COMBINED RESPONSES OF FEDERAL RESPONDENTS AND SUPPORTING INTERVENORS TO THE AT&T PRINCIPAL BRIEF

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NO. 11-9900

IN RE: FCC 11-161

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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GLOSSARY

CLEC	Competitive Local Exchange Carrier
FCC	Federal Communications Commission
ILEC	Incumbent Local Exchange Carrier
IP	Internet Protocol
LEC	Local Exchange Carrier
PSTN	Public Switched Telephone Network
VoIP	Voice over Internet Protocol

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FEDERAL RESPONDENTS' FINAL RESPONSE TO THE AT&T PRINCIPAL BRIEF

ISSUE PRESENTED

Some providers of voice telephone service (including many cable operators) use Voice over Internet Protocol ("VoIP") technology. They often partner with competitive local exchange carriers ("CLECs") to connect their customers to the public switched telephone network ("PSTN"). In the *Order* on review,[1] the Federal Communications Commission ("FCC") permitted CLECs in such circumstances, on a transitional basis, to collect access charges for functions that they or their retail VoIP partners perform. After a transition period, this interim compensation rule – like all other forms of "intercarrier compensation" addressed by the *Order* – will be replaced by a "bill-and-keep" framework under which carriers recover their network costs

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

from their subscribers (and, where necessary, explicit universal service subsidies), not from other carriers.

AT&T generally supports the transition to bill-and-keep. But it seeks to have this Court second-guess the interim rule governing CLEC-VoIP partnerships. AT&T notes that this transitional rule differs from the compensation rule that the FCC historically has applied when a CLEC partners with a wireless carrier. AT&T maintains that the agency offered no reasoned explanation for treating VoIP providers differently from wireless carriers in this regard. AT&T's petition for review presents a single issue:

Whether the FCC adequately explained the rationale for its interim intercarrier compensation rule governing CLEC-VoIP partnerships.

COUNTERSTATEMENT

Although this case involves a narrow application of settled principles of administrative law, the factual and legal background is complex. We describe that background in detail below.

A. Regulatory Background

Historically, providers of long-distance telephone service have paid "access charges" to compensate local exchange carriers ("LECs") for the cost of originating or terminating long-distance calls over the LECs' wireline networks. *See* FCC Preliminary Br. 4-5. Wireline LECs generally collect these access charges pursuant to tariffs.

By contrast, for almost two decades, wireless telecommunications carriers have been barred from filing access charge tariffs. *See Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd 1411, 1479-80 ¶¶178-179 (1994); 47 C.F.R. §20.15(c). Rather, they may collect access charges only pursuant to a contract with the carrier being charged.[2] In the absence of such a contract, a CLEC that partners with a wireless carrier to provide access service "has no right to collect access charges for the portion of the service provided by the [wireless carrier]." *Access Charge Reform*, 19 FCC Rcd 9108, 9116 ¶16 (2004).

Given these regulatory constraints on their ability to collect intercarrier compensation, wireless carriers "have long been operating pursuant to what are essentially bill-and-keep arrangements." *Order* ¶737 (JA at 631). As a matter of longstanding "industry practice," wireless carriers recover their network costs "from their end users," not from other carriers. *Sprint Declaratory Ruling*, 17 FCC Rcd at 13199 ¶15.

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[2] *Petitions of Sprint PCS and AT&T Corp. For Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13192, 13196-98 ¶¶8-12 (2002) ("*Sprint Declaratory Ruling*"), *pets. for review dismissed*, *AT&T Corp. v. FCC*, 349 F.3d 692 (D.C. Cir. 2003).

In recent years, a growing number of consumers have subscribed to VoIP service. This service, which is provided via Internet Protocol ("IP") networks, allows users to "make real-time [phone] calls to, and receive calls from," users of traditional telephone service. *Order* ¶63 (JA at 412). To offer these capabilities, VoIP providers (including cable operators that provide telephone service) must connect their customers to the PSTN (*i.e.*, the network that LECs and wireless carriers use to provide telephone service).

VoIP service currently is offered in two different ways. Some VoIP providers voluntarily submit to common carrier regulation; they obtain state certification as LECs, interconnect directly with the PSTN, and offer VoIP to subscribers on a common carrier basis. These carriers thus become regulated LECs subject to Title II of the Communications Act. *See* Cox Comments, Apr. 1, 2011, at 3 (JA at 1956); FCC Principal USF Br. 26-27. Other VoIP providers do not hold themselves out as regulated LECs.[3] A "non-LEC" VoIP provider typically partners with a CLEC, which interconnects with the facilities of other carriers and delivers calls from the PSTN to the non-LEC VoIP provider (and vice versa). *See* Comcast Comments, Aug. 24, 2011, at 5

[3] The FCC has not yet decided whether the VoIP services at issue here are "telecommunications services" (subject to common carrier regulation under Title II of the Communications Act) or "information services" (which are covered by Title I of the Act). *See Order* ¶974 & n.2042 (JA at 756).

(JA at 3356); *Time Warner Cable Request for Declaratory Ruling*, 22 FCC Rcd 3513, 3519 ¶13 (Wireline Comp. Bur. 2007).

The partnerships between CLECs and VoIP providers are fundamentally different from the "partnerships" that wireless carriers formed with CLECs in the early 2000s in an effort "to overcome their ineligibility to tariff access charges." *See* AT&T Br. 6. Wireless carriers entered into those arrangements "to do indirectly" what FCC rules forbade them to "do directly" (*i.e.*, to collect tariffed access charges). *Access Charge Reform*, 19 FCC Rcd at 9116 n.57.

