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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NO. 11-9900

IN RE: FCC 11-161

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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GLOSSARY

Act	The Communications Act of 1934
CAF	Connect America Fund
COLR	Carrier of Last Resort
ETC	Eligible Telecommunications Carrier
FCC	Federal Communications Commission
FNPRM	Further Notice of Proposed Rulemaking
LEC	Local Exchange Carrier
NPRM	Notice of Proposed Rulemaking
USF	Universal Service Fund
WCB	Wireline Competition Bureau

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ON PETITIONS FOR REVIEW OF ORDERS OF THE
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FEDERAL RESPONDENTS' FINAL RESPONSE TO THE ADDITIONAL UNIVERSAL SERVICE FUND ISSUES BRIEF OF PETITIONERS

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Communications Commission ("FCC") submits this supplemental brief in response to the miscellaneous challenges to the *Order*'s[1] universal service reforms asserted in the Additional Universal Service Fund Issues Brief of Petitioners. These challenges fare no better than those addressed in the FCC's Principal USF Brief and the FCC's Response to the Wireless Carrier USF Principal Brief, and the Court should reject them.

I. To encourage the deployment of broadband facilities in underserved areas, the FCC offered incumbent local exchange carriers ("LECs") subject to price cap regulation a one-time opportunity to claim federal high-cost

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[1] *Connect America Fund*, 26 FCC Rcd 17663 (2011) ("*Order*") (JA at 390-1141).

universal service support conditioned on a commitment to deploy a broadband-capable network in a state. Petitioners argue that the *Order* violates the FCC's principle of "competitive neutrality." But the FCC reasonably found that principle outweighed by the requirement that Congress placed in sections 254(b)(2) and (3) of the Communications Act of 1934 (the "Act"), 47 U.S.C. §254(b)(2), (3), to promote access to advanced telecommunications and information services.

Moreover, substantial record evidence showed that incumbent LECs, which have networks serving broad geographic areas, are likely to have the only wireline facilities in the areas eligible for support, and so are uniquely well positioned to deploy broadband facilities rapidly and cost-effectively. The FCC thus reasonably concluded that it could maximize broadband deployment and minimize the burden on the federal universal service fund ("USF") by providing incumbent LECs a limited right of first refusal to high-cost support.

II. Petitioners claim that the FCC was required by 47 U.S.C. §410(c) to obtain a recommendation from the Federal-State Joint Board on Separations before adopting the universal service and intercarrier compensation reforms in the *Order*. No Joint Board referral was required, however, because the *Order* did not formally amend the FCC's separations rules; instead, it revised the distribution of subsidies.

III. The FCC eliminated high-cost universal service support in areas served by an unsubsidized provider in order to more efficiently support voice and broadband. Petitioners contend that this violates an alleged *quid pro quo* established by 47 U.S.C. §214(e) and 47 U.S.C. §254(e), pursuant to which eligible telecommunications carriers ("ETCs") provide and advertise voice service in exchange for universal service support. That argument fails because the statute does not entitle a carrier to receive universal service support merely by virtue of its ETC designation. Nor have petitioners demonstrated that their ongoing service obligations under section 214(e)(1) will be too onerous without federal subsidies. Should that situation arise, petitioners may seek reinstatement of their universal service support through a waiver process provided by the *Order*, or they could ask the FCC to forbear from their section 214(e)(1) obligations under 47 U.S.C. §160(a).

IV. Allband Communications Cooperative's claims – many of which duplicate those of other petitioners – are waived or unripe, and all lack merit.

ARGUMENT

I. THE FCC REASONABLY OFFERED PRICE CAP CARRIERS UNIVERSAL SERVICE SUPPORT CONDITIONED ON A STATE-LEVEL COMMITMENT TO DEPLOY BROADBAND FACILITIES.

To encourage "the rapid deployment of broadband services over a large geographic area," *Order* ¶177 (JA at 458-459), the FCC offered incumbent LECs subject to price cap regulation a one-time opportunity (akin to a right of first refusal) to obtain federal high-cost universal service support, conditioned on a commitment to deploy a broadband-capable network to specified areas within a state, *id*. ¶¶171-178 (JA at 456-459). Should they decline that option, "support … will be awarded by competitive bidding, and all providers will have an equal opportunity to seek USF support." *Id*. ¶178 (JA at 459). Moreover, "even where the [price cap carrier] makes a state-level commitment, its right to support will terminate after five years," at which time the FCC expects to distribute all support through a competitive bidding process. *Id*. This "interim rule" is entitled to substantial deference. *See, e.g., Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105-06 (D.C. Cir. 2009) ("*RCA I*") (affirming an interim cap on universal service subsidies to competitive ETCs); FCC Response to Wireless Carrier USF Principal Br. 27 n.6.

