Inc., Brantley Telephone Company, Inc., Brazoria Telephone Company, Brindlee Mountain Telephone LLC, Bruce Telephone Company, Bugs Island Telephone Cooperative, Cameron Telephone Company, LLC, Chariton Valley Telephone Corporation, Chequamegon Communications Cooperative, Inc., Chickamauga Telephone Corporation, Chickasaw Telephone Company, Chippewa County Telephone Company, Clear Lake Independent Telephone Company, Comsouth Telecommunications, Inc., Copper Valley Telephone Cooperative, Cordova Telephone Cooperative, Crockett Telephone Company, Inc., Darien Telephone Company, Deerfield Farmers' Telephone Company, Delta Telephone Company, Inc., East Ascension Telephone Company, LLC, Eastern Nebraska Telephone Company, Eastex Telephone Coop., Inc., Egyptian Telephone Cooperative Association, Elizabeth Telephone Company, LLC, Ellijay Telephone Company, Farmers Telephone Cooperative, Inc., Flatrock

Telephone Coop., Inc., Franklin Telephone Company, Inc., Fulton Telephone Company, Inc., Glenwood Telephone Company, Granby Telephone LLC, Hart Telephone Company, Hiawatha Telephone Company, Holway Telephone Company, Home Telephone Company (St. Jacob, Ill.), Home Telephone Company (Moncks Corner, SC), Hopper Telecommunications Company, Inc., Horry Telephone Cooperative, Inc., Interior Telephone Company, Kaplan Telephone Company, Inc., KLM Telephone Company, City Of Ketchikan, Alaska, Lackawaxen Telecommunications Services, Inc., Lafourche Telephone Company, LLC, La Harpe Telephone Company, Inc., Lakeside Telephone Company, Lincolnville Telephone Company, Loretto Telephone Company, Inc., Madison Telephone Company, Matanuska Telephone Association, Inc., McDonough Telephone Coop., Inc., MGW Telephone Company, Inc., Mid Century Telephone Coop., Inc., Midway Telephone Company, Mid-Maine Telecom LLC, Mound Bayou Telephone & Communications, Inc., Moundville Telephone Company, Inc., Mukluk Telephone Company, Inc., National Telephone of Alabama, Inc., Ontonagon County Telephone Company, Otelco Mid- Missouri LLC, Otelco Telephone LLC, Panhandle Telephone Cooperative, Inc., Pembroke Telephone Company, Inc., People's Telephone Company, Peoples Telephone Company, Piedmont Rural Telephone Cooperative, Inc., Pine Belt Telephone Company, Pine Tree Telephone LLC, Pioneer Telephone Cooperative, Inc., Poka Lambro Telephone Cooperative, Inc., Public Service Telephone Company, Ringgold Telephone Company, Roanoke Telephone Company, Inc., Rock County Telephone Company, Saco River Telephone LLC, Sandhill Telephone Cooperative, Inc., Shoreham Telephone LLC, The Siskiyou Telephone Company, Sledge Telephone Company, South Canaan Telephone Company, South Central Telephone Association, Star Telephone Company, Inc., Stayton Cooperative Telephone Company, The North-Eastern Pennsylvania Telephone Company, Tidewater Telecom, Inc., Tohono O'Odham Utility Authority, SD, Unitel, Inc., War Telephone LLC, West Carolina Rural Telephone Cooperative, Inc., West Tennessee Telephone Company, Inc., West Wisconsin Telcom Cooperative, Inc.,

Wiggins Telephone Association, Winnebago Cooperative Telecom Association, and Yukon Telephone Co., Inc.*

By Their 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

*Rural Telephone Service Co., Inc. et al. does not join in Part III 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 Part III of the brief

tw telecom inc.*

By Its Counsel

David P. Murray
Thomas Jones
Nirali Patel
Willkie Farr & Gallagher LLP
1875 K Street, NW
Washington, DC 20006
Tel: 202-303-1000
dmurray@willkie.com
tjones@willkie.com
npatel@willkie.com

*tw telecom joins only in Part I.C of this brief.

Vermont Public Service Board*

By Its Counsel

Bridget Asay
Assistant Attorney General
Office of the Attorney General
for the State of Vermont
109 State Street
Montpelier, VT 05609-1001
Tel: 802-828-3181
basay@atg.state.vt.us

*Vermont does not join Part III.B.

Virginia State Corporation Commission* (Intervenor)

By Its Counsel

Raymond L. Doggett, Jr., Senior Counsel
Office of General Counsel
Virginia State Corporation Commission
P.O. Box 1197
Richmond, Virginia 23218
Phone: (804) 371-9671
Fax: (804) 371-9240
raymond.doggett@scc.virginia.gov

* Virginia State Corporation Commission joins Part I.B.1 and 2 of this brief and takes no position on the balance of the issues included in this brief.

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Statement of Related Cases

There are no prior appeals, and all related cases have been consolidated into this omnibus case. A previous order arising from one of the administrative proceedings in which *Connect America Fund,* 26 FCC Rcd 17663 (2011) (*"Order"*) was entered is before the Ninth Circuit in *Ronan Tel. Co. et al. v. FCC et al.* (9th Cir. Case No. 05-71995).

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
CAF	Connect America Fund
CLEC	Competitive Local Exchange Carrier
CMRS	Commercial Mobile Radio Service
FCC, Commission	Federal Communications Commission
ICC	Intercarrier Compensation
ILEC	Incumbent Local Exchange Carrier
ISP	Internet Service Provider
IXC	Interexchange (or Long Distance) Carrier
JA	Joint Appendix
LEC	Local Exchange Carrier
RLEC	Rate-of-Return ILEC
TELRIC	Total Element Long-Run Incremental Cost
USF	Universal Service Fund
USF Brief	Uncited Joint Universal Service Fund Principal Brief
VoIP	Voice over Internet Protocol

Statement of Issues

Sixteen years after enactment, in the face of multiple contrary Congressional proscriptions, the FCC concocts a new interpretation of 47 U.S.C. §251(b)(5) "reciprocal compensation," raising the following issues:

Whether the FCC can expand its jurisdiction to set “reciprocal compensation” rates for all intrastate and interstate traffic eliminating an assigned State duty (§252(d)(2)), preempting intrastate access charge regimes in the face of an explicit reservation (47 U.S.C. §251(d)(3)), and contravening Congress’s explicit instructions not to imply preemption (§601(c)(1))?

Whether the FCC can classify "originating" intrastate access as reciprocal compensation given §251(b)(5) addresses only the “transport and termination of telecommunications” and does not mention originating traffic?

Whether the FCC's specification of a zero rate as a "methodology" intrudes on the State’s authority to "set the actual

rate" specified by statute, conceded by the FCC, and recognized by the Supreme Court?

Whether the imposition of a zero rate conflicts with (i) the pricing standards in 47 U.S.C. §252(d)(2) requiring "mutual recovery" of costs from each carrier, (ii) prior FCC interpretations allowing such arrangements only where exchanging carrier rates are symmetrical and traffic is balanced, and (iii) 47 U.S.C. §201's requirement for rates to be "just and reasonable", and/or the FCC's failure to conduct hearings required by 47 U.S.C. §205.

Whether the FCC can in a rulemaking change its Part 36 rules without complying with 47 U.S.C. §410(c)'s mandate for a specific referral to a joint board and a recommended decision as a basis for such change?

Whether the FCC can instruct States, assigned by Congress the task of considering carrier requests under 47 U.S.C. §251(f)(2 not to suspend or modify, *inter alia*, the FCC's "bill-and-keep" methodology?

Whether the FCC acted arbitrarily, capriciously, and otherwise unlawfully in ignoring conflicts among its existing cost

recovery rules, relevant legal precedent, and its new rules reducing and eliminating ICC rates and USF Support Mechanisms?

Whether the FCC's *ex parte* process violates fundamental due process?

Whether the FCC's order infringes on core State sovereignty?

Standard of Review

Section I of the brief is governed by the *Chevron* "step one" standard set out at pp. 39-40 of the Preliminary Joint Brief.[1] *Chevron U.S.A. v. Nat'l Resources Defense Council, Inc.* 467 U.S. 837, 842-3 (1984). Section II is governed by the arbitrary and capricious standard of review set out at pp. 41-42 of that brief.

Argument Summary

Both "reciprocal compensation" and "access charges" had established meanings Congress incorporated in 1996 legislation. Sixteen years after the passage, in the face of unambiguous

[1] Subsequent to the filing of the Joint Preliminary Brief, the Supreme Court granted certiorari to address whether *Chevron* applies at all where the issue concerns any agency's determination of its own jurisdiction. *City of Arlington, Tex. v. FCC*, No. 2012 WL 4748083 (U.S. Oct. 5, 2012).

statutory text, the FCC attempts to expand its jurisdiction under 47 U.S.C. §251(b)(5) to set compensation for all intrastate and interstate traffic—including associated *exchange access charges*—on the theory that the 1996 Act gives it jurisdiction over compensation relating to all "telecommunications." *Order*, ¶764. (JA at 643). The FCC nowhere provides an adequate explanation of its departure from the prior interpretations. Read in context, it is clear that §251(b)(5) and §251(g) cannot authorize including access charges as reciprocal compensation. Unlike traditional reciprocal compensation, access charges (including originating access charges) are not "reciprocal" – that is – there is no reciprocity. IXCs pay access charges for *exchange access,* a LEC service that permits IXCs to complete toll calls, a service separate from the local services to which *reciprocal compensation* arrangements apply. The servicing LEC does not make a corresponding payment.