By contrast, CLEC-VoIP partnerships are essential to the provision of VoIP service by non-LEC VoIP providers. Unlike wireless carriers, non-LEC VoIP providers have not been classified as "telecommunications carrier[s]" as defined by the Communications Act, 47 U.S.C. §153(51). Therefore, they cannot perform certain functions that are integral to providing VoIP service – including interconnection with the PSTN.[4] Without interconnection, VoIP providers would be unable to connect calls from their

[4] The Communications Act does not require incumbent local exchange carriers ("ILECs") like Verizon and AT&T to interconnect with non-LEC VoIP providers. Telecommunications carriers are only obligated to interconnect "with the facilities and equipment of other telecommunications carriers." 47 U.S.C. §251(a)(1); *see also Verizon California, Inc. v. FCC*, 555 F.3d 270, 275 (D.C. Cir. 2009).

subscribers to users of traditional telephone service. Non-LEC VoIP providers must "rely on [their CLEC] partners" to obtain not only interconnection, but also "access to [telephone] numbers" for new customers and "compliance with 911 obligations." *Order* ¶970 (JA at 753).

Until this proceeding, the FCC had "declined to explicitly address the intercarrier compensation obligations associated with VoIP traffic." *Connect America Fund*, 26 FCC Rcd 4554, 4745 ¶610 (2011) ("*2011 NPRM*") (SA at 1, 192). These unresolved questions, which led to "billing disputes and litigation," appeared to "be deterring innovation" and the "introduction of new IP services." *Id.* ¶608 (SA at 192); *see also id.* nn.913-914 (SA at 192). To address this uncertainty, the FCC sought comment on "a range of approaches" concerning "the appropriate treatment of interconnected VoIP traffic for purposes of intercarrier compensation." *Id.* ¶609 (SA at 192).

B. The *Order* On Review

In the *Order*, the FCC defined "the prospective intercarrier compensation obligations associated with VoIP-PSTN traffic." *Order* ¶939 (JA at 732).[5] Under the agency's new intercarrier compensation rules, such

[5] The agency defined "VoIP-PSTN traffic" as "traffic exchanged over PSTN facilities that originates and/or terminates in IP format." *Order* ¶940 (JA at 733) (internal quotation marks omitted). The *Order* "does not address intercarrier compensation payment obligations for VoIP-PSTN traffic for any prior periods." *Id.* n.1874 (JA at 730).

traffic "ultimately will be subject to a bill-and-keep framework," and intercarrier compensation obligations will be eliminated. *Id.* ¶933 (JA at 729). AT&T "fully supports this aspect of the FCC's decision." Br. 9.

Before bill-and-keep takes effect, however, transitional rules will govern intercarrier compensation for VoIP-PSTN traffic. During the multi-year transition period, VoIP-PSTN traffic will be subject to intercarrier compensation at rates prescribed by the FCC's interim rules. *Order* ¶933 (JA at 729).

When a non-LEC VoIP provider and its CLEC partner team up to transmit a telephone call to a VoIP subscriber, they provide services that are functionally indistinguishable from the service an ILEC provides when delivering a call from a VoIP user to a wireline service subscriber. The FCC concluded that, in these circumstances, CLEC-VoIP partnerships "should be entitled to charge the same intercarrier compensation as [ILECs] do" under the interim rules for VoIP-PSTN traffic. *Order* ¶970 (JA at 753).[6]

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[6] AT&T asserts that the challenged rule does not apply to certain types of VoIP service arrangements. Br. 2 n.2. The FCC has not yet ruled on this issue.

Unlike ILECs, non-LEC VoIP providers cannot file tariffs.[7] They must "rely on [their CLEC] partners to charge tariffed intercarrier compensation charges." *Order* ¶970 (JA at 753). To accommodate "these distinct circumstances," and to ensure that CLEC-VoIP partnerships can collect the same intercarrier compensation as ILECs receive for providing comparable services, the FCC's interim rules "permit a LEC to charge the relevant intercarrier compensation for functions performed by it and/or by its retail VoIP partner." *Id.* (JA at 753-54).

The FCC explained that it adopted this "symmetric approach to VoIP-PSTN intercarrier compensation" because it did "not want to disadvantage providers that already have made … investments" in IP networks. *Order* ¶968 (JA at 752). This approach was consistent with one of the *Order*'s principal goals: "to promote investment in and deployment of IP networks." *Id.* The interim rules ensure that VoIP providers will have "the same opportunity, during the transition, to collect intercarrier compensation" for VoIP-PSTN traffic as providers that use traditional telecommunications infrastructure. *Id.*

[7] "Only common carrier services can be tariffed." *MTS and WATS Market Structure*, 93 FCC 2d 241, 314 ¶244 (1983). Non-LEC VoIP providers do not hold themselves out as common carriers.

The FCC rejected AT&T's claim that "there is no basis for distinguishing the historical treatment of [wireless] providers" from the agency's treatment of CLEC-VoIP partnerships under the interim rule. *Order* n.2024 (JA at 753). The agency noted that it had long prohibited wireless carriers from using CLEC "partners" to collect tariffed access charges for work performed by wireless carriers. *Id.*; *see also Access Charge Reform*, 19 FCC Rcd at 91115-16 ¶16 & n.57. By contrast, the agency had previously "endorsed" the formation of CLEC-VoIP partnerships. *Order* ¶970 (JA at 753). In particular, in 2005, it stated that VoIP providers could comply with 911 service obligations by partnering with CLECs to obtain interconnection with the PSTN. *IP-Enabled Services*, 20 FCC Rcd 10245, 10267 ¶38 (2005), *pet. for review denied*, *Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006).

Moreover, the record showed that some non-LEC VoIP providers – unlike wireless carriers – had recently received intercarrier compensation payments.[8] In light of this evidence, the FCC determined that the "immediate adoption of bill-and-keep for all VoIP-PSTN traffic would appear to be, in the aggregate, a … significant departure from the intercarrier compensation payments for VoIP traffic that have been made in the recent past." *Order* ¶952 (JA at 739). The FCC crafted the interim VoIP-PSTN compensation rules to provide for a "measured transition" away from intercarrier compensation. *Id.* This sort of gradual transition to bill-and-keep, however, was unnecessary for wireless carriers, which have long operated under "bill-and-keep arrangements." *Id.* ¶737 (JA at 631).