Petitioners contend that this interim rule is inconsistent with 47 U.S.C. §214(e)(2), which provides that a "State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission." Br. 10. According to petitioners, section 214(e)(2) requires that the statute's universal service principles be served *only* by providing support for multiple ETCs in one area. Br. 9-10. As the FCC explained, however, "nothing in the statute compels that every party eligible for support actually receives it." *Order* ¶318 (JA at 507); *see also* FCC Principal USF Br. 62-63; FCC Response to Wireless Carrier USF Principal Br. 36-40. Moreover, "the statute's goal is to expand availability of service to users," *Order* ¶318 (JA at 507), "not to subsidize competition through universal service in areas that are challenging for even one provider to serve." *Id.* ¶319 (JA at 507); *see also* FCC Response to Wireless Carrier USF Principal Br. 31; *id.* at 36-37 (discussing the FCC's decision to distribute universal service support through a separate Mobility Fund to a single wireless provider in each area eligible for subsidies). In all events, it was at least reasonable for the FCC to read section 214(e)(2) as it did, and its result should be upheld under *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

Petitioners further argue, Br. 10-14, that the interim state-level commitment procedure violates the FCC-created principle of "competitive neutrality," which generally holds that "universal service support mechanisms … should not unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another." *Order* ¶176 (JA at 458) (internal quotation marks omitted). But, as the FCC found, petitioners' demand that the agency "adher[e] to strict competitive neutrality at the expense of the state-level commitment process would unreasonably frustrate achievement of the universal service principles of ubiquitous and comparable broadband services and promoting broadband deployment." *Order* ¶178 (JA at 459). It would also "unduly elevate the interests of competing providers over those of unserved and under-served consumers … as well as … consumers and telecommunications providers who make payments to support the Universal Service Fund." *Id.*; *cf. Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) ("The Act only promises universal service, and that is a goal that requires sufficient funding of *customers*, not *providers*").

The FCC adopted the competitive neutrality principle pursuant to 47 U.S.C. §254(b)(7). As such, it is one of several principles that guide its exercise of discretion in distributing USF support. *See Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8801-03 (¶¶48 & 52) (1997). In this case, the agency reasonably found its own goal of competitive neutrality "outweighed" by the statutorily mandated principles in section 254(b)(2) and (3), which direct that "[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation," and that consumers in rural areas should have access to advanced services that are reasonably comparable to those in urban areas. *Order* ¶174-178 (JA at 457-459). As the FCC explained, incumbent LECs serving price cap areas are "in a unique position to deploy broadband networks rapidly and efficiently" because they already have networks serving large geographic areas. *Id*. ¶177 (JA at 458-459). The FCC, as the expert agency entrusted by Congress to administer the Act, "enjoys broad discretion when conducting exactly this type of balancing" of sometimes conflicting objectives. *RCA I*, 588 F.3d at 1103 (citing *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999)); *see also Qwest Corp. v. FCC*, 258 F.3d 1191, 1199 (10th Cir. 2001) (holding that "[t]he FCC may balance the [section 254(b)] principles against one another").

Moreover, petitioners' claim that the FCC failed to "minimize disparities in treatment" is without merit. Br. 11. The *Order* does not "exclude [competitive] ETCs from USF support entirely." Br. 8. To the contrary, the support following exercise of an incumbent LEC's state-level commitment is available to that LEC for only five years, and during that period, competitive ETCs may compete for high-cost support in areas where the incumbent LEC declines a state-level commitment. *Order* ¶514 (JA at 558).

Petitioners further contend that the FCC's adoption of the interim state-level commitment procedure "is not supported by the record." Br. 12. Petitioners challenge the FCC's finding in paragraph 175 of the *Order* (JA at 451-458) that "the incumbent LEC is likely to have the only wireline facilities" capable of supporting broadband in areas eligible for universal service support. Br. 12-13. Relying on comments filed more than a decade ago, petitioners assert "that in rural areas, price cap carriers' facilities are often old and ill-maintained." *Id*. at 13.

Petitioners' arguments miss the mark – the *Order* adopted the state-level commitment procedure based on the existing *availability* of incumbent LEC facilities, *even if* those facilities must be upgraded. As the FCC found, while competitive ETCs "may be well situated to make broadband commitments with respect to relatively small geographic areas," "incumbent LECs have had a long history of providing service throughout the relevant areas … [and] generally have already obtained the ETC designation necessary to receive USF support throughout large service areas." *Order* ¶177 (JA at 458-459). Thus, the FCC reasonably predicted that it could get more "bang for its buck" by providing subsidies to incumbent LECs to upgrade their extensive existing facilities than by providing subsidies to competitive ETCs, once designated,[2] to deploy entirely new facilities. That predictive judgment is entitled to deference. *See, e.g., Franklin Sav. Ass'n v. Dir., Office of Thrift Supervision*, 934 F.2d 1127, 1146-47 (10th Cir. 1991); *Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012) ("*Qwest Phoenix*").

The FCC's prediction, moreover, was reasonably based on two findings. First, because the *Order* eliminates support to all carriers in price cap areas served by an unsubsidized competitor, the incumbent LEC is likely to be the only provider with wireline facilities already deployed in the areas where there is no unsubsidized competitor. *Order* ¶175 (JA at 457-458).[3] Second, because "incumbent LECs generally continue to have carrier of last

[2] *See* 47 U.S.C. §214(e)(2), (6); FCC Principal USF Br. 24-25.