Even if the inclusion of access charges were permissible, the FCC can't set a zero rate for the service. The agency concedes Congress expects States to set the rate for §251(b)(5) traffic and that, whatever traffic belongs within §251(b)(5), the FCC only has authority to set a "methodology." *Id.,* ¶773. (JA at 647-648) But

having conceded that statutory limitation, the FCC promptly ignores it, specifying that its zero-rate "methodology" is "less burdensome than approaches that would *require…state commissions to [actually] set a* uniform positive intercarrier compensation *rate*, such as $0.0007." *Id.*, ¶743 (JA at 633-634). (*emphasis added*)

In setting the rate at zero, the FCC eliminates a Congressionally assigned State duty (§252(d)(2)) and ignores record evidence of positive termination costs, preempts State intrastate access charge regimes in the face of an explicit Congressional reservation (§251(d)(3), manufactures an ambiguity out of whole cloth that contravenes Congress's explicit instructions not to imply preemption (§601(c)(1)), ignores explicit Congressional instructions limiting bill-and-keep to balanced traffic and voluntary carrier negotiations (§252(d)(2)), violates the mutual and reciprocal requirements that carriers recover termination costs from each other while at the same time acknowledging that LECs are unlikely to be able to recover such costs from other sources (§§251(b)(5) and 252(d)(2)), attempts to exercise general §201 rulemaking authority to set rates rather than comply with the more specific standards

and processes that govern ratesetting (§§252(d)(2) and 205), and effects separations changes without Congressionally-mandated Joint Board referrals (§410(c)).

Then, adopting a *de facto* public interest standard that it admits lacks record support, arbitrarily ignoring other prongs of §251(f)(2), and exceeding its jurisdiction to adopt rules that "guide" the States, the FCC instructs States *not* to exercise their jurisdiction to grant relief from the new zero-rate regime, claiming the standard can be met only under "highly unlikely" circumstances. *Order* ¶824. (JA at 671-672)

The FCC also unlawfully and arbitrarily prohibits RLECs from recovering interstate costs through intercarrier compensation rate elements assigned to the interstate jurisdiction at the same time it acknowledges that LECs will be precluded from recovering such costs elsewhere.

Finally, the FCC's ex parte process is so deficient as to constitute a denial of due process.

The FCC's effort to rewrite the Act flounders under any careful examination of the unambiguous statutory text, legislative history, and controlling precedent.

Argument

I. The FCC lacks authority to establish a new Section 251(b)(5) framework.

A. The FCC lacks statutory authority to classify exchange access as reciprocal compensation.

In ¶765 (JA at 643-644), the FCC rejects arguments that §251(b)(5) cannot apply to intrastate access charges. The agency claims that if Congress intended to exclude certain telecommunications traffic from the reciprocal compensation framework, it could have easily done so by using more restrictive terms to define the traffic subject to §251(b)(5).[2]

But that's precisely what Congress did.

The Supreme Court has specified that technical terms in a statute should be interpreted by reference to the industry to which

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[2] *Order*, ¶765. (JA at 643-644). The FCC also relies on statements in a 2008 order that on their face apply ONLY to dial-up *interstate* traffic the FCC prior to the 1996 Act exempted from interstate access charges. Both the FCC's legal theory and the reviewing Court specified the case is specific to "interstate" traffic terminating to an Internet service provider. *See* discussion, *infra,* at 20-21.

they apply.[3] Both "reciprocal compensation" and "access charges" had established meanings that Congress incorporated in the 1996 legislation.[4] Even today, on its website, the FCC properly distinguishes the concepts:

> There are two major forms of intercarrier compensation - *access charges* and *reciprocal compensation*.
>
> *Access charges* generally apply to calls that begin and end in different *local* calling areas…
>
> The Commission oversees interstate access charge rates, and *the states oversee intrastate access charge rates.*

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[3] *See*, *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 371-2 (1986) ("in accordance with the rule of construction that technical terms of art should be interpreted by reference to the trade or industry to which they apply.") *See, e.g.*, *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991); *Corning Glass Works v. Brennan*, 417 U.S. 188, 201–02 (1974); *US 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 than by the usual tools of statutory construction.")

[4] *See,* November 26, 2008 *Initial Comments of the National Association of Regulatory Utility Commissioners*, at: http://apps.fcc.gov/ecfs/document/view?id=6520188674, at p.8 n.19 outlining pre-Act references to *reciprocal compensation* and *local exchange competition.* (JA at 1469-1472).

> *Access charges do not apply to Internet service providers under an [FCC] exemption for enhanced service providers that use the facilities of local telephone companies.*
>
> *Reciprocal compensation* generally applies to calls that begin and end within the same local calling area.[5]

The FCC effort to lump these concepts together ignores a host of specific Congressional requirements and reservations.[6] Section 251(b)(5) *cannot* include *access charges* for *exchange access traffic*. *Exchange access* is a LEC service that permits IXCs to utilize the LECs' networks for the IXC's intrastate telephone toll service, and is separate from the local competitive LEC services to which *reciprocal compensation* arrangements apply. *See Preliminary Brief of Petitioners* at 15-16; *see also* 47 C.F.R. §51.209 (Toll dialing parity) and 47 C.F.R. §51.207 (Local dialing parity).

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[5] FCC "Intercarrier Compensation" page at http://transition.fcc.gov/wcb/ppd/IntercarrierCompensation/ (last accessed 9/25/2012) (emphasis added). This webpage was updated in 2009 after the release of the *ISP Remand Decision* that, in the accompanying rulemaking, first raised the FCC's new interpretation of "reciprocal compensation."

[6] *In re Dawes*, 652 F.3d 1236, 1242 (10th Cir. 2011) *cert. denied*, 132 S. Ct. 2429 (U.S. 2012) *quoting Corley v. United States,* 556 U.S. 303, 314 (2009) ("[A] 'statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'").

Section 251(b)(5) specifies only that LECs have a duty to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." The term "telecommunications" within §251(b)(5) cannot be divorced from the duty to establish "reciprocal compensation arrangements" or from other provisions of the Act. For compensation to be "reciprocal" it must, by definition, be given by "each to the other." *Webster's New World Dictionary* 1120 (3d College Ed. 1988). *Exchange access traffic* and *access charge* payments are *never* reciprocal. The IXC pays LECs serving the calling and called parties for the service on both ends of the long distance call and no reciprocity exists between the IXC and the LEC, *i.e.,* no traffic is exchanged between them since all of the traffic is that of the IXC.

Moreover, reading *reciprocal compensation* in §251(b)(5) more closely and in the context of other sections of the Act forecloses expansion of that term to cover access traffic. "[A] statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context."[7] Read in context, §251(b)(5) can only

[7] *King v. St. Vincent's Hosp.,* 502 U.S. 215, 221 (1991); *see also, Dolan v. United States Postal Service,* 546 U.S. 481, 486 (2006) (The

apply to non-access traffic. Subsection (b)(5) specifies the LEC duty to transport *and* *terminate* the traffic of other LECs competing in the same local exchange service area. On its face, it has no applicability to *exchange access services*, either interstate or intrastate. LECs have never established *reciprocal compensation* arrangements with IXCs. Indeed, Congress distinguished *exchange access* services from the *reciprocal compensation* transport and termination arrangements required by §251(b)(5), when it specified that competitive LECs can utilize the facilities and equipment of incumbents "for the transmission and routing of telephone exchange service and exchange access." 47 U.S.C. §251(c)(2)(A)[8] Section 252(d)(2)(A) adds further support to this view – when it refers to an "incumbent local exchange carrier's" compliance with §251(b)(5) and specifies "mutual and reciprocal recovery by each

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"[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context.")

[8] In the Conference report, the Senate specification that "[t]he obligations and procedures proscribed in this section do not apply to interconnection arrangements between local exchange carriers and telecommunications under section 201 . . . for the purposes of providing interexchange service, and nothing in this section is intended to affect the Commission's access charge rules" morphed into §251(i). H.R. CONF. REP. 104-458, at pp 117, 123.

carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." The FCC's effort to collapse "telephone exchange service" and "exchange access" is flatly inconsistent with both the express terms of the statute and the FCC's prior interpretations of those terms.[9]

Section 251(b)(5) applies only when traffic is both transported *and terminated* by the carrier seeking compensation. The FCC relied on this limitation in the *Local Competition Order*, finding that "transport and termination of local traffic" is distinct from "access service for long distance communications," and so rejected claims that §251(b)(5) governs the exchange of traffic between a LEC and an IXC. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16013 (1996) (*"Local Competition Order"*). As the Commission noted, it is the LEC, not the IXC, which terminates the traffic. *Id.* 16013. The Commission defined transport "as the

[9] *See Secretary of Labor v. Excel Mining, LLC*, 334 F.3d 1, 7 (D.C. Cir. 2003) (Court prefers an agency interpretation made "when the origins of both the statute and the finding were fresh in the minds of their administrators" over a subsequent interpretation.")

transmission of terminating traffic that is subject to section 251(b)(5)." *Id.* 16015. Therefore, termination defines the scope of §251(b)(5) traffic.

In any case, the FCC's new theory is also invalid based on its unexplained departure from prior interpretations. To change its position, an agency must, at a minimum, acknowledge that it is departing from its earlier view and "show there are good reasons for the new policy." "[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *See FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009). The FCC cannot satisfy this requirement because it does not acknowledge its prior definitions of "transport" and "termination," much less provide a reasoned explanation for changing its position.