SUMMARY OF ARGUMENT

AT&T contends that the FCC's interim intercarrier compensation rule arbitrarily distinguishes between CLEC-VoIP partnerships and CLEC-wireless partnerships. AT&T's challenge rests on mischaracterizations of law and fact.

[8] *See Order* n.1917 (JA at 737-38); Bright House Comments, Apr. 1, 2011, at 1, 7 (JA at 1969, 1975) (Verizon had previously made "substantial access charge payments" to CLECs that provide VoIP in partnership with cable operators like Bright House); Letter from Daniel Brenner, Counsel for Bright House, to Marlene Dortch, FCC, Sept. 28, 2011, at 2 (JA at 3818) (Bright House estimated that an ILEC proposal for transitional intercarrier compensation for VoIP traffic would result in "a 90% reduction in intrastate access" revenues for cable operators that partner with CLECs to provide VoIP).

With respect to the law, AT&T claims that the FCC modified "settled" legal principles to favor cable VoIP providers over wireless carriers. To the contrary, the law governing intercarrier compensation for CLEC-VoIP partnerships was unsettled before the FCC issued the *Order*. Indeed, there was considerable dispute as to what intercarrier compensation rules (if any) applied to VoIP traffic generally.

With respect to the facts, AT&T asserts that VoIP providers, like wireless carriers, historically had not collected intercarrier compensation. The record showed, however, that unlike wireless carriers, some VoIP providers have previously received intercarrier compensation payments through their CLEC partners.

Against this legal and factual backdrop, the FCC reasonably explained that its interim rule treats CLEC-VoIP partnerships differently from CLEC-wireless partnerships because, in three important respects, VoIP and wireless service are not similarly situated.

First, unlike wireless carriers, whose primary reason for "partnering" with CLECs in most cases is to evade the FCC's prohibition on tariffed wireless access charges, non-LEC VoIP providers must partner with telecommunications carriers (such as CLECs) in order to provide voice telephone service on the PSTN. Because of the different purposes underlying these arrangements, the FCC historically has treated them differently – forbidding CLECs from collecting tariffed access charges for work done by wireless carriers pursuant to revenue sharing arrangements, while endorsing the formation of CLEC-VoIP partnerships. The agency reasonably made the same sort of distinction when crafting its transitional intercarrier compensation rules for VoIP-PSTN traffic.

Second, unlike conventional wireless voice service, VoIP service uses IP facilities. One of the *Order*'s prime objectives is "to promote investment in and deployment of IP networks." *Order* ¶968 (JA at 752). Consistent with that goal, the interim rules give VoIP providers – which provide service via IP networks – "the same opportunity" to collect intercarrier compensation for VoIP-PSTN traffic as carriers that provide service over traditional wireline networks. *Id.* The FCC explained that it did not want to penalize providers that have already deployed IP networks. *Id.* This rationale for the interim rules does not apply to conventional wireless voice service, which is not provided over IP facilities.

Third, unlike wireless carriers (which have been operating under bill-and-keep arrangements since the 1980s), some non-LEC VoIP providers have received intercarrier compensation payments over the years. The FCC explained that the interim rule is designed to ensure a "measured transition" away from intercarrier compensation. *Order* ¶935 (JA at 730).

Ultimately, in deciding how to handle VoIP-PSTN traffic for purposes of intercarrier compensation, the FCC confronted a choice. It could treat VoIP providers like wireless carriers and preclude them from collecting access charges indirectly via a CLEC partner. Or it could treat VoIP providers like wireline carriers and adopt a framework for a measured transition away from the compensation that some providers are receiving. The agency chose the latter course. It reasoned that this approach would best promote the deployment of IP networks. AT&T disagrees with the agency's approach, but that policy disagreement provides no legal basis for the Court to disturb the FCC's reasonable policy judgment.

ARGUMENT

THE FCC REASONABLY EXPLAINED THE RATIONALE FOR ITS INTERIM RULE GOVERNING INTERCARRIER COMPENSATION FOR CLEC-VOIP PARTNERSHIPS.

The FCC explained why its interim rule governing CLEC-VoIP partnerships treats VoIP providers differently from wireless carriers. AT&T's claim to the contrary (Br. 16-23) is baseless. Because the rule challenged by AT&T is "merely transitional, [the Court's] review is especially deferential." *Sorenson Commc'ns, Inc. v. FCC*, 659 F.3d 1035, 1046 (10th Cir. 2011) (internal quotation marks omitted). Applying this deferential standard of review, the Court should deny AT&T's petition.

AT&T's argument rests on two fundamentally flawed premises. First, AT&T maintains that "wireless carriers and cable VoIP providers occupied" the same "bill-and-keep" position "for many years." Br. 13. That is incorrect. While wireless carriers "have long been operating" under "bill-and-keep arrangements" that provided for no intercarrier compensation, *Order* ¶737 (JA at 631), some VoIP providers have received intercarrier compensation payments in the past. *Id.* n.1917 (JA at 738).

Second, AT&T wrongly asserts that pre-existing FCC rules barred CLECs from collecting intercarrier compensation for services rendered by their retail VoIP partners. Br. 11 n.7, 19. Contrary to AT&T's contention (Br. 11), FCC rules were not "settled on this point." Indeed, before the FCC issued the *Order* in this proceeding, it had "declined to explicitly address the intercarrier compensation obligations associated with VoIP traffic." *2011 NPRM* ¶610 (SA at 192). Because the agency had not previously resolved whether VoIP providers may collect access charges under FCC rules, it had never decided whether CLECs could collect intercarrier compensation for work done by their retail VoIP partners. By contrast, because FCC rules do not authorize wireless carriers to file access tariffs or impose access charges, the FCC has expressly precluded CLECs from collecting tariffed access charges for services provided by their wireless carrier partners. *Access Charge Reform*, 19 FCC Rcd at 9116 n.57 ("We will not interpret our rules or prior orders in a manner that allows [wireless] carriers to do indirectly that which we have held they may not do directly.").