[3] An "unsubsidized competitor" is "a facilities-based provider of residential fixed voice and broadband service that does not receive high-cost support." 47 C.F.R. §54.5.

resort ["COLR"] obligations for voice services," *id*., they must maintain networks capable of "ensur[ing] service to consumers who request it" throughout their designated service area. *Id*. ¶177 n.290 (JA at 458-459); *see also id*. ¶862 (JA at 691-692). By contrast, "competitive LECs typically have not built out their networks subject to COLR obligations" and, as a consequence, often serve much smaller geographic areas. *Id*. ¶864 (JA at 692-693).

Indeed, wireline competitive ETCs, like the members of the Rural Independent Competitive Alliance, received only $23 million of high-cost universal service support annually prior to the *Order*. By contrast, price cap carriers received more than $1 billion annually. *Id.* ¶¶7, 158, 501, 503 n.834 (JA at 396, 452, 553, 554-555). That differential underscores the fact that competitive ETCs serve very few lines relative to the price cap carriers.

There is likewise no basis for petitioners' claim that the FCC ignored evidence that price cap carriers have "underperformed in rural communities." Br. 14. Although evidence in the record showed that "more than 83 percent" of the areas in the nation that remain unserved by broadband are in locations subject to price cap regulation, the FCC attributed the lack of broadband deployment in those areas not to price cap carriers' lack of commitment, but to flaws in the pre-existing system. *Order* ¶158 (JA at 452). In particular, price cap carriers have only "received approximately 25 percent of high-cost support," despite serving 95 percent of the Nation's access lines. *Id.* By contrast, annual funding for rate-of-return carriers, which serve "less than five percent of access lines in the U.S.," totals nearly one-half of annual high-cost support (*i.e.*, approximately $2 billion of the $4.5 billion budget). *Id.* ¶¶26, 126 (JA at 401, 438-439).

In other words, the record showed the need for the very broadband-promoting reforms that the FCC adopted. To address the shortcomings of the existing system, which "fail[ed] to direct money to all parts of rural America where it is needed," the *Order* reasonably increased high-cost universal service support for price cap areas (from approximately $1 billion to $1.8 billion annually). *Id.* ¶¶7, 158 (JA at 396, 452). Moreover, price cap carriers that accept a state-level commitment must meet certain broadband deployment milestones, *id.* ¶¶160-163 (JA at 453-454), and like all USF recipients, they will be subject to oversight and accountability measures, *id.* ¶¶74-114 (JA at 418-436).

In short, the FCC's expert judgments about how to best promote universal service were consistent with the statutory principles and supported by substantial evidence. *See, e.g., Cordero Mining LLC v. Sec'y of Labor ex rel. Clapp*, 699 F.3d 1232, 1236 (10th Cir. 2012).

II. THE FCC WAS NOT REQUIRED BY 47 U.S.C. §401(C) TO MAKE A JOINT BOARD REFERRAL BEFORE ADOPTING THE REFORMS IN THE *ORDER*.

The FCC has exclusive jurisdiction to regulate, among other things, *interstate* common carrier services, including rates, 47 U.S.C. §§151, 152(a), while the states generally regulate *intrastate* services and rates, 47 U.S.C. §152(b). "[T]elephone carriers often use the same facilities to provide both intrastate and interstate service." *Crockett Tel. Co. v. FCC*, 963 F.2d 1564, 1566 (D.C. Cir. 1992). Thus, "[t]he cost of these facilities," which are "obviously significant components of the ratebase in each system, must be apportioned between the federal and state jurisdictions." *Id*.

Pursuant to section 221(c) of the Act, 47 U.S.C. §221(c), the FCC "may adopt rules governing the apportionment of the costs between state and federal jurisdictions under a formal regulatory process known as 'jurisdictional separation.'" *Crockett Telephone*, 963 F.2d at 1566. Before exercising that authority, however, the FCC must "refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations … to a Federal-State Joint Board." 47 U.S.C. §410(c). The Joint Board "shall prepare a recommended decision" for the FCC's consideration, *id*., but "the states are not entitled to vote on final separation decisions." *State Corp. Comm'n of the State of Kansas v. FCC*, 787 F.2d 1421, 1426 (10th Cir. 1986).

Under section 410(c), however, "[j]oint board consultation is required *only* in proceedings regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate jurisdictions." *Sw. Bell Tel. Co. v. FCC*, 153 F.3d 523, 556 (8th Cir. 1998) (emphasis added); *see also State Corporation Commission*, 787 F.2d at 1423 (explaining that the "process of 'jurisdictional separations' determines how the[] costs" of "items of telephone equipment [that] are used for both interstate and intrastate calls" will be "allocated for ratemaking purposes"). There was no such jurisdictional separation here: the *Order* did not reallocate costs for any type of telecommunications plant or any operating expense between the federal and the state jurisdictions. *See also* FCC Principal ICC Br. 41 n.17.