B. The FCC lacks authority to classify intrastate access as reciprocal compensation.

1. The FCC Lacks authority to preempt State intrastate exchange access authority.

Reciprocal compensation necessarily excludes *intra*state access by any plain text reading and the action of §152(b).[10] Section 152 operates in tandem with other sections of the Act that *specifically preserve* continuing State authority to "establish[] access and interconnection obligations of local exchange carriers."[11] Exceptions to this authority must be express.[12]

Preemption of State law is "not lightly to be presumed"[13] and is not lightly found.[14] True, the Supreme Court determined Congress

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10 47 U.S.C. §152(b).

11 47 U.S.C. §251(d)(3).

12 Section 601(c)(1), codified at 47 U.S.C. §153 note.

13 *See, e.g., Greater Washington Bd. of Trade v. District of Columbia*, 948 F.2d 1317, 1320 (D.C. Cir. 1991); *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1195 (10th Cir. 2002) *citing Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Statutes are entitled to the presumption of non-preemption."); *Missouri Bd. of Examiners for Hearing Instrument Specialists v. Hearing Help Exp., Inc.*, 447 F.3d 1033, 1035 (8th Cir. 2006) *citing Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518-19 (1992). *Compare, Louisiana PSC v. FCC,* 476 U.S. 355 (1986).

provided the FCC with a limited degree of intrusion upon State authority with respect to the local competition provisions of the 1996 Act. *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 377-378 (1999)("*Iowa Utilities Board"*). But the FCC steps well outside those statutory bounds in preempting intrastate exchange access. Indeed, Congress provided a specific rule that conclusively resolves the point. Section 601 (c)(1) specifies that where a provision can be read in more than one way, it must be construed to avoid preemption.[15] The FCC's use of §251(b)(5) is subject to §601's limitation. The prior FCC interpretation of §251(b)(5) that predates the *Order* by 15 years complies with Congress' explicit instruction in §601. Section 251(b)(5) does <u>*not*</u> require preemption. The Court need not consider any other aspect of the FCC's "analysis." *Compare Order,* ¶¶760-768. (JA at 641-646)

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[14] *Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597 (1991); *see also Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1204 (10th Cir. 2009) quoting *Nat'l Solid Wastes Mgmt. Ass'n v. Killian,* 918 F.2d 671, 676 (7th Cir.1990) ("Courts do not 'lightly attribute to Congress or to a federal agency the intent to preempt state or local laws'").

[15] Section 601(c)(1) provides that "[t]his Act and the amendments by this Act <u>*shall not be construed to modify, impair, or supersede*</u> Federal, <u>*State*</u>, or local *law* <u>*unless expressly so provided in such Act or amendments*</u>." (emphasis added).

Even absent §601's limitation, the FCC's action is expressly barred by §251(d)(3) ("Preservation of State Access Regulations"), which states:

> In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that -
>
> (A) establishes access and interconnection obligations of local exchange carriers;
>
> (B) is consistent with the requirements of this section; and
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

47 U.S.C. §251(d)(3).

The Court cannot permit the FCC to construe §251(b)(5) so as to eliminate §251(d)(3).[16] The FCC conducts no analysis of §251(d)(3) and fails to articulate any criterion that allows the agency to override this express reservation of State authority. Clearly, *intrastate exchange access services* are included within §251(d)(3), (A)'s retention of State authority over *intrastate LEC* "access and interconnection obligations." The FCC does not suggest otherwise.

[16] *In re Dawes,* 652 F.3d at 1242.

Order, ¶767. (JA at 644-645). LEC *intrastate exchange access service* affords IXCs the use of the LEC's network for the origination and termination of the IXCs' toll services. States have historically overseen the intrastate rates, terms and conditions pursuant to which an IXC may utilize the LEC network to originate or terminate the traffic. Nor can the FCC sustain its suggestion, *id.*, that State exchange access regulation is *inconsistent* with "the requirements of this section." 47 U.S.C. §251(d)(3)(B). There is no requirement in §251(b)(5), §251(g), or anywhere else for the FCC to override State access regulations. As the FCC previously (and properly) ruled, §251(b) addresses the obligations of all LECs with respect to the competitive services they offer within a local calling area. *See Local Competition Order,* 16013. Finally, the *Order* ignores the fact that preemption is not necessary to implement any requirement or purpose of §251, a fact the Commission must demonstrate to sustain preemption. Section 251 was intended to open up local markets to competition.[17] While the FCC attempts unpersuasively

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[17] *See, e.g., Iowa Utilities Board*, 525 U.S. 366, 371 (The 1996 Act "fundamentally restructures local telephone markets.); *see also Global Naps, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 61-62 (1st Cir. 2006) (The 1996 Act "was enacted 'to end the local

to now apply a legal theory that rejects history, it can cite to no record that supports the conclusion that preemption of State authority over exchange access services is necessary to implement any §251(b)(5) requirement or to achieve the local competition purpose of §251. The fact is that exchange access remains an input into the provision of telephone toll service (47 U.S.C. §153(20)), a class of service that is separate from telephone exchange service. 47 U.S.C. §§153(54) and (55).

Indeed, there is no specific finding that the preemption of intrastate exchange access is required to avoid "substantially prevent[ing] implementation of the requirements of this section and the purposes of this part," (47 U.S.C. §251(d)(3)(C)), other than the circular argument that intrastate access must be eliminated to comply with §251(b)(5). *Order*, ¶767. (JA at 644-645). The record cannot support the notion that State intrastate exchange access

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telephone monopolies and create a national telecommunications policy that favored competition in local telephone markets.'"); s*ee* *Qwest Corporation v. FCC,* No. 10-9543, issued August 6, 2012 (10th Cir.)(to be published) at 3 citing *Qwest Corp. v. Colo. Pub. Utils. Comm'n*, 656 F.3d 1093, 1096 (10th Cir. 2011) (The 1996 Act "imposed on the monopolistic local phone companies . . . several new requirements designed to enhance competition in the market for local telephone service.").

regulation and the coexistence of parallel inter- and intrastate access regimes has prevented local competitive markets from developing (*see* 47 U.S.C. §251 *et seq.* (Part II – Development of Competitive Markets)).

Preemption of State intrastate exchange access regulation is of course necessary to effect the *Order*'s new legal theory. *Louisiana* makes clear, however, that regardless of the FCC's policy desires, the agency can only act where Congress has given it jurisdiction:

> [W]e simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress.[18]

Nor does *Iowa Utilities Board* permit the FCC (*Order*, ¶ 760) to bootstrap its §201(b) rulemaking authority to re-write the §251 framework to eliminate State authority over intrastate exchange access services. *See* 47 U.S.C. §152(b)(1). The discussion in *Iowa Utilities Board* did not address whether the 1996 Act preserved State ratemaking authority over intrastate exchange access rates.

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18 *Louisiana*, 476 U.S. at 374-375.

Rather, as the FCC admits, the discussion could only address the pricing issues under the Act related to the new <u>*local*</u> service competitive framework – local traffic exchanged between competitors which was "the subject of" the FCC's "reciprocal compensation rules since the Commission implemented the 1996 Act." *Order*, ¶765. (JA at 643-644). Given the local focus, the decision cannot be cited to extend the FCC's jurisdiction to intrastate exchange access.

Nor can the FCC rely on the *ISP Remand Order*, 16 FCC Rcd 9151 (2001), to support its construction of §251(g). *Id.*, ¶763, n.1368. (JA at 643) That decision, as acknowledged by the FCC, was remanded (*id.,* ¶759, n. 1346 (JA at 641)), and ultimately modified based on the explicit premise that the traffic being addressed – ISP-bound traffic – was jurisdictionally *interstate*. *Compare id.* ¶¶761-768 (JA 642-646) with *Core Communications v. FCC,* 592 F.3d 139, 144 (D.C. Cir. 2010)(establishing that the issue the Court evaluated was "FCC ratesetting authority for a leg of an interstate communication" and noting that "[d]ial-up internet traffic is special because it involves interstate communications that are delivered through local calls; it thus simultaneously implicates the

regimes of both §201 and of §§251-252"); *see also Core Communications, Inc. and Pennsylvania Public Utility Commission, Petitioners v. Federal Communications Commission*, Petitions for Writ of Certiorari, Supreme Court Docket Nos. 10-185 and 10-189, Brief for the Federal Respondents in Opposition (October 12, 2010), pp. 12 (FCC concedes that "[t]he court of appeals correctly held that the Communications Act's longstanding grant of authority to the FCC over *interstate* communications provided a sound basis for the Commission's compensation rules for ISP-bound traffic"). The Communications Act authorizes the FCC to regulate the rates and terms of *interstate* common carrier services. 47 U.S.C. §201(b))

Factually, the FCC's claimed policy "justification" for preemption conflicts with the record. The FCC contends per-minute access charges should be eliminated to "promote the transition to IP networks, provide a more predictable path for the industry and investors, and anchor the reform process that will ultimately free consumers from shouldering . . . multi-billion dollar subsidies." *Order,* ¶736; *see also*, *id.*, ¶740. (JA at 632) But this claim is inconsistent with the *Order's* recognition that many States have taken action to reduce access charges (*see id.*, ¶¶795, 796)(JA

at 659), some *interstate rates* are higher than comparable *intrastate access*,[19] and the fact that States have both USF and other programs to encourage broadband deployment. Moreover, the FCC's appropriation of intrastate authority has real consequences. For example, the FCC's *Order* preempts Pennsylvania's authority to regulate intrastate access rates and to promote broadband. *Compare Order*, ¶¶648-655 (JA at 599-601) and 752-759 (JA at 638-641) *with* 66 Pa.C.S. §§3011, *et. seq.* (Chapter 30) and 73 Pa.C.S. §§2251.1, *et seq.* ("*VoIP Bill*"). Pennsylvania's *VoIP Bill* preserves the Commonwealth's authority to impose intrastate ICC. The FCC's decision replaces the State's compensation with a zero rate. No record evidence establishes that Pennsylvania's laws interferes with the FCC's regulation of interstate telecommunications as required by 47 U.S.C. §253.[20] Although the *Order* eviscerates State authority over ICC arrangements for the stated goal of ensuring broadband service is widely available, *see Order*, ¶1 (JA at 394), it directly undermines State efforts to

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[19] *See In the Matter of Connect America Fund, et.al.*, WC Docket No. 10-90, *et al.*, *Order*, 27 FCC Rcd 605, 612 (WCB 2012).