Simply put, AT&T mistakenly assumes that before the *Order*, VoIP providers and wireless carriers were similarly situated. The FCC recognized that they were not. It reasonably explained that its interim compensation rule for CLEC-VoIP partnerships treats VoIP service differently from wireless service for three reasons: (1) non-LEC VoIP providers – unlike wireless carriers – must partner with telecommunications carriers (such as CLECs) in order to provide voice telephone service; (2) VoIP service – unlike conventional wireless service – is provided over IP facilities, and a primary goal of the *Order* is to promote the deployment of such facilities; and (3) VoIP providers – unlike wireless carriers – have recently received intercarrier compensation payments, and therefore would be adversely affected by a sudden transition to bill-and-keep. These considerations fully justified the FCC's distinction between VoIP and wireless service for purposes of transitional intercarrier compensation.

A. The FCC Reasonably Distinguished Between CLEC-VoIP Partnerships And CLEC-Wireless Partnerships.

There is no merit to AT&T's claim that the FCC provided "no coherent rationale" for treating CLEC-VoIP partnerships differently from CLEC-wireless partnerships. Br. 23. In the *Order*, the agency pointed out the fundamental differences between those two types of arrangements, and explained why those differences supported distinct approaches. As the FCC explained, CLEC-wireless "partnerships" are often created solely to evade FCC rules and collect access charges, while CLEC-VoIP partnerships are vital to the effective provision of telephone service by non-LEC VoIP providers.

The FCC has long "prohibited [wireless] providers from partnering with [CLECs] to collect access charges in the absence of a contract" with the carrier being charged. *Order* n.2024 (JA at 753). In most cases, the principal purpose of such arrangements is to circumvent the longstanding FCC rule barring wireless carriers from filing access tariffs. *See Access Charge Reform*, 19 FCC Rcd at 9116 ¶16 & n.57.

In stark contrast, the agency "has endorsed" CLEC-VoIP partnerships. *Order* ¶970 (JA at 753) (citing *IP-Enabled Services*, 20 FCC Rcd at 10267 ¶38). Without such partnerships, VoIP providers that are not LECs would be unable to provide VoIP service. Because those providers are not "telecommunications carrier[s]," 47 U.S.C. §153(51), they cannot perform certain functions that are essential to providing VoIP service – including interconnection with the PSTN. *See* note 4 above. Non-LEC VoIP providers must "rely on [their CLEC] partners" to obtain "interconnection, access to [telephone] numbers [for new customers], and compliance with 911 obligations." *Order* ¶970 (JA at 753).

Wireless carriers do not need a CLEC partner to perform these functions. Because wireless carriers are telecommunications carriers, they can obtain interconnection directly. Thus, AT&T ignores the "relevant distinction … between wireless and VoIP providers" in this context: Non-LEC VoIP providers *must* use a "LEC middleman" to interconnect; wireless carriers need not. *See* Br. 20. Furthermore, as AT&T concedes, wireless carriers "typically address" numbering and 911 compliance issues "themselves." *Id.* That is not an option for non-LEC VoIP providers; they must rely on their CLEC partners to handle those matters.

The Court should reject AT&T's assertion that the *Order* must be remanded because the FCC failed to acknowledge or address AT&T's concern about "competitive bias." Br. 18. When AT&T opposed adoption of the interim rules, it argued that they would "arbitrarily tilt the regulatory playing field" in favor of VoIP providers by making an "arbitrary distinction" between VoIP and wireless service. Br. 17 (quoting Letter from Robert Quinn, Jr., AT&T, to Marlene Dortch, FCC, Oct. 21, 2011, at 2, 4 (JA at 3987, 3989)). The FCC explained, however, that the differences between CLEC-VoIP partnerships and CLEC-wireless partnerships justified the distinction drawn by the interim VoIP compensation rule. *Order* ¶970 & n.2024 (JA at 753) (citing AT&T's October 21, 2011 letter). That explanation fully satisfies the applicable standard of review, even though the agency made no specific reference to AT&T's claim of "competitive bias." As this Court has held, even when an agency does not "*expressly*" analyze a particular issue, a reviewing court must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Citizens' Comm. to Save Our Canyons v. United States Forest Serv.*, 297 F.3d 1012, 1034 (10th Cir. 2002) (internal quotation marks omitted); *see also Aviva Life & Annuity Co. v. FDIC*, 654 F.3d 1129, 1133 & n.3 (10th Cir. 2011).

B. The Interim Rule Preserves The Proper Incentives For Deployment Of IP Networks.

Broadband services that provide high-speed Internet access "have become crucial to our nation's economic growth, global competitiveness, and civic life." *Order* ¶3 (JA at 394). Thus, one of the *Order*'s primary goals "is to promote investment in and deployment of IP networks." *Id.* ¶968 (JA at 752).

Consistent with that goal, the FCC sought to ensure that its transitional intercarrier compensation rules for VoIP-PSTN traffic would not “disadvantage” providers that use IP facilities. *Order* ¶968 (JA at 752). This rationale for transitional intercarrier compensation does not apply to wireless carriers, which do not use IP facilities to originate or terminate conventional wireless service.

To preserve the appropriate incentives for deployment of IP networks, the agency reasonably decided that *all* VoIP providers (LECs and non-LECs alike) should have the same opportunity to benefit from intercarrier compensation as wireline service providers during the transition to bill-and-keep. Accordingly, the agency adopted “a symmetric approach to VoIP-PSTN intercarrier compensation.” *Order* ¶968 (JA at 752). In particular, the *Order* makes clear that an entity that “uses [IP] facilities to transmit [VoIP-PSTN] traffic” from the caller’s premises or to the called party’s premises may impose “origination [or] termination charges … under [the] transitional intercarrier compensation framework." *Id.* ¶969 (JA at 752) (internal quotation marks omitted).[9]

The FCC recognized that non-LEC VoIP providers "are not carriers that can tariff intercarrier compensation charges." *Order* ¶970 (JA at 753). Those VoIP providers must "rely on [their CLEC] partners to charge tariffed intercarrier compensation charges." *Id.* To ensure that non-LEC VoIP providers were not disadvantaged relative to providers of non-IP wireline services, the FCC decided to "permit a LEC to charge the relevant intercarrier compensation for functions performed by it and/or by its retail VoIP partner." *Id.* (JA at 753-54).