Petitioners nevertheless claim that the FCC violated section 410(c) because it made changes to its rules at 47 C.F.R. Part 36 without first making a Joint Board referral. Br. 19-20. Petitioners are mistaken. Not all the rules contained in Part 36 concern jurisdictional separation of costs. Part 36 also contains universal service rules governing high-cost loop support ("HCLS") for rate-of-return carriers. *See* 47 C.F.R. Part 36 Subpart F (entitled "High

Cost Loop Support"). These are the only Part 36 rules that the FCC changed, and they have nothing to do with jurisdictional separations.

Thus, although petitioners assert that "[t]he FCC limited the portion of nationwide loop cost expense that certain carriers could allocate to the interstate jurisdiction," Br. 19, the rule petitioners challenge (47 C.F.R. §36.603) simply adjusted the amount of universal service *funding* that is prospectively available for HCLS. The rule change did not involve cost allocation.

Likewise, the *Order* did not change the amount "carriers c[an] allocate to the interstate jurisdiction" by eliminating Safety Net Additive Support, or by imposing new limits on recoverable corporate operations expenses, capital expenses, and operating expenses. Br. 19-20 (citing 47 C.F.R. §§36.605(a), 36.621(a)(4), 36.621(a)); *see also* FCC Principal USF Br. 40-46, 48-50 (explaining the substantive rule amendments). Those amended rules merely prohibit carriers from obtaining universal service *subsidies* to cover certain costs already allocated to the federal jurisdiction. The amended rules did not change the jurisdictional allocation of costs. Because the FCC's rule changes do not involve jurisdictional separations, they do not implicate the Joint Board process specified in section 410(c).

Petitioners alternatively argue that, by reducing universal service support and intercarrier compensation revenues, the *Order* "*essentially* reassigned" costs "to the intrastate jurisdiction." Br. 21-23 (emphasis added). The Eighth Circuit in *Southwestern Bell*, 153 F.3d at 556, however, rejected a similar argument, holding that only formal changes to the allocation of costs require consultation with the Joint Board. In that case, the petitioner argued that section 410(c) obliged the FCC to make a referral to the Joint Board before requiring local telephone companies to apply federal universal service funds to their interstate revenue requirements – a policy the petitioner contended would lead to an "intrastate revenue shortfall." *Id*. at 554-56. The Eighth Circuit found no merit in petitioner's claim, explaining that "the FCC was not allocating jointly used plant, nor was it changing the proportions for jointly used plant to interstate and intrastate jurisdictions." *Id*. at 556. Here, as in *Southwestern Bell*, none of the rule changes identified by petitioners formally "allocat[ed] jointly used plant" or "chang[ed] the proportions for allocating jointly used plant to interstate and intrastate jurisdictions." *Id*. Therefore, a referral to the Joint Board was not necessary.

Petitioners are thus wrong when they argue that "even where the proposed rule changes do not explicitly change the separations rules, but nevertheless effect allocations between jurisdictions, Joint Board referral is required." Br. 18. *Crockett Telephone*, 963 F.2d 1564, Br. 18, is not to the contrary. That case simply notes that a section 410(c) referral is only "mandatory when the Commission chooses to adopt a formal separations methodology," which the FCC did not do here. *Id.* at 1571. Likewise, *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 416 (5th Cir. 1999), Br. 18, concerned whether the FCC properly obtained the Joint Board's recommendation concerning certain rule changes, not whether the statute required a referral to the Joint Board in the first place.

In any event, petitioners' argument is based on a misunderstanding of the *Order*, because the FCC made clear that states need *not* ensure that carriers recover reductions in intercarrier compensation revenues under the agency's reforms. Thus, petitioners' assertion that states have been "left" with the responsibility to recover certain carrier access costs, Br. 22-23, overlooks the *Order*'s explicit holding that "states will not be required to bear the burden of establishing and funding state recovery mechanisms for intrastate access reductions." *Order* ¶795 (JA at 459).

Rather, that responsibility lies with the FCC. To that end, the *Order* established a federal recovery mechanism to "provide carriers with recovery for reductions to eligible interstate and intrastate [intercarrier compensation] revenue." *Id.*; *see generally id.* ¶¶847-920 (JA at 683-723). And the backstop Total Cost and Earnings Review process permits a carrier to make a comprehensive cost showing to the FCC that additional recovery is needed to avoid a taking. *Id.* ¶924 (JA at 723-724); *see also* FCC Principal ICC Br. 48-49.

Further, the *Order*'s waiver process allows "any carrier negatively affected by the universal service reforms … to file a petition for waiver that clearly demonstrates that good cause exists for exempting the carrier from some or all of those reforms, and that waiver is necessary and in the public interest to ensure that consumers in the area continue to receive voice service." *Order* ¶¶539-44 (JA at 566-569). The FCC has already granted two such waivers. *See* FCC Principal USF Br. 35-36.