[20] 47 U.S.C. §253 sets out criteria to preempt State laws that inhibit competition.

promote broadband. Pennsylvania's Chapter 30 legislation, for example, provides the State flexibility to set higher rates for intrastate telecommunications if carriers commit to deploying broadband networks. Pennsylvania attained broadband service in its highest-cost rural areas in December 2008 and is set to complete a statewide broadband network no later than 2015. Although this program is among the most aggressive in the nation, the FCC's action undermines the mechanism to bring it to a successful conclusion.

Finally, any suggestion that §251(g) is a "transitional device" (*Order*, ¶763 (JA at 642-643)) that allows the FCC to apply the §251(b)(5) framework "'unless and until the Commission by regulation should determine otherwise'" (*id.* (JA at 642-643) citing *ISP Remand Order*, ¶3963) and therefore provides a basis to "supersede the traditional exchange access charge regime" (*Order*, ¶764 (JA at 643)) for *intra*state services, is deficient on its face. Even ignoring the fact that the FCC has not reconciled its analysis with the underlying purpose of §251(g),[21] such a suggestion ignores

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[21] The legislative history is clear that the purpose of §251(g) was to maintain the requirements of two consent decrees. *See* S. CONF.

the fact that §251(g) *expressly* limits[22] the FCC's actions to those matters that had been explicitly addressed in court orders, consent decrees or "any regulation, policy or decision *of the Commission*"[23] at the time the 1996 Act was signed into law on February 8, 1996. 47 U.S.C. §251(g) (*emphasis* added). While §251(g) recognizes that the FCC may alter its regulation of *interstate* exchange access services established by its regulations,[24] the same cannot be said of

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REP. 104-230, at 123 ("Because the new approach completely eliminates the prospective effect of the AT&T Consent Decree, some provision is necessary to keep these requirements in place. By the same token . . . some provision is also needed to ensure that the GTE Operating Companies . . . continue to provide equal access and nondiscrimination to interexchange carriers and information service providers. Accordingly, the conference agreement includes a new section 251(g)."); *accord*, H.R. CONF. REP. 104-458 at 123.

[22] The *Order*'s quotation from §251(g) conveniently (*see Order*, ¶763) (JA at 642-643) omits the wording that limits the scope of the section to restrictions and obligations under a "court order, consent decree or regulation, order or policy *of the Commission*." 47 U.S.C. §251(g) (*emphasis* added). The section on its face does not apply to regulations, orders or policies of State commissions, yet the FCC claims that the section preserves the pre-Act regulatory regime "that applies to access traffic," implying both State and federal.

[23] *See, WorldCom, Inc. v. F.C.C.*, 288 F.3d 429, 433 (D.C. Cir. 2002) *quoting* 47 U.S.C. §251(g) (*citation omitted*).

[24] The Eighth Circuit recognized this concept. After discussing §251(g) in the context of immediately moving access charges to cost-based rates and quoting with emphasis the provision that the

intrastate exchange access regulation established by the States. The FCC had no jurisdiction over intrastate exchange access services on February 7, 1996 or before, and the FCC points to nothing to suggest otherwise. Moreover, at least one Court rejected the Commission's efforts to use §251(g) as an independent basis of authority to remove jurisdictionally interstate local ISP-bound traffic from §251(b)(5). *See*, *WorldCom*, 288 F.3d) at 434 ("Having found that §251(g) does not provide a basis for the Commission's action, we make no further determinations.").

2. The FCC lacks authority to preempt State authority over intrastate originating access.

The FCC lacks any authority over intrastate *originating* access charges. But the *Order* adopts bill-and-keep as the default for all ICC, caps intrastate *originating* access rates immediately, and initiates a rulemaking to transition all to bill-and-keep. *Order*, ¶¶

section is applicable to a *"regulation, order, or policy of the [FCC]"* (emphasis in original), the court noted that §251(g) "leaves the door open for the promulgation of new rates at some future date, but any possible new exchange access rates for *interstate calls* will not carry the same deadline or the same cost-based restrictions as will those for interconnection and unbundled network elements specifically mentioned in §252(d)(1)." *Competitive Telecommunications Ass'n v. FCC,* 117 F.3d 1068, 1072-3 (8th Cir. 1997)(*emphasis* added).

736 (JA at 631), 777-778 (JA at 650), 817-818 (JA at 669). Section 251(b)(5) cannot authorize this action because *reciprocal compensation* cannot apply to originating access since it consists of one-way payments made by IXCs for their access traffic and thus is not reciprocal, and §251(g) is "a transitional device" that does not grant the FCC new authority. *Iowa Utilities Board,* 525 U.S. at 481-83 n. 8-9; *WorldCom, Inc. v. FCC*, 288 F.3d 429, 430, 434 (D.C. Cir. 2002). Because any new FCC rule must have its own statutory foundation and cannot be grounded in §251(g), the preemption of State intrastate exchange access authority must be vacated.

Moreover, as to originating access, §251(b)(5) addresses only the "*transport and termination* of telecommunications." (emphasis added.) *Originating access* is not referenced. In contrast with a local call, a toll call has three distinct parts that often are provided by three distinct carriers: originating access, transport, and termination. The FCC defined "transport" to mean "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." *Local Competition Order*, 16015. It defined "termination" to mean

"the switching of traffic that is subject to section 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.*, 16015-16. Although the FCC found that an originating LEC may not charge a CMRS provider or other carrier for LEC-originated traffic, *id.*, ¶1042, the FCC later explained that finding was based on the fact that the originating LEC recovers the costs of origination in a local call flow from its end-user customer that places the call.[25] In contrast, where an end-user pays its IXC to make a long distance call, the originating LEC does not recover the costs of originating the call. *See* Comments of the Nebraska Rural Independent Companies, WC Docket No. 10-90 et al., at 72 (filed Aug. 24, 2011). (JA at 3532). Because the FCC does not acknowledge or explain why its prohibition on origination charges applies where the originating LEC receives no compensation from its end-user, its

[25] *TSR Wireless, LLC v. US West Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 11166, 11186 (2000) ("[T]he cost of the facilities used to deliver this traffic is the originating carrier's responsibility, because these facilities are part of the originating carrier's network. The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls."), *aff'd sub nom, Qwest Corp. v. FCC*, 252 F3d 462 (DC Cir 2001).

finding that §251(b)(5) precludes originating access charges is also arbitrary and capricious.[26]

C. Assuming the revised §251(b) framework is lawful, the FCC lacks statutory authority to establish a zero rate for reciprocal compensation.

1. The FCC lacks authority to set a specific rate for reciprocal compensation.

In *Order* ¶773 (JA at 647-648), the FCC posits the threshold question: does "bill-and-keep intrude on States' rate-setting authority by effectively setting a compensation rate of zero." The FCC answers incorrectly "no."

The FCC concedes the Supreme Court drew a distinction between setting rates and designing a methodology for setting rates - finding the FCC's prescription of a pricing methodology does not prevent States from establishing rates under §252(d). *Order*, ¶773. (JA at 647-648) "It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances." *Iowa Utilities Board*, 525 U.S. at 384.

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[26] Nor, for the reasons discussed, *infra* at 22-25, can the FCC assert that it can regulate intrastate originating access under §251(g). *Order*, ¶778. (JA at 650). *See Iowa Util. Bd.*, 525 U.S. at 481-83 nn. 8-9.

The FCC *never* explains why bill-and-keep – which results in a zero rate – does not conflict with both the statute and this Supreme Court decision. Indeed, the agency effectively concedes the trespass on the acknowledged State rate authority when it argues that zero rate "methodology" is "less burdensome than approaches that would *require…state commissions to set a uniform positive [ICC] rate*, such as $0.0007." *Order* ¶743 (JA at 633-634)(*emphasis* added) . This zero rate does not differ conceptually from the specific default rates the FCC also concedes in ¶773 (JA at 647-648) would have been rejected by the Courts.

In 1996, the Commission adopted <u>*both*</u> a pricing methodology for States to apply in pricing transport and termination functions pursuant to §252(d)(2) <u>*and*</u> "default proxies" (actual rates) for transport and termination. *Local Competition Order*, 16026-27. The Eighth Circuit on remand vacated the default prices, relying upon the Supreme Court's determination that the FCC's role was limited to resolving "general methodological issues." As the Order concedes, the Eighth Circuit found that "'[s]etting specific prices goes beyond the [Commission's] authority to design a pricing methodology,'" and "'intrudes on the States' right to set the actual rates pursuant to

§252(c)(2).'" *See, Order* ¶773 (JA at 647-648) (quoting *Iowa Util. Board v. FCC*, 219 F.3d 744, 757 (8th Cir. 2000), *aff'd in part and rev'd in part, Verizon Comm's, Inc. v. FCC*, 535 U.S. 467 (2002), and *vacated in part, Iowa Util. Board v. FCC*, 301 F.3d 957 (8th Cir. 2002)).