This decision did not represent "an abrupt change" from "settled" law, as AT&T claims (Br. 11). The FCC had not previously addressed whether a CLEC could collect intercarrier compensation for services provided by its retail VoIP partner. Furthermore, the sort of joint billing arrangement authorized by the interim rule was not unprecedented. The FCC has long recognized that "a [CLEC] may bill [a long-distance carrier] on behalf of itself *and another carrier* for jointly provided access services" so long as

[9] AT&T claims to find the FCC's symmetrical approach "perplexing" because the agency has not classified VoIP as a Title II common carrier service. Br. 22 n.9. But it made perfect sense for the FCC to create sufficient incentives for deployment of IP networks by *all* providers of voice telephone service, whether or not those providers are subject to Title II.

"each carrier" in the partnership charges "only what it is entitled to collect from the [long-distance carrier] for the [access] service it provides." *Access Charge Reform*, 19 FCC Rcd at 9115-16 ¶16 (emphasis added).[10]

To be sure, the FCC for years has barred CLECs from collecting tariffed access charges on behalf of wireless carriers. But the agency based that prohibition on the fact that wireless carriers – which have long been barred from filing access charge tariffs – "had no independent right to collect" access charges absent a contract with the carrier being charged. *Access Charge Reform*, 19 FCC Rcd at 9116 ¶16.

The FCC has never made any such finding with respect to VoIP providers. To the contrary, in this proceeding, the agency made clear that VoIP providers *are* prospectively entitled to intercarrier compensation during the transition to bill-and-keep. *Order* ¶¶968-970 (JA at 752-54). If VoIP providers are LECs (*i.e.*, if they provide VoIP service on a common carrier basis), they may file their own intercarrier compensation tariffs. If VoIP providers do not hold themselves out as LECs, their CLEC partners may levy

[10] In the past, the agency had expressed concern that joint billing arrangements "could result in double billing," but the new intercarrier compensation rules "include measures to protect against double billing." *Order* ¶970 (JA at 753-54).

charges to obtain intercarrier compensation for services rendered by non-LEC VoIP providers. *Id.* ¶970 (JA at 753-54).

In short, the FCC determined that VoIP providers are prospectively eligible to receive intercarrier compensation, including compensation for access traffic, even if they have no contract with the carrier paying compensation. The agency has never made a similar finding for wireless carriers.

AT&T complains that the interim rule governing CLEC-VoIP partnerships created an "asymmetry" between VoIP providers and wireless carriers. Br. 19. But if the FCC had adopted the approach advocated by AT&T (*i.e.*, treating VoIP providers like wireless carriers), it would have created an asymmetry between VoIP providers and *wireline* carriers – the very sort of asymmetry that bill-and-keep (which AT&T generally supports) is designed to eliminate. Under that scenario, wireline carriers would collect more intercarrier compensation than CLEC-VoIP partnerships (because such partnerships could not collect tariffed access charges for any service provided by the retail VoIP partner). By providing for less compensation for IP-based services, AT&T's proposed framework would dampen incentives for the deployment and use of modern IP networks.

Because the FCC historically has treated wireline carriers differently from wireless carriers for purposes of intercarrier compensation, any interim mechanism short of a flash-cut transition to bill-and-keep for all telephone service providers must inevitably result in some "asymmetry." The question for the FCC was: Which approach would best serve the agency's policy objectives? The FCC reasonably explained that it could most effectively promote the deployment of IP networks during the transition to bill-and-keep by giving VoIP providers "the same opportunity … to collect intercarrier compensation" for VoIP-PSTN traffic as carriers that provide service over traditional wireline networks. *Order* ¶968 (JA at 752). The Court should not disturb this reasonable policy judgment. *See IMC Kalium Carlsbad, Inc. v. Interior Bd. of Land Appeals*, 206 F.3d 1003, 1012 (10th Cir. 2000) (the Court's role is not "to decide which policy choice is the better one, for it is clear that Congress has entrusted such decisions to the [agency]") (quoting *Arkansas v. Oklahoma*, 503 U.S. 91, 114 (1992)).

C. The FCC Reasonably Explained That The Interim Rule Allows VoIP Providers To Make A Gradual Transition To Bill-and-Keep.

Unlike wireless carriers, both wireline carriers and VoIP providers have received intercarrier compensation. Indeed, notwithstanding the uncertainty surrounding compensation obligations for VoIP traffic, the record contained evidence that some non-LEC VoIP providers recently received intercarrier compensation payments.[11] This evidence refutes AT&T's assertion (Br. 13) that VoIP providers, like wireless carriers, have been operating under a "bill-and-keep" regime "for many years."

In light of this evidence, the FCC reasonably determined that the "immediate adoption of bill-and-keep for all VoIP-PSTN traffic would appear to be, in the aggregate, a … significant departure from the intercarrier compensation payments for VoIP traffic that have been made in the recent past." *Order* ¶952 (JA at 739). To avert the disruption that such a sudden change might cause, the agency explained that it would provide for a "measured transition away from carriers' reliance on intercarrier compensation as a significant revenue source." *Id.*

In crafting its interim rules for VoIP intercarrier compensation, the FCC properly took into account "the ability of [VoIP providers] to adjust financially to changing policies" and "the unfairness of abruptly shifting policies." *MCI Telecomms. Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984). The interim rules – including the rule governing CLEC-VoIP

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[11] *See* note 8 above. On reconsideration, the FCC found additional evidence that VoIP providers collected originating access charges before the *Order* was issued. *Connect America Fund*, 27 FCC Rcd 4648, 4661 ¶33 & nn.92-93 (2012) (JA at 1151, 1164).

partnerships – are sensibly designed to minimize "upheaval in the industry." *Id.*

The FCC's desire to avoid "market disruption pending broader reforms" justified its adoption of the interim rules to ensure a smooth transition to bill-and-keep for VoIP providers. *See Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1106 (D.C. Cir. 2009); *Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002). The agency reasonably concluded that the move to bill-and-keep should "be accomplished gradually to permit [VoIP providers] to adjust to the new pricing system, thus preserving the efficient operation of the interstate telephone network during the interim." *See Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1135-36 (D.C. Cir. 1984).