III. THE FCC WAS NOT REQUIRED TO MODIFY ETC SERVICE OBLIGATIONS.

The FCC found that "USF support should be directed to areas where providers would not deploy and maintain network facilities absent a USF subsidy, and not in areas where unsubsidized facilities-based providers already are competing for customers." *Order* ¶281 (JA at 494) (internal quotation marks omitted). The FCC thus adopted rules that eliminate universal service support in areas where an "unsubsidized competitor" offers voice and broadband service.[4] *See* FCC Principal USF Br. 59-62.

According to petitioners, "[t]he Order is contrary to [47 U.S.C.] §214 because it requires ETCs to provide services for which the carrier is not receiving, and cannot receive, support." Br. 25. As the FCC explained, and as is addressed in more detail in other FCC briefs, "nothing in the statute compels that every party eligible for support actually receive it." *Order* ¶318 (JA at 507); *see* FCC Response to Wireless Carrier USF Principal Br. 37-40; FCC Principal USF Br. 62-63. This is true even where a carrier is the only ETC designated in a service area until the state designates another ETC. *See* Br. 25-26 (citing 47 U.S.C. §214(e)(4)).

While every "community or any portion thereof" must be served by at least one ETC, *see* 47 U.S.C. §214(e)(3), ETC designation does not necessarily entitle a carrier to federal subsidies. In some areas, like the District of Columbia, the designated ETC receives no high-cost universal service support, even though it must comply with the service obligations in

[4] In areas served by price cap carriers, an ETC will be ineligible to receive support in CAF Phase II for any census block in which an "unsubsidized competitor" offers services. *Order* ¶¶103-04, 170-171 (JA at 428-429, 456). In areas served by rate-of-return carriers, an ETC will be denied support, after a three-year transition period, only if one or more "unsubsidized competitors" serve an entire service area as designated under 47 U.S.C. §214(e)(5). *Id.* ¶¶ 281-284 (JA at 494-495).

section 214(e)(1) of the Act.[5] This reflects the fact that there are "advantages to obtaining and maintaining an ETC designation *regardless* of whether a[n] … ETC receives high-cost support." *High-Cost Universal Service Support*, 23 FCC Rcd 8834, 8847-48 (¶30) (2008) (emphasis added). "In particular," an ETC could be eligible to receive "low-income universal service support" from a separate federal mechanism and "universal service support at the state level." *Id.*; *see* FCC Response to Wireless Carrier USF Principal Br. 39.[6] Thus, it is not correct that ETC status confers no benefits if a carrier does not obtain high-cost support.

Tellingly, while petitioners claim that they are entitled to high-cost universal service support, they fail to explain why they need it to serve consumers. The FCC reasonably found that, if an area is served by a carrier without federal subsidies, there is no need to provide high-cost support to any

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[5] *See Universal Service Monitoring Report*, Federal-State Joint Board on Universal Service, Table 2.12 at p. 2-16 (2011), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-311775A1.pdf

[6] For example, several ETCs that have been designated by the Colorado Public Utilities Commission pursuant to 47 U.S.C. §214(e)(2) are *only* eligible for federal low-income support and not the federal high-cost support demanded by petitioners. *See, e.g., In the Matter of the Application of Cricket Communications, Inc. for Designation as an Eligible Telecommunications Carrier in the State of Colorado*, 2011 WL 5056349 (Colo. P.U.C. 2011); *In the Matter of the Application of Virgin Mobile USA, L.P. for Limited Designation as an Eligible Telecommunications Carrier in the State of Colorado*, 2012 WL 1038132 (Colo. P.U.C. 2012).

carrier. *Order* ¶281 (JA at 494); *see* FCC Principal USF Br. 59-62. That common-sense policy judgment is entitled to substantial deference. *IMC Kalium Carlsbad, Inc. v. Interior Bd. of Land Appeals*, 206 F.3d 1003, 1012 (10th Cir. 2000).

Nor is there merit to petitioners' argument that, because the unsubsidized competitor has no legal obligation to advertise and offer service to every customer, it will engage in "cream skimming" and only serve the low-cost portions of the relevant area, leaving the ETC with the burden to serve the high-cost portions. Br. 26-27. In areas served by rate-of-return carriers, a new rule eliminates high-cost support only where an unsubsidized competitor already serves 100 percent of the relevant service area. *Order* ¶283 (JA at 494-495). Likewise, in areas served by price cap carriers, a new rule eliminates high-cost support in a census block only where an unsubsidized competitor already serves that census block. *Id.* ¶¶170-171 (JA at 456). The FCC predicted that an "unsubsidized competitor" – which, by definition, is a facilities-based provider that is not eligible for support yet serves the incumbent LEC's geographic service area, *see* p.9 n.3, above – would have an incentive to recover its investment by continuing to serve every possible customer. This was reasonable. *See* FCC Principal USF Br.

60-61, citing *Nuvio Corp. v. FCC*, 473 F.3d 302, 309 (D.C. Cir. 2006), *Melcher v. FCC*, 134 F.3d 1143, 1152 (D.C. Cir. 1998).