The FCC does the same thing here. It sets a rate relying on a provision that on its face only allows the setting of a methodology. States cannot set rates during arbitrations because the FCC has already set the rate to zero. The *Order* supplants State-set intrastate access charge rates and State-approved reciprocal compensation rates in arbitrated agreements with an FCC-set rate of zero. *Order*, ¶¶740-759. (JA at 632-641).

The FCC offers two rationales for why the States rate-setting role is not eliminated. Neither is persuasive. First, it contends that States still have a role in setting rates (albeit not the role Congress specified) because they will continue "to regulate rates carriers charge *their end-users*." *Order*, ¶776 (*emphasis* added) (JA at 649-650). But §§251-252 address *intercarrier compensation*, not retail rates which are not *reciprocal compensation*. The FCC also contends States retain a rate-setting role because they can address

through §252 arbitrations "the determination of points on a network at which a carrier must deliver terminating traffic." *Order* ¶776. (JA at 649-650). This is another non-sequitur. The Supreme Court specified the duty that the FCC's new legal theory calls in to question. It is establishing the actual reciprocal compensation *rate*, not finding points on a network at which a carrier must deliver traffic.

In sum, the FCC has established a rate, and in so doing the FCC has eliminated a task assigned by Congress to the States. The *Order* must be vacated.

2. Bill-and-keep is contrary to statute, arbitrary and capricious, and an inadequately explained departure from precedent.

The FCC asserts several statutory bases for establishing a rate of zero. None is availing.

Section 251(b)(5) cannot be read to authorize compulsory bill-and-keep because that reading conflicts with §252(d)(2), which provides "pricing standards" for States to use to determine if an ILEC's reciprocal compensation rates comply with §251(b)(5). For a reciprocal compensation arrangement to be "just and reasonable," it

must (a) provide for the "mutual and reciprocal recovery" of "costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," and (b) determine such costs "on the basis of a reasonable approximation of the additional costs of terminating such calls." 47 U.S.C. §252(d)(2)(A)(i), (ii). Because bill-and-keep imposes a compensation rate of zero, it does not allow for "mutual and reciprocal recovery" of such costs.

The FCC attempts to avoid the limitation imposed by §252(d)(2) on two grounds. Neither is persuasive. First, it argues "the pricing standard in section 252(d) simply does not apply to *most* of the traffic that is the focus of this order – traffic exchanged between LECs and IXCs."[27] *Order* at ¶774. (emphasis added). (JA at 648).

This concedes that the pricing standards do apply to some portion of traffic covered by the new zero rate (e.g., traffic exchanged between two LECs) which, as the FCC concedes,

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[27] Even if §252(d)(2)'s standards do not apply to some ILEC §251(b)(5) traffic, the FCC still cannot mandate bill-and-keep for that traffic because §201's "just and reasonable" standard would still apply. *See* Part I.C.2., *infra*.

implicates "States' authority under §252(c) or (d)." *Id.* (JA at 648). Where the statute defines what is within the agency's authority, *i.e.*, what is lawful, it "does not say a little unlawfulness is permitted." *FPC v. Texaco, Inc.*, 417 U.S. 380, 399 (1974). Because the FCC does not dispute that it has mandated bill-and-keep for traffic that *is* subject to §252(d)'s standard, its pricing rule must comply with that provision. Because it does not, it must be vacated.

The FCC also acknowledges that §252(d) requires that each carrier be allowed to recover its costs, but asserts that bill-and-keep satisfies this requirement because "[t]he Act does not specify from whom each carrier may (or must) recover those costs and, under the approach we adopt today, each carrier will 'recover' its costs from its own end-users or from explicit support mechanisms such as the federal universal service fund." *Order*, ¶775. (JA at 648-649).

Additionally, the FCC holds that bill-and-keep is consistent with §252(d)'s pricing standard because §252(d)(2)(B) references "arrangements that waive mutual recovery (such as bill-and-keep arrangements)". *Id.* (JA at 648-649). The FCC's logic is flawed. The 1996 Act is not silent as to the entity from whom the carrier

shall recover its costs. Sections 251(b)(5) and 252(d) indicate carriers will recover transport and termination costs through "*reciprocal* compensation arrangements." 47 U.S.C. §§251(b)(5), 252(d)(2)(A) (emphasis added). Even when carriers have a bill-and-keep arrangement, they still recover their costs "through the offsetting of *reciprocal* obligations." §252(d)(2)(B)(i) (emphasis added). For compensation to be "reciprocal" it must, by definition, be given by "each to the other." *Webster's New World Dictionary* 1120 (3d College Ed. 1988). By mandating carriers seek compensation from end-user customers, the FCC's bill-and-keep rule conflicts with the plain statutory text, which requires carriers exchanging traffic to compensate each other.

Second, the FCC acts arbitrarily and capriciously by assuming that carriers can recover the additional costs of call termination through end-user compensation and "where necessary, explicit universal service support." *Order*, ¶757 (JA at 640-641); *see also id.*, ¶¶746-47. (JA at 636). While "states retain the authority to regulate the rates that the carriers will charge their end-users to recover" their costs, ¶776 (JA at 649) and ILECs (but not CLECs) are given a new temporary end-user charge and universal service

support, ¶¶850-853 (JA at 684-688), ¶864 (JA at 692-693), there is no assurance that LECs can recover their termination costs from end-users. To the contrary, the FCC acknowledges that competitive considerations generally *prevent* carriers from raising end-user rates, even where they are given the flexibility to do so. ¶747 (JA at 636) ¶864 (JA at 692-693), ¶908, n.1781 (JA at 715). In short, the FCC eliminates cost recovery from other carriers based on the finding that recovery through end-user rates and universal service support is possible, while demonstrating elsewhere that these possibilities are illusory at best. The FCC's internally inconsistent reasoning violates applicable statutory requirements and renders its rejection of "claims that bill-and-keep does not allow for sufficient cost recovery", *id.* ¶746 (JA at 636), arbitrary and capricious.

Further, although the FCC characterizes call termination costs as "very nearly zero," *Order*, ¶753 (JA at 639), it acknowledges that the "additional" costs of termination may be more than nominal. *Id.* at n.1333 (JA at 639). The record confirms that termination costs are positive, not zero. *See, e.g., Reply Comments of the Public Service Commission of Wisconsin,* WC Docket No. 10-90 et al., at 2 (filed May 19, 2011)(JA at 2832). As the Commission admits, §252(d)(2)

assures carriers the right to recover those "additional costs" of termination through reciprocal compensation charges. *Order*, n.1332. (JA at 639). Such charges, by definition, do not recover implicit subsidies, they recover the carrier's *actual* termination costs. It is therefore contrary to the statute and arbitrary and capricious to relegate recovery of such costs to increased end-user charges and explicit subsidies that, in reality, are not available to LECs who incur such costs.

Adoption of bill-and-keep also conflicts with the "[r]ules of construction" in §252(d)(2)(B)(i). That provision provides an exception to the requirement of reciprocal compensation, where carriers voluntarily agree to net out offsetting costs and forgo the process of making payments. It provides that the §252(d)(2) pricing standards should not be construed "to preclude arrangements 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)." 47 U.S.C. §252(d)(2)(B)(i).

By referring to arrangements between carriers that "waive mutual recovery," the statute establishes an entitlement to the

process of mutual payments but permits carriers *voluntarily* to waive such payments through a process of mutual offsets. Such arrangements are permissible *only* where carriers agree that "the mutual recovery of costs" is possible "through the offsetting of reciprocal obligations."

Prior to the *Order*, the FCC consistently interpreted §252(d)(2)(B) to authorize bill-and-keep only where carrier rates were symmetrical and traffic was in balance. *Local Competition Order* ¶1116. In the *Local Competition Order*, the FCC recognized what the statute unambiguously provides: that in these limited circumstances, the statutory requirement of "mutual recovery of costs through the offsetting of reciprocal obligations" is satisfied through an "in kind" exchange. *Id.* The FCC found that mandatory bill-and-keep arrangements outside of these limited circumstances would not satisfy the statutory requirement of §252(d)(2) that LEC rates provide "mutual and reciprocal recovery" of carrier costs:

> [W]e find that carriers incur costs in terminating traffic that are not *de minimis*, and consequently, bill-and-keep arrangements that lack any provisions for compensation do not provide for recovery of costs.

Id., ¶1112.

Rather than acknowledging that it is reversing this finding,[28] the FCC now concludes bill-and-keep does not preclude cost recovery because carriers can recover these costs from end-users. *Order*, ¶775 (JA at 648-649). Because the FCC's departure from this position conflicts with the plain meaning of §252(d)(2)(A)(i), it must be rejected. *Chevron,* 467 U.S. 842-3 .