There was no need to provide for such a gradual transition for wireless carriers, which already operate under "bill-and-keep arrangements." *Order* ¶737 (JA at 631). The FCC's ultimate objective is to move *all* telephone service providers from the current intercarrier compensation system to the sort of bill-and-keep framework that wireless carriers have been using for years. *See id.* ¶¶736-737 (JA at 631). It would have been entirely counterproductive for the FCC to move wireless carriers in the *opposite* direction – replacing their existing bill-and-keep arrangements with the sort of intercarrier compensation regime that the agency is in the process of reforming. Nor was the FCC required to move to the other extreme – mandating an immediate transition to bill-and-keep for VoIP providers, even though the record shows that at least some VoIP providers (unlike wireless carriers) were receiving intercarrier compensation.

In sum, the FCC made a reasonable policy judgment regarding transitional intercarrier compensation. That judgment should be upheld.

CONCLUSION

AT&T's petition for review should be denied.

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July 29, 2013

CERTIFICATE OF COMPLIANCE

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

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 AT&T Principal Brief was certified to be 5,050 words in length. Therefore, the FCC may file a response brief up to 5,807 words in length. This brief contains 4,893 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.

3. All required privacy redactions have been made.

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July 29, 2013

NO. 11-9900

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: FCC 11-161

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

FINAL BRIEF OF INTERVENORS IN SUPPORT OF FEDERAL RESPONDENTS IN RESPONSE TO THE AT&T PRINCIPAL BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Intervenors submit the following Corporate Disclosure Statement through their counsel:

Comcast Corporation ("Comcast") is a publicly held corporation. Comcast has no parent corporation, and no publicly held corporation holds 10% or more of the stock of Comcast.

Cox Communications, Inc. ("Cox") is a privately-held corporation, formed under the laws of the State of Delaware. Cox Enterprises, Inc., a privately-held corporation, owns Cox through a direct majority interest and through a minority interest held by an intermediate holding company, Cox DNS, Inc. Cox has no other parent companies within the meaning of Rule 26.1, and no publicly-held company has a 10% or greater ownership interest in Cox.

HyperCube Telecom, LLC ("HyperCube") is a privately held company that is wholly owned by its parent HyperCube, LLC. HyperCube, LLC is an indirect wholly owned subsidiary of West Corporation ("West"). West is a publicly traded company. According to filings made with the Securities and Exchange Commission as of April 23, 2013, the following persons and entities hold a direct interest of 10% or more in West: Thomas H. Lee Equity Fund VI, L.P., 18.0%; and Thomas H. Lee Parallel Fund VI, L.P., 12.2%. The general partner of Thomas H. Lee Equity Fund VI, L.P. and Thomas H. Lee Parallel Fund VI, L.P. is THL

Equity Advisors VI, LLC. Thomas H. Lee Partners, L.P. is the sole member of THL Equity Advisors VI, LLC. No other person or entity holds a direct 10% or greater interest in West.

Level 3 Communications, LLC ("Level 3") is a wholly-owned subsidiary of Level 3 Financing, Inc. Level 3 Financing, Inc. is a wholly-owned subsidiary of Level 3 Communications, Inc. Level 3 Communications, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

NCTA is the principal trade association of the cable industry in the United States. Its members include owners and operators of cable television systems serving over ninety (90) percent of the nation's cable television customers as well as more than 200 cable program networks. NCTA's cable operator members also provide high-speed Internet service to more than 50 million households, as well as telephone service to more than 26 million customers. NCTA also represents equipment suppliers and others interested in or affiliated with the cable television industry. NCTA has no parent companies, subsidiaries or affiliates whose listing is required by Rule 26.1.

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GLOSSARY

AT&T Letter	Letter from Robert Quinn, Jr. (AT&T) to Marlene Dortch (FCC), CC Docket No. 01-92 et al., at 2-5 (Oct. 21, 2011)
IP	Internet Protocol
LEC	Local Exchange Carrier
Order	In re Connect America Fund, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011)
VoIP	Voice over Internet Protocol

SUMMARY OF THE ARGUMENT

Providers of fixed Voice over Internet Protocol ("VoIP") service[1] assess charges on long-distance carriers to complete their calls. They do so either by operating as Local Exchange Carriers ("LECs") and filing tariffs, or by completing calls in partnership with LECs that file tariffs. Before the FCC issued the *Order*,[2] AT&T had begun to challenge the validity of the partnership model, arguing that LECs cannot tariff charges for functions provided by their VoIP partners. The FCC never accepted AT&T's theory, and, prior to the *Order*, LEC partners of VoIP providers generally continued to collect access charges for VoIP calls.

The *Order* resolved this dispute by phasing out access charges while, during the transition, implementing what it termed the "VoIP Symmetry Rule," which treats VoIP providers operating under the partnership model identically to those operating as LECs.[3] AT&T made only a cursory argument below that this transitional treatment would competitively harm wireless carriers, and the Commission fully articulated why its historical refusal to allow wireless carriers to

[1] "Fixed" VoIP providers (some of which are affiliated with cable companies) use their own facilities to transmit calls to retail end-users. *See Qwest Corp v. FCC*, 689 F.3d 1214, 1221 n.4 (10th Cir. 2012). "Over-the-top" VoIP providers transmit calls via public-Internet connections provided by third parties. *Id*. AT&T's challenge involves fixed VoIP providers; over-the-top services are not at issue here. *See* AT&T Brief at 2 n.2.