Nonetheless, the *Order* recognized the possibility that ETCs may be required to provide service in areas where they no longer receive support, or receive reduced support. Accordingly, in an attached Further Notice of Proposed Rulemaking ("FNPRM"), the FCC sought comment on whether it should "relax or eliminate ETCs' voice service obligations" under section 214(e)(1) in those circumstances. *Order* ¶1095 (JA at 790-791).

Petitioners contend that it was arbitrary and capricious for the FCC to defer consideration of that issue. Br. 27-29. However, that decision was well within the agency's broad discretion to define the scope of its own proceedings, *see FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940), and to proceed incrementally, *see Sorenson Commc'ns, Inc. v. FCC*, 567 F.3d 1215, 1222 (10th Cir. 2009). And petitioners have not suffered any harm as a result: while the *Order* adopted rules that eliminate support in areas served by an unsubsidized competitor, those rules have yet to be implemented.

Once the rules become effective, petitioners have avenues to seek relief should their continuing section 214(e)(1) obligations prove too onerous. First, petitioners may ask the FCC to exempt them from universal service support reductions if they can show that those reductions would imperil their financial viability and threaten service to consumers. *Order* ¶¶539-544 (JA at 566-569). Second, petitioners may seek forbearance from the requirements in section 214(e)(1) under section 10 of the Act, 47 U.S.C. §160. Pursuant to that provision, the FCC "shall forbear from applying any regulation or any provision of [the] Act to a telecommunications carrier … in any or some of its geographic markets," if certain conditions are met.[7] The FCC has forborne from imposing other section 214(e) requirements in the past, *see Order* ¶1097 & n.2226 (JA at 791-792) (citing FCC precedent), and sought comment in the *Order* on "us[ing] case-by-case forbearance to adjust carriers' section 214(e)(1) service obligations," *id*. ¶1097 (JA at 791-792).

IV. ALLBAND'S MULTIPLE CHALLENGES ARE PROCEDURALLY BARRED AND, IN ANY EVENT, BASELESS.

A. Statement Of Additional Facts.

Petitioner Allband presents a series of discrete claims which, as we demonstrate below, are both procedurally barred and fail on the merits. We

[7] These conditions are: "(1) such regulation or provision is not necessary to ensure that the charges [or] practices … for, or in connection with that telecommunications carrier … are just and reasonable … [;] (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest." 47 U.S.C. §160(a); *see also Qwest Phoenix*, 689 F.3d at 1217.

include the following brief supplemental statement of facts to place these claims in context.

The *Order* adopted various reforms to more efficiently support voice and broadband services with federal universal service support. Among other reforms, the *Order* imposed a presumptive per-line cap of $250 per month – to be phased in over three years – on total high-cost universal service support for all ETCs. *See Order* ¶¶274, 279 (JA at 492, 493); 47 C.F.R. §54.302.

The *Order* also adopted a new rule (the "benchmarking rule"), which uses regression analysis to establish "benchmarks," or caps, to limit the reimbursable capital and operating expenses in the formula used to determine HCLS for rate-of-return carriers. *Id.* ¶214 (JA at 470); 47 C.F.R. §36.621(a)(5); FCC Principal USF Br. 41-47, 49-50. The FCC delegated authority to its Wireline Competition Bureau ("WCB") to establish the precise methodology to implement the rule. *Order* ¶217 (JA at 471). WCB completed that task in an April 25, 2012, Order, *see Connect America Fund*, 27 FCC Rcd 4235 (WCB 2012) ("*Benchmarking Order*"), that was subsequently affirmed in part, and modified in part, by the full Commission. *See Connect America Fund*, 28 FCC Rcd 2572 (Feb. 27, 2013) ("*Sixth Order on Reconsideration*").

Finally, the *Order* provides a waiver process for carriers that can demonstrate that "reductions in current support levels would threaten their financial viability, imperiling service to consumers in the areas they serve." *Order* ¶539 (JA at 566); *see generally id.* ¶¶539-544 (JA at 566-569). The FCC did not "expect to grant waiver requests routinely." *Id*. ¶540 (JA at 567). With respect to the $250 per-line cap, the FCC also warned carriers that it "d[id] not anticipate granting any waivers" for an "undefined duration," and "expect[ed] carriers to periodically re-validate any need for support above the cap." *Id*. ¶278 (JA at 493).

Shortly after the *Order* was released, Allband sought waivers of both the $250 per-line cap and the benchmarking rule. *See Allband Communications Cooperative Petition for Waiver of Certain High-Cost Universal Service Rules*, 27 FCC Rcd 8310 (WCB 2012) ("*Allband Waiver Order*"). After evaluating Allband's request pursuant to its delegated authority, *see Order* ¶544 (JA at 569), WCB found "good cause to grant a waiver of [the $250 per-line cap] for three years," *Allband Waiver Orde*r ¶10. "During this time," WCB "expect[ed] Allband to actively pursue any and all cost-cutting and revenue generating measures in order to reduce its dependency on federal high-cost USF support." *Id*. ¶14. It also noted

Allband's "willingness … to work with RUS [Rural Utilities Service] to rework its loan terms." *Id*.