The FCC also attempts to justify its revised perspective with a policy discussion divorced from the statute. The FCC contends bill-and-keep brings market discipline, is less burdensome, is consistent with cost causation principles, and will bring consumer benefits. *Order* ¶¶741-759. (JA at 632-641) But this policy rationale cannot justify departing from the plain statutory language. The statute only permits bill-and-keep when it allows for "the mutual recovery of costs through the offsetting of reciprocal obligations." An agency has only the authority granted it by Congress; it cannot adopt regulations simply because it believes

[28] The FCC's conclusion in ¶752 (JA at 638-639) that the costs of terminating calls is "extremely small," lacks support. The "justification" is a one paragraph refutation of the prior pricing methodology implemented by 50 State commissions. Even if the FCC intended to reverse its prior conclusion that the costs of terminating traffic are not *de minimis*, its incomplete defense of this new conclusion is arbitrary and capricious.

them to be beneficial. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S.120, 125 (2000).

The FCC also cites 47 U.S.C. §201(b) as a basis to adopt a zero rate. *Order* ¶¶760 (JA at 641-642), 770-771 (JA at 646-647). Section 201(b) provides a general grant of rulemaking authority to the FCC. By contrast, §252(d)(2) provides specific instructions with respect to pricing for relevant traffic. As the Supreme Court made clear, "it is a basic principle of statutory construction that a specific statute . . . controls over a general provision." *HCSC Laundry* v. *United States*, 450 U.S. 1, 6 (1981); *see also Corley* v. *United States*, 129 S. Ct. 1558, 1568 (2009) ("'[A] more specific statute will be given precedence over a more general one . . .' "). (internal citation omitted). That principle forecloses the FCC's reliance on §201 as a standalone basis for adopting bill-and-keep.[29] Both the 1996 Act and §201 require rates to be "just and reasonable." 47 U.S.C. §252(d)(2)(A), §201(b). But the 1996 Act provides detailed

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[29] This principle also forecloses FCC's claim in ¶772 (JA at 647) of the *Order* that §152 (b)(1) has "less practical effect" under the 1996 Act because that section remains more specific than §201(b). Further, nothing in the 1996 Act expressly amended §201(b) to impair or supersede states' delegated §152(b)(1) authority, so §201(b), pursuant to §601(c)(1), may not be construed as doing such.

instructions for determining whether a rate meets that standard. Terms and conditions governing compensation for call termination are not "just and reasonable" unless they permit "recovery by each carrier of costs," based on "a reasonable approximation of the additional costs of terminating such calls," §252(d)(2)(A)(i)-(ii). The 1996 Act thus not only requires rates to be "just and reasonable," it also specifies exactly how a rate must satisfy that standard.

The FCC relies upon a single court decision to assert "the Commission's authority under section 201 to establish interim rates… [for traffic] which the Commission had found to also be subject to section 251(b)(5)."[30] However, where both apply, (*i.e.*, where a rate is both an ICC rate and an interstate rate), the former, more specific, standard governs. *See Nat'l Cable & Telecomms. Ass'n, Inc.* v. *Gulf Power Co.*, 534 U.S. 327, 335-336 (2002) (where a statute requires rates to be "just and reasonable" and prescribes a formula for two particular types, "[t]he specific [formula] controls . . . within its self-described scope"); *Ohio Power Co.* v. *FERC*, 954 F.2d 779, 784-785 (D.C. Cir. 1992) (contrasting SEC's "specific statutory

[30] *Order* ¶771 (JA at 646-647), citing *Core Communications*. The court's decision was limited to the special case of ISP-bound traffic. See discussion, *supra* at 20-21.

mandate to establish a cost-based price" with FERC's "general charge to establish 'just and reasonable' wholesale electric rates").

Even if §201 could be read to override the specific instructions Congress reserved to §252(d)(2), the FCC's §201(b) authority is not unbounded. The statute limits that authority by requiring "[a]ll charges, practices, classifications, and regulations" to be "just and reasonable." 47 U.S.C. §201(b). The Supreme Court held that a carrier subject to §201 "is entitled to cover its reasonable expenses and a fair return on its investment through the rates it charges its customers." *Louisiana,* 476 U.S. at 364-65.

A mandatory bill-and-keep approach fails to satisfy §201's "just and reasonable" standard for the same reasons that it fails under §252(d)(2)'s "just and reasonable" standard. In the context of intercarrier exchanges of traffic, a regulated carrier's "customer" is not an end-user but rather an interconnecting carrier, such as a LEC, IXC or CMRS provider. The interconnecting carrier has a legally binding relationship with a LEC to purchase carrier services from the LEC, typically from a tariff or interconnection agreement. *Order* ¶828. (JA at 672-673).

Yet the FCC's new bill-and-keep rule mandates that a LEC is entitled to zero compensation for certain termination services it provides to another carrier, regardless of circumstances (and the LEC cannot refuse to provide such services). *Order* ¶¶755-59. (JA at 640-641). The FCC's rule therefore violates §201(b)'s just and reasonable standard because it does not allow the LEC to recover its reasonable ICC related expenses and a fair return from "its customers," i.e., the carriers terminating traffic on the LEC's network.

The FCC's ultimate justification for mandatory bill-and-keep-that a regulated carrier can "cover its reasonable expenses and a fair return on its investment through the rates it charges its [other] customers" -- stands the notion of just and reasonable charges on its head. A LEC has ongoing contractual relationships with other LECs, IXCs, and CMRS providers to exchange traffic. *Id.* ¶¶1322-23. (JA at 845-846). Carriers enter these relationships because the parties seek a mutual exchange of obligations and benefits *from each other*. But the FCC's bill-and-keep rule guarantees that a carrier will not receive just compensation from the carrier with which it has a contractual relationship. Under the FCC's

interpretation, a LEC providing services to another carrier must look elsewhere for fair compensation: from the universal service program, *id.* ¶747 (JA at 636), or from its *other* customers, *id.* ¶746 (JA at 636), not from the entity with which it has a commercial relationship to provide service. But, as discussed, *supra*, the possibility that a carrier could recover its costs from end-users and universal service is illusory. Because the bill-and-keep rule denies a carrier just and reasonable compensation from its carrier-customer, the entity with which it has a legally binding relationship for service, the rule is invalid under §201(b).

The FCC's reliance on §201(b) as an independent basis for ratemaking authority fails for another reason. Although §201(b) requires all charges to "be just and reasonable," it specifies no procedures for the FCC to prescribe any rate as just and reasonable. The FCC's authority to set rates is 47 U.S.C. §205, which provides that the "Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge" only "after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative." None of the §205 procedures

has been utilized.[31] Rather, the FCC asserts it need not satisfy §205 hearing requirements because it has rulemaking authority to determine the just and reasonable rate. *Order* n.1390. (JA at 646). But, in determining whether the FCC has prescribed a rate, courts evaluate the impact of the FCC's action rather than its characterization of it. *Southwestern Bell Tel Co. v. FCC,* 168 F.3d 1344, 1350 (D.C. Cir. 1999). As the Second Circuit explained when holding that an FCC prohibition on tariff revisions violated §205's rate prescription requirements, §§203-205 "establish precise procedures and limitations" regarding the FCC's authority to set rates. *AT&T Co. v. FCC*, 487 F.2d 865, 873 (2d Cir. 1973). The *AT&T* Court held that "[t]here is no regulatory authority granted to the Commission . . . which permits it to circumvent the statutory plan of carrier initiated rate changes, a limited suspension period, rate refunds and rate prescriptions only after a full hearing and specific findings." *Id.* at 875.

The FCC also asserts it has independent authority under

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[31] The ordering paragraph lists §205 as authority. *Order* ¶1412. (JA at 878). Section 205 applies only to interstate traffic. Nothing in §251(i) expands §205 authority to prescribe rates for intrastate traffic. 47 U.S.C. §251(i).

§332(c) to establish bill-and-keep as a default methodology for CMRS-LEC traffic. *Order* ¶779. (JA at 650-651). But §332(c)(1)(B) provides that LECs shall interconnect with CMRS providers "pursuant to the provisions of section 201." 47 U.S.C. §332(c)(1)(B). As a result, §332(c) authorizes the FCC to mandate bill-and-keep for LEC-CMRS traffic *only* if that approach satisfies the "just and reasonable" standard set forth in §201. Because §201 does not authorize the FCC's bill-and-keep rule, the FCC cannot impose a default bill-and-keep methodology on CMRS-LEC traffic.

D. The FCC Lacks Authority to Effect Changes to Part 36 without a Joint Board Recommended Decision.

Part 36 of the FCC's rules (47 C.F.R. §36.1 et seq.) implements the requirement that a carrier's revenues and costs must be split between State and federal jurisdictions. Because the *Order*, at Appendix A (pp. 495-499) (JA at 884-888), revises Part 36 rules that impact intrastate revenue requirements without the Joint Board referral on the changes and recommended decision mandated by 47 U.S.C. §410(c), it must be vacated.

E. The FCC Lacks Authority to Instruct States not to grant §251(f)(2) Relief from Bill-and-Keep.

Even if the FCC can establish a new framework, the *Order* unlawfully circumscribes carrier §251(f)(2) rights and infringes on State jurisdiction to address lawful suspension and modification requests. In 47 U.S.C. §251(f)(2), Congress specifies that States review LEC requests to suspend or modify obligations imposed under §251(b) or (c) that could result in "significant adverse economic impact on users of telecommunications services generally," be "unduly economically burdensome," or "technically infeasible." A State may grant relief if the carrier meets these criteria *and* the requested change "is consistent with the public interest, convenience and necessity." *Id.* In the face of these clear directives, the FCC attempts to block State action, concluding:

> [I]t [is] highly unlikely that any attempt by a state to modify or suspend the federal bill-and-keep regime would be 'consistent with the public interest, convenience and necessity' as required under section 251(f)(2)(B), and we urge states not to grant any petitions seeking to modify or suspend the bill-and-keep provisions.