[2] *In re Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) ("*Order*").

[3] 47 C.F.R. § 51.913(b).

tariff access charges (either directly or through a LEC) should not prevent parity as between the two types of VoIP providers. The FCC's decision should be upheld.

COUNTERSTATEMENT

A. Business Structure of VoIP Providers.

Providers of fixed VoIP services use two business models. Some are certified as LECs, providing both retail VoIP service and interconnecting with other carriers (the "unitary" model). Others are structured as partnerships between two entities: a non-LEC that provides retail VoIP service, and an affiliated or unaffiliated LEC that interconnects with other carriers on behalf of the retail entity (the "partnership" model). Although AT&T asserts that "[a]lmost all cable companies that offer voice telephone services today choose not to offer those services as regulated LECs," AT&T Br. at 10, both models are common even among cable companies. For example, both Cox Communications (the third-largest cable company in America) and Charter Communications (the sixth-largest) use the unitary model, as does Time Warner Cable (the second-largest) in some markets.[4]

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[4] *See, e.g.*, *In re Sprint Nextel Corp.*, Order, 26 FCC Rcd 2216, 2218 ¶ 4 (2011) (Cox Communications as a LEC); *In re Charter Communications*, Order, 27 FCC Rcd 7300, 7302 ¶ 4 (2012) (same as to Charter); *Petition of Time Warner Cable Information Services (New York), LLC for Modification of Its Existing Eligible Telecommunications Carrier Designation*, Order Approving Designation As A Lifeline-Only Eligible Telecommunications Carrier, Case 12-C-00510 (N.Y. Pub. Serv. Comm'n Mar. 14, 2013), *available at* http://documents.dps.ny.gov/

The two different business models largely stem from uncertainty as to whether retail VoIP service is a "telecommunications service" that is appropriately provided by a LEC or an "information service" that can be provided by a non-LEC – an issue the FCC has not resolved.[5] Yet the different models have little practical significance to either subscribers or interconnecting carriers.

B. Access Charge Tariffing by VoIP Providers and AT&T's Challenge.

In the years prior to the *Order*, LECs partnering with retail VoIP providers had filed tariffs with the FCC and state commissions assessing charges for connecting calls to their retail VoIP partners' subscribers.[6] LECs operating under such tariffs routinely collected access charges.[7] AT&T's assertion that the *Order*

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[5] *See* 47 U.S.C. § 153(24); *id.* §§ 153(53)-(54).

[6] *See, e.g.*, Cablevision Lightpath, Inc., Tariff F.C.C. No. 4 (2004), *available at* https://apps.fcc.gov/etfs/public/view_a_128329.action?id=128329; Bright House Networks Information Services F.C.C. Tariff No. 1 (2007), *available at* https://apps.fcc.gov/etfs/public/view_a_129518.action?id=129518; Comcast Phone, LLC Tariff FCC No. 1 (2003), *available at* https://apps.fcc.gov/etfs/public/view_a_127852.action?id=127852.

[7] *See, e.g.*, Letter from Daniel Brenner to Marlene Dortch, Sept. 28, 2011, JA at 2817-20 (Bright House, a partnership VoIP provider, would lose "tens of millions of dollars in lost revenues" from being unable to continue collecting access charges during transition); Letter from Samuel Feder to Marlene Dortch, April 6, 2012, JA at 4366-69 (noting that it is "not accurate" that clarifying rights of VoIP providers to collect certain access charges would result in new charges, since Cablevision, a partnership provider, had "historically assessed" such charges, and until very

gave such LECs the right to tariff "for the first time," AT&T Br. at 9, is thus a misstatement.

Long prior to the *Order*, the FCC had expressly "endorsed" the VoIP partnership model for purposes of interconnection.[8] The FCC also had approved the common practice of a LEC's tariffing for functions performed by another provider; carriers can use "joint billing arrangements," and a carrier can bill "on behalf of itself and another carrier for jointly provided access services." *In re Access Charges Reform*, *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Fifth Order on Reconsideration and Eighth Report and Order, 19 FCC Rcd 9108, 9115-16 ¶ 16 (2004).

Notwithstanding the above, AT&T's theory has been that the VoIP partnership model is analogous to two past circumstances in which the FCC had not permitted certain charges to be tariffed. *See* Letter from Robert Quinn, Jr.

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recently, Verizon, one of the nation's largest interexchange carriers, "ha[d] historically paid them"); Letter from Samuel Feder to Marlene Dortch, March 12, 2012, JA at 4324-25 (noting that Cablevision had already "suffered revenue losses" amounting to "several million dollars annually" from reduction of access charges in *Order*); Letter from Matthew Brill to Marlene Dortch, October 21, 2011, JA at 3998-4000 (*ex parte* by Time Warner, at the time a partnership provider, noting that VoIP providers already had "existing tariff language describing access services" that should "remain in force").

[8] *Order* ¶ 970, JA at 753-54; *see also, e.g.*, *In re Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2006).

(AT&T) to Marlene Dortch (FCC), Oct. 21, 2011, JA at 3986-91 ("*AT&T Letter*"). AT&T's first analogy is to the wireless context. *AT&T Letter* at 4 n.17, JA at 3989. The FCC has long prohibited wireless carriers from tariffing access charges; the FCC thus also prohibited a LEC partnering with a wireless carrier from tariffing services performed by the wireless carrier that the wireless carrier could not itself have tariffed. *See* Eighth Report and Order, *Access Charge Reform*, 19 FCC Rcd at 9115-16 ¶ 16.

AT&T's second analogy is to the scenario in which multiple wireline LECs are involved in completing a call. *AT&T Letter* at 2-3 & n.8, JA at 3986-88. There, the FCC ruled that a LEC cannot tariff services it does not provide, to ensure that multiple LECs cannot impose multiple charges for the same function. *See* Eighth Report and Order, *Access Charge Reform*, 19 FCC Rcd at 9115-16 ¶ 16.