WCB, however, "d[id] not find it to be in the public interest to grant Allband an unlimited waiver," as Allband had requested. *Allband Waiver Order* ¶13. "[C]onsistent with the [FCC's] direction," WCB found that it should "reassess [Allband's] financial condition to determine whether a waiver remains necessary in the future." *Id*. (citing *Order* ¶278 (JA at 493)). To that end, WCB set forth the showing required should Allband seek further relief at the end of the three-year waiver period. *Id*. ¶16.

WCB separately dismissed Allband's request for a waiver of the benchmarking rule as moot, because "under the specific methodology ultimately adopted by [WCB], which occurred after Allband filed its petition, Allband is not capped." *Allband Waiver Order* ¶17.

Allband sought full Commission review of WCB's Order and asked the FCC to waive both the $250 per-line cap and the regression rule until 2026, when Allband's RUS loan will be repaid.[8] Allband's petition remains pending before the agency.

[8] Petition of Allband Communications Cooperative for Waiver of Part 54.302 and the Framework to Limit Reimburseable Capital and Operating Costs, WC Docket 10-90 *et al*. (filed Aug. 24, 2012).

B. Allband Has Failed To Demonstrate That The *Order* Is Unconstitutional Or Otherwise Unlawful.

Allband launches a scattershot attack on the *Order*. Allband's claims – many of which duplicate claims raised by other petitioners – are waived or unripe, and all lack merit.

1. Allband argues that the *Order* effects an unconstitutional taking of property. Br. 33-34. This contention is not ripe for judicial review because, among many other things, the agency has *exempted* Allband from the reforms in the *Order* for three years, and provided the opportunity for a further waiver at the end of that period. *See Allband Waiver Order* ¶¶10-16; FCC Principal USF Br. 39-40.

2. Allband also seems to argue that the *Order* constitutes improper retroactive rulemaking – *i.e.*, governmental conduct that "impair[s] rights a party possessed when he acted, increase[s] a party's liability for past conduct, or impose[s] new duties with respect to transactions already completed," *Landgraf v. USI Film Products, Inc*., 511 U.S. 244, 280 (1994). Br. 32, 33, 35-36. Allband's claim fails because the *Order* is entirely prospective: it does not mandate the return of USF disbursements *already* made, but only reduces or eliminates federal subsidies going forward. *See* FCC Principal USF Br. 47-51.

3. Allband attacks the *Order* on a variety of other grounds. Allband, however, did not raise these arguments before the agency in a petition for reconsideration of the *Order*, and so they are waived. *See* 47 U.S.C. §405(a); *Sorenson Commc'ns, Inc. v. FCC*, 659 F.3d 1035, 1048 n.8 (10th Cir. 2011). In any event, all of these claims lack merit.

a. Allband contends that the benchmarking rule is impermissibly vague, in violation of the Fifth Amendment. Br. 32-33 (citing *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012)). But Allband's complaint is with the methodology WCB adopted in the *Benchmarking Order*, 27 FCC Rcd 4235, not with the rule that the FCC adopted in the *Order* on review. *See* Br. 32.[9] Indeed, the rule adopted in the *Order* had no effect on HCLS disbursements to rate-of-return carriers like Allband until WCB adopted the methodology required to implement it in the *Benchmarking Order*, 27 FCC Rcd at 4235, 4236 (¶¶1, 5).

As a staff-level decision issued on delegated authority, the *Benchmarking Order* was not a "final" order when Allband filed its brief. *See* 47 U.S.C. §155(c)(7) ("The filing of an application for review … shall be a condition precedent to judicial review of any order, decision, or action made

[9] By contrast, the Joint Universal Service Fund Principal Brief of Petitioners, at 36-39, challenges the FCC's delegation of authority to WCB to implement the rule, not the rule itself.

or taken pursuant to a delegation" of authority to FCC staff); *Int'l Telecard Ass'n v. FCC*, 166 F.3d 387, 388 (D.C. Cir. 1999). That changed when the full Commission, on February 26, 2013, adopted the *Sixth Order on Reconsideration*, 28 FCC Rcd 2572. That Order granted in part, and denied in part, applications for review of the *Benchmarking Order*. As relevant to Allband's vagueness claim, the FCC in the *Sixth Order on Reconsideration* substantially modified the methodology adopted by WCB in the *Benchmarking Order*.