Order ¶824. (JA at 671-672). This portion of the *Order* must be vacated.

The FCC's pre-judgment of all potential §251(f)(2) requests lacks either a statutory or evidentiary basis. Congress assigned States, not the FCC, to determine if suspension or modification of a §251(b)(5) bill-and-keep requirement satisfies §251(f)(2) standards.[32] The FCC's *de facto* prohibition on State §251(f)(2) determinations is one more jurisdictional land grab that is inconsistent with Congressional intent.[33] Rather than allowing States to make an individualized public interest determination based on facts, the FCC pre-determines that <u>*any*</u> modification of its §251(b)(5) regime is not in the public interest. *Order* ¶824. (JA at 671-672). Even if it does

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[32] It is settled that §251(f)(2) allows States to modify federal pricing regimes. *See New Cingular Wireless PCS, LLC v. Finley*, 674 F. 3d 225, 249-50 (4th Cir. 2012) (§251(f)(2) relief encompasses modification of FCC TELRIC methodology related to §251(b)(5) pricing).

[33] Even the FCC admits, *Order* ¶824 (JA at 671-671), it could not adopt the rule that would state its conclusion. If the limited record is insufficient to adopt governing rules, then – even assuming the FCC can demonstrate it is within its authority to make a determination (which it did not and cannot) it is insufficient for the FCC to determine the adverse impacts a particular §251(f)(2) determination would have on the public interest.

not rise to the level of a *de facto* prohibition, the *Order* adopts a governing standard that dictates public interest factors that a State must weigh when evaluating §251(f)(2) requests.[34]

Moreover, the FCC's *de facto* prohibition on individualized suspension determinations is inconsistent with governing law that limits the FCC's §201(b) rulemaking authority to adopting "rules to guide the state-commission judgments." *Iowa Utilities Board*, 525 U.S. at 385 (emphasis added). This directive bars the FCC's effort to direct States how to apply 251(f)(2) standards in specific factual circumstances,[35] or to make purely legal determination of what is

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[34] The question of whether the FCC's direction to States violates §251(f)(2), §251(d), and §201(b) and the Administrative Procedures Act is ripe. The FCC has not just forecasted that individual petitions will fail the statutory criteria, it has determined which factors a State must weigh against the public interest, regardless of the facts. *See Farm-to-Consumer Legal Defense Fund v. Sebelius*, 734 F.Supp.2d 668, 693-94 (N.D. Iowa 2010) (finding ripe for review a case involving legal questions not contingent on future possibilities).

[35] Congress rejected concurrent State and federal jurisdiction over §251(f)(2) requests. *See* S.Rep. No. 104–23, 1995 WL 142161 at 206–07 (§251(i)(3)) (1995); H.R. 1555, 104th Cong. §242(e) (1995) (discussing draft legislation that would have provided concurrent jurisdiction to the FCC and State commissions under §251(f)).

against the public interest without a record that justifies adopting governing standards.[36]

Finally, the FCC's focus on public harms, to the exclusion of the other prongs of the §251(f)(2) review, is also inconsistent with the statute. In a similar context, the FCC's efforts to pigeon-hole demonstrations under §251(f) to only one prong of the applicable statutory test were found to "impermissibly disregard[]" some of the statutory criteria and therefore were "an arbitrary and unreasonable interpretation of the governing statute." *Iowa Util. Board v. FCC*, 219 F.3d 744, 759-60 (8th Cir. 2000), *aff'd in part, rev' in part,* 535 U.S. 467 (2002). Here, the FCC seeks to direct an outcome of a §251(f)(2) request by suggesting the State avoid the technical feasibility and economic harms prongs of §251(f)(2). This FCC interpretation of public harm, necessarily excluding other statutory criteria, violates the governing statute and is arbitrary and capricious.

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[36] See 5 U.S.C. §553(a)-(b) (requiring agencies to undertake rulemaking through notice and comment procedures, and "after consideration of the relevant matter presented," the agency shall issue a statement of the rule's "basis and purpose").

II. The New §251(b)(5) Framework is Arbitrary and Capricious.

Supreme Court precedent and FCC rules require ILECs to apportion investments and expenses between jurisdictions, and to recover interstate costs via specific rates and USF support. By eliminating intercarrier charges for exchanging interstate traffic, and reducing and/or eliminating USF support, the *Order* creates a "regulatory black hole" into which interstate revenue requirements are parceled, but disappear. This is unlawful, arbitrary and capricious and must be vacated and remanded.

More than 60 years ago, the Supreme Court required that telephone exchange property be apportioned between intrastate and interstate jurisdictions to avoid placing "undue burden" upon intrastate service. *Smith v. Illinois Bell Telephone,* 282 U.S. 133, 151 (1930). Both the Commission and courts long recognized that separated local telephone costs and customer rates are inextricably linked. *Id.* at 149 ("The proper regulation of rates can be had only by maintaining the limits of State and federal jurisdiction, and this cannot be accomplished unless there are findings of fact underlying the conclusions reached with respect to the exercise of each

authority."). Under *Smith*, "there must be some determination by which the federal regulator *computes rates* based on the carrier's property apportioned to interstate usage and the State regulator *conducts ratemaking* based on that portion allocated to intrastate usage." *Crockett Telephone Co. v. FCC*, 963 F.2d 1564, 1573 (D.C. Cir. 1991) (*emphasis* added); *accord Competitive Telecomms Ass'n v. FCC*, 87 F.3d 522, 530 (D.C. Cir. 1996) (remanding FCC's challenged treatment of access charge elements, noting that related costs "are real costs that would not otherwise be recovered.").

Regulators must provide carriers with a reasonable opportunity to recover the costs assigned to their respective jurisdictions, including a fair return. *See, e.g., FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). This is essential because carriers are required to serve all customers "upon reasonable request." 47 U.S.C. §201(a). *See also Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor,* Further Notice of Proposed Rulemaking, 84 F.C.C.2d 445, 457 (1981).

Consistent with these principles, the FCC adopted uniform access charge rules to "provide for the recovery of the incumbent

LEC's costs assigned to the interstate jurisdiction by the separations rules." *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long Distance Users; Federal-State Joint Board on Universal Service*, Sixth Report and Order, 15 FCC Rcd 12962, 12966 (2000). These rules included both "access" charges and a new, flat-rate "end-user common line" charge. *Id.*, 12966-71. Subsequently, the Commission deemed certain costs to be "implicit subsidies" and removed them from interstate access charges, but allowed their recovery via federal USF mechanisms. *See, e.g., id.,* ¶3; *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Second Report & Order, 16 FCC Rcd 19613, 19664 (2001).

Regardless of the precise means for recovery, the Commission made clear that regulated costs subject to its separations and accounting rules "will be included in some revenue requirement." *MTS and WATS Market Structure; Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, 1 FCC Rcd 615, 616 (1986).

The *Order* abandons this approach. RLECs must continue to serve as "carriers of last resort" and expand their service offerings to include broadband services as a condition of receiving USF support.[37] They must continue to allocate their interstate costs to specific categories and rate elements, in compliance with the Commission's rules, which remain largely unaltered by the *Order*.[38]

The Commission recognizes that carriers will be unable to fully recover their costs. Its ICC recovery mechanism, for example, bases "eligible recovery" on costs associated with providing intercarrier call termination services, but decreases that amount annually by five percent. *Order,* ¶894 (JA at 707-708).[39] It permits RLECs to recover their remaining "eligible recovery" from intercarrier compensation revenues, which decline precipitously over a nine-year period,[40] and the ARC, which is strictly limited annually and

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[37] See USF Brief, 11-12.

[38] *See* USF Brief, 44.

[39] The five percent figure was based in part on record evidence of a three percent annual average decline in costs, which was adjusted to five percent to provide an incentive to carriers to reduce costs further. *Id.*, ¶902. (JA at 711-712).

[40] Although RLECs may continue to receive transport revenue, their end office switching and reciprocal compensation revenues

subject to an absolute cap by rule. *Id.* ¶¶852-53. (JA at 685-686). Recovery of interstate costs allocated to federal USF mechanisms is likewise sharply limited without regard to costs as determined by the Commission's rules. *See* USF Brief at V. Although costs will be allocated to the interstate jurisdiction, the federal regulator will no longer "compute rates" on that apportionment, gutting the requirement in *Smith*.

Agency rules may not be arbitrary and capricious. 5 U.S.C. §706(2). Fundamental to this analysis is whether the rules are logical, internally consistent, and supported by the record. *See Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) (rule must be rational); *Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 643-44 (10th Cir. 1990) (agency decision must consider important aspects of the problem and not be implausible); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1990) (agency must address arguments before it).

Instead of responding to comments pointing out the conflict with *Smith's* requirements,[41] the Commission simply announced

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decline to zero by July 1, 2020. *Order* ¶801. (JA at 661-662).

[41] *See, e.g, Comments of Blooston Rural Carriers*, WC Docket No.

that the new cost recovery mechanism "takes rate-of-return carriers off of rate-of-return based recovery specifically for interstate switched access revenues." *Order*, ¶900. It did not explain how imposition of this new "incentive" system is rational based on past precedent. Instead of acknowledging and justifying this change in position, the FCC cites its decisions adopting incentive price cap regulation for larger carriers several years ago—decisions the FCC had stated could not apply fairly to smaller LECs. *Order*, ¶900 n.1758; *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786, 6799 (1990).

Important differences distinguish the Commission's earlier decision to impose price cap incentive regulation on the RBOCs in the 1990's and the current *Order*. Most significantly, the FCC concluded in prior orders that carriers subject to incentive regulation would have a fair opportunity to recover their costs. *Id.* ¶120. For example, price cap regulation allowed large LECs to increase interstate rates in connection with the occurrence of certain exogenous changes. *Southwestern Bell Tel. Co.*, 7 FCC Rcd

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10-90, at 24-26 (filed Apr. 18, 2011) (JA at 2647-2649); *Reply Comments of Alexicon Telecommunications Consulting*, WC Docket No. 10-90 at 10 (filed May 20, 2011) (JA at 2845).

2906, ¶32 (1992). The price cap rules also contain a provision permitting large carriers in certain circumstances to increase their rates when their earnings fall below a "low-end adjustment factor." 47 C.F.R. §§61.45(d)(1)(vii), 69.731.[42]

In stark contrast, the FCC's new reform scheme, when fully implemented, will prevent RLECs from charging carriers *any* ICC rates for many switched access services, block them from increasing other interstate rates to compensate for the loss of ICC revenues, and sharply limit alternative recovery of costs from capped and shrinking universal service mechanisms.[43]

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[42] The Commission also analyzed in detail the rates, costs, and productivity expectations implicated by the shift in the methodology of regulation. *See Nat'l Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993). A "productivity factor" was applied to rates, based on multiple studies used to project the ability of larger carriers to reduce costs. The courts carefully evaluated these details, and reversed and remanded issues the FCC did not adequately explain. *See United States Tel. Ass'n v. FCC*, 188 F.3d 521 (D.C. Cir. 1999); *Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 328-29 (5th Cir. 2001). No similar analysis was conducted here.

[43] The prospect of obtaining waiver of support limitations based on very difficult-to-meet standards does nothing to ameliorate concerns of companies facing drastic revenue shortfalls resulting from the Order. *See* USF Brief at 45-46.

No amount of cost-cutting or efficiency gains will enable rate-of-return carriers to overcome these reductions and remain financially viable, let alone realize higher earnings, as the Commission unreasonably appears to expect. *See Order* ¶ 902. (JA at 711-712).

The Commission believes rate-of-return regulation provides incentives for wasteful spending and investment, *see, e.g., Order* ¶903. (JA at 712-713). But it found no facts to justify a conclusion that specific RLEC costs were imprudently incurred or not "used and useful" in the provision of regulated services, and thus cannot justify shortfalls in cost recovery in this manner.[44] Finally, the Commission's cavalier suggestion that RLECs can recover some of their interstate costs from unregulated services, *id.*, ¶750 (JA at 637), ignores its own rules requiring strict separation of costs and revenues between regulated and non-regulated services. *See, e.g.*, 47 C.F.R. §§64.901-5.

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44 The FCC has in the past investigated whether specific costs claimed by an RLEC are "used and useful" in the provision of regulated services and has, after hearings, disallowed recovery when such costs were not justified. *See, e.g., Beehive Telephone Company, Inc.*, Order Designating Issues for Investigation, 13 FCC Rcd 20204 (1998); Memorandum Opinion & Order, 14 FCC Rcd 1224 (1998).

The Court accordingly should vacate the Commission's rules insofar as they require mandatory reductions and eventual elimination of ICC switched access charges without opportunity for RLECs to recover costs assigned to the interstate jurisdiction elsewhere. The Court should instruct the agency to explain how elimination of such charges, in combination with limits imposed on end-user rates and alternative universal service mechanisms, can be harmonized with constitutional and statutory ratemaking requirements and the Commission's cost accounting and allocation rules.

III. The Order Violates Due Process and Raises Serious Constitutional Questions.

A. The Order Violates Due Process.

Review for compliance with the Administrative Procedures Act is *de novo.* *National Coal v. Dir., OWCP,* 854 F.2d 386, 389 (10th 1988). Courts vacate APA rulemakings that fail to substantially comply with the requirement for public participation or which provide no meaningful opportunity for comment. *Prometheus Radio v. FCC,* 652 F.3d 431, 450-454, n. 25 (3rd Cir. 2011).

Section 553(c) of the Administrative Procedures Act, 5 U.S.C.

§553(c), requires an agency to establish disciplined decision-making by providing a meaningful opportunity for participation and addressing relevant and significant comments. *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998). While someone always seeks the last word, a "meaningful opportunity for comment" cannot preclude parties with substantial claims and property interests from being heard. It is a "fundamental proposition" that parties be given an effective chance to respond to crucial facts. *American Ass'n of Meat Processors v. Bergland*, 460 F.Supp. 279, 282 (D.D.C. 1978).

Here, the FCC relied on *ex parte* practices to decide matters in a comingled rulemaking and adjudicatory proceeding that went well beyond "informal rulemaking of a policymaking sort."[45] It decided substantial financial and property interests by relying in part on unchallenged *ex parte* filings submitted so late in the decision-making process as to deny due process by precluding a meaningful opportunity to be heard.

From October 7 through October 19 (JA at 3765-3759), just two days before the October 21 blackout date, the FCC inserted

[45] *Sierra Club v. Costle,* 657 F.2d 298, 398, 400 (D.C. Cir. 1981).

over 110 documents. (JA at 3847-3853, 3918-3921, 3947-3961) They were voluminous and complex filings on issues decided in this comingled proceeding.

At least 775 additional *ex parte* contacts occurred from July 29 to October 21, 2011. (JA at 3771-3754). Many involved quantitative data and analyses, some of it confidential and unavailable unless a party executed a confidentiality agreement in anticipation of the deluge. *Ex parte* filings increased as the October 21, 2011, "blackout" loomed. (JA at 3754-3766).

AT&T alone made five contacts on that date discussing intercarrier compensation (JA at 3985-3991), quantitative USF high-cost support (JA at 3992-3997), federal subscriber line charge caps (JA at 3984), and eligible telecommunications carrier obligations (JA at 3982-3983, 3992-3995).

On October 20, 2011, Verizon filed an *ex parte*. (JA at 3980-3981). Verizon addressed access recovery charges "that we understand are addressed in the Commission's draft order…" which provided "modest additional revenues from their own end-users *(at the holding company level)* as part of changes to the intercarrier compensation system." (JA at 3980). Verizon concluded that

flexibility in surcharges was allowed under 47 U.S.C. §202. The meeting also addressed the critical State issue of allowing a *holding company* to impose surcharges compared to an intrastate affiliate.

The Verizon and AT&T contacts are two examples of numerous similar occurrences that cumulatively deny adequate due process. Interested parties could not (1) timely detect and respond to these *ex parte* contacts; (2) arrange and hold a meeting or telephone conversation to dispute them; or (3) file a substantive response before the October 21, 2011, "blackout period."

While a confidentiality agreement might provide access to proprietary information and the FCC's rules may permit a two-day response period for "blackout" date filings, those options were insufficient given the timing, volume, and complexity of filings made so proximate to the blackout date as to deny due process. This *Order* reveals a systematic abuse of the "permit but disclose" *ex parte* process that produced a deeply flawed order that contravenes federal law.

Courts have previously vacated FCC rulemakings where there was no realistic notice or opportunity to be heard. *Prometheus Radio,* 652 F.3d at 450-454. A similar due process violation occurs

here in a proceeding that was a rulemaking and a determination on conflicting private claims to a valuable privilege. This Court should review *de novo,* vacate the accompanying rules, and reinstate the existing rules. *Prometheus Radio,* 652 F.3d at 453, n. 25.

B. The Order Usurps State Sovereignty

The preemption of State authority over intrastate telecommunications raises serious constitutional issues; it erodes State sovereignty on matters critical to economic regulation. Such constitutional issues are not subject to *Chevron* deference. *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999).

The FCC preempts State laws regulating State certified carriers governed under State law and policy. Sovereigns must implement local rate changes for these carriers to receive support. This coercion replaces State rates with federal rate floors, ceilings, and surcharges. It undermines State authority over intrastate revenues, broadband deployment and services, and universal service.

This undermines sovereignty because it destroys political accountability; State officials are responsible to prevent harm while federal officials dictate policy. An FCC rule allowing an interstate

holding company to shift an intrastate affiliate's costs among sovereigns without those sovereign's consent also undermines sovereignty because the sovereigns retain public accountability but lack control over the intrastate rate results.

The FCC replaces State rate law and broadband network deployment benchmarks with federal mandates that force States to act -- even though not even Congress can force a State to regulate.

In *Nat'l Fed'n of Ind. Businesses v. Sibellius,* 132 S.Ct. 2566 (2012), the Supreme Court struck down a provision in Congress' health care legislation. The provision shifted from encouragement to a coercion that undermines our co-equal federal-State structure because it creates a system that vests power in one central government. The *Order* does that.

This Court must invalidate this FCC regulatory "gun to the head" which initially strikes at regulated carriers but hits at the heart of the States' sovereignty.

Respectfully submitted,

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

BY: /s/ James Bradford Ramsay

James Bradford Ramsay
General Counsel
National Association of Regulatory Utility Commissioners
1101 Vermont Avenue, Suite 200
Washington, DC 20005
Tel. 202.898.2207
jramsay@naruc.org

July 17, 2013

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July 17, 2013

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I hereby certify that, on July13, 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 conformed Joint Intercarrier Compensation 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. I have also this day mailed via Federal Express 20 copies of this brief for filing with the Court. This document is available for viewing and downloading on the CM/ECF system.

/s/ James Bradford Ramsay

July 17, 2013