If Allband, after reviewing the revised benchmarking methodology, still finds it impermissibly vague, Allband may challenge the methodology on vagueness grounds – but *only* if it invokes the jurisdiction of a court with venue by properly filing a Hobbs Act challenge to the *Sixth Order on Reconsideration*. *See* 47 U.S.C. §402(a); 28 U.S.C. §2342(1).[10] That is because the *Sixth Order on Reconsideration* is the only "final" order subject to judicial review – and Allband has not challenged that order. Until then, no

[10] The venue test in 28 U.S.C. §2343 provides that in a properly filed Hobbs Act appeal, venue "is in the judicial circuit in which the petitioner resides or has its principal office or in the United States Court of Appeals for the District of Columbia Circuit." Allband, which states that it operates in northern Michigan, Br. 29, thus has venue to challenge the *Sixth Order on Reconsideration* in the Sixth Circuit or the D.C. Circuit – but not this circuit.

court has jurisdiction to consider Allband's challenge to the benchmarking methodology.

b. Allband, citing no authority, also asserts that the benchmarking rule is "an unconstitutional Bill of Attainder." Br. 34-35. Allband's claim fails, because the prohibition against bills of attainder applies to legislative acts and not to the regulatory actions of administrative agencies, like the FCC. *See Walmer v. U.S. Dept. of Defense*, 52 F.3d 851, 855 (10th Cir. 1995).

c. Allband further contends that the *Order* is an unlawful breach of its loan agreement with RUS, citing *United States v. Winstar*, 518 U.S. 839 (1996). Br. 37. However, the FCC is not a party to that agreement, and it never entered into any contract agreeing to provide universal service support to Allband in the future. Nor did RUS agree to provide Allband universal service support (indeed, it had no authority to do so). For all these reasons, Allband's breach of contract claim fails.[11]

d. Allband, without support, next asserts that "[t]he Order should be reversed as applied to Allband based on estoppel principles." Br. 35. As this Court has explained, "winning an equitable estoppel argument against the

[11] Under Allband's contract theory, the FCC is prohibited from changing its universal service support amounts for the duration of its RUS loan. But Allband did not enjoy such a guarantee either before or after the *Order*. *See id.* ¶220 (JA at 472). No FCC rule or order guaranteed indefinite universal service support to parties that have RUS loans.

government is a tough business." *Wade Pediatrics v. Dept. of Health and Human Svcs.*, 567 F.3d 1202, 1206 (10th Cir. 2009). Thus, a party must establish that: "(1) the party to be estopped must know the facts; (2) he must intend that his conduct will be acted upon or must so act that the party asserting the estoppel has the right to believe that it was so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury." *Tsosie v. U.S.*, 452 F.3d 1161, 1166 (10th Cir. 2006). The party must further show "affirmative misconduct on the part of the government." *Wade*, 567 F.3d at 1206.

Allband cannot make that showing, because the FCC never represented that Allband would receive federal universal service support for the duration of its RUS loan, and Allband does not even cite any such purported representation. Nor does the *Order*'s prospective reduction of Allband's federal universal service subsidies constitute "affirmative misconduct" under this Court's precedent. *See Bd. of County Comm'rs v. Isaac*, 18 F.3d 1492, 1498 (10th Cir.1994) ("Affirmative misconduct means an affirmative act of misrepresentation or concealment of a material fact.").

e. Finally, Allband asserts that "[t]he Order is … arbitrary because it fails to recognize that the destructive impacts upon Allband (or similar small rural carriers) are wholly unnecessary to achieve the stated goals or objectives of the Order." Br. 35-36. Allband further claims that the *Order* violates sections 254(b)(5) and (e) of the Act, which require "sufficient" universal service support, on similar grounds. Br. 31.

These arguments lack merit. As we explain elsewhere, the *Order* structured universal service reform to mitigate the financial impact on small, rate-of-return carriers like Allband. *See* FCC Principal USF Br. 34-37. It also provides a waiver process for carriers that can demonstrate that "reductions in current support levels would threaten their financial viability, imperiling service to consumers in the areas they serve." *Order* ¶¶539-544 (JA at 566-569). And, while Allband seems to contend that the FCC's generally applicable universal service rules must produce sufficient support everywhere, the courts have uniformly held that it is reasonable for the agency to rely on a waiver process to address any unforeseen shortfalls. *See Vermont Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 65 (D.C. Cir. 2011); *RCA I*, 588 F.3d at 1104; FCC Principal USF Br. 35; FCC Response to Wireless Carrier USF Principal Br. 40-41.

CONCLUSION

The petitions for review should be dismissed in part and otherwise denied.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of the Second Briefing Order. It does not exceed 15% of the size of the brief to which it is responding. The Additional Universal Service Fund Issues Brief was certified to be 7,785 words in length. Therefore, the FCC may file a response brief up to 8,952 words in length. This brief contains 6,454 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 10th Cir. R. 32(a) and the type style requirements of Fed. R. App. P. 32(a)(6) because this filing has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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July 24, 2013

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2013, I caused the foregoing Federal Respondents' Final Response to the Additional Universal Service Issues Brief to be filed by delivering a copy to the Court via e-mail at FCC_briefs_only@ca10.uscourts.gov. I further certify that the foregoing document will be furnished by the Court through (ECF) electronic service to all parties in this case through a registered CM/ECF user. This document will be available for viewing and downloading on the CM/ECF system.

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