Prior to issuance of the *Order*, the FCC had not addressed AT&T's claims about whether these purportedly analogous situations should apply to the VoIP partnership model. Thus, while AT&T argues that the law was "settled" on this point, *see* AT&T Br. at 11, there was at most a "dispute" on the issue, largely created by AT&T itself. *Order* ¶ 968, JA at 752.

C. The FCC's *Order*.

In addressing the larger intercarrier compensation issue surrounding VoIP, the *Order* decided on a course of allowing for the collection of gradually-reduced access charges on VoIP traffic, balancing the objective of reforming access charges with a competing objective of avoiding substantial disparities between VoIP and traditional wireline traffic during the transitional period. *See Order* ¶¶ 933-953, JA at 729-40. The *Order* recognized, however, that its "symmetrical approach to VoIP-PSTN intercarrier compensation" could be undercut if some VoIP providers were excluded from the access charge regime because they used the partnership model instead of the unitary model. *Order* ¶ 970, JA at 753-54.

In deciding to avoid this result by treating both types of VoIP providers the same during the transition, the *Order* considered, and rejected, AT&T's claimed analogies. *See* FCC Br. at 6-10. In the wireless context, the prohibition on tariffing by a partner LEC for functions performed by a wireless carrier followed directly from the prohibition on tariffing by wireless carriers themselves. *Order* ¶ 970 n.2024, JA at 753. In contrast, there has never been any prohibition on tariffing by VoIP providers; unitary VoIP providers can and do tariff. Thus, where a VoIP provider uses a LEC partner, it does so not to circumvent a prohibition on tariffing, but rather to obtain essential services. *Order* ¶ 970, JA at 753-54.

Likewise, unlike the "multiple LECs" scenario, under the VoIP Symmetry Rule, only one party – the LEC partner – can charge, and it can charge only once, for services supplied via the partnership arrangement. *Id*. This eliminates the double-billing scenario that had troubled the FCC in the "multiple providers" context. *Id*. As the *Order* notes, the absence of concerns about gamesmanship and double billing makes the VoIP partnership context "distinct" from AT&T's analogies. *Id*.

ARGUMENT

I. THE FCC'S TRANSITIONAL RULE IS SUBJECT TO HEIGHTENED DEFERENCE.

AT&T does not even acknowledge, much less challenge, the FCC's decision that unitary VoIP providers should be placed on a gradual "glide path" of steadily reducing access charges, like traditional wireline providers. *See Order* ¶ 969, JA at 752. AT&T challenges only the FCC's subsidiary decision that VoIP providers that use a partnership model should be treated no differently from unitary VoIP providers. AT&T Br. 16.

AT&T's challenge is subject to "arbitrary and capricious" review under 5 U.S.C. § 706, which is "highly deferential to the agency's determination." *Aviva Life & Annuity Co. v. FDIC*, 654 F.3d 1129, 1131 (10th Cir. 2011); *WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178, 1183 (10th Cir. 2013). The "'arbitrary and capricious' standard is particularly deferential in matters implicating … interim regulations," *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009), because "[a]voidance of market disruption pending broader reforms is, of course, a standard and accepted justification for a temporary rule." *Competitive Telcomms. Ass'n v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002); *see also Sorenson Commc'ns, Inc. v. FCC*, 659 F.3d 1035, 1046 (10th Cir. 2011) ("[T]he FCC is entitled to substantial deference when adopting interim rates"); *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410 (D.C. Cir. 2002); *Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068, 1073-75 (8th Cir. 1997); *MCI Telecomms. Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984).

II. THE FCC ARTICULATED MULTIPLE, INDEPENDENTLY REASONABLE GROUNDS FOR ITS INTERIM RULE.

The *Order* "examined the relevant data and articulated a rational connection between that data and its decision," *WildEarth*, 703 F.3d at 1182-83, in three independent ways: (1) allowing the market gradually to adjust to the new bill-and-keep regime; (2) ensuring parity among VoIP providers and between VoIP and wireline LECs; and (3) preserving incentives to invest in IP during the transition. None of these reasons applies to wireless carriers, and the Commission justifiably declined AT&T's assertion – which it made only in the most cursory fashion below – that competitive considerations required parity with wireless carriers.

A. Allowing the Market Gradually to Adjust.

The primary rationale behind the FCC's *Order* is straightforward: a gradual reduction of access charges for VoIP providers accounts for existing reliance on such revenues and allows for a "measured transition." *Order* ¶ 952, JA at 739-40. AT&T does not dispute the *Order*'s factual finding that, notwithstanding some disputes, it had been "in the aggregate" the practice in the industry for LECs involved in the provision of VoIP service to receive tariffed access charge revenues. *Order* ¶¶ 952 & 948 n.1917, JA at 739-40 & 737-38; *see also In re Connect America Fund*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4748 ¶ 614 (2011). The record before the Commission showed that both VoIP providers operating under the partnership model and those operating as unitary providers received such revenues prior to the *Order*. *See* n.7 *supra*.

This alone explains the FCC's refusal of AT&T's demand that VoIP partnerships be treated like wireless carriers during the transition. Wireless carriers had been prohibited from tariffing access charges for years. *See In re Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd 13,192, 13,199 ¶ 15 (2002), *appeal dismissed*, *AT&T Corp. v. FCC*, 349 F.3d 692 (D.C. Cir. 2003); *Order* ¶

970 n.2024, JA at 753. Wireless carriers thus were differently situated from VoIP providers: they had no expectation of access charge revenues to begin with.

This rationale did not require the FCC to decide AT&T's claims about the propriety of access charges by VoIP partnerships in the past, only to acknowledge that VoIP partnerships were in fact receiving access charge revenues at the time of the *Order* and that it made sense to allow them to adjust gradually to losing them. AT&T may have preferred either a regime in which wireless carriers received a windfall or VoIP partnerships lost revenues immediately, but interim solutions reasonably may "consider the past expectations of parties and the unfairness of abruptly shifting policies." *MCI Telecommc'ns Corp.*, 750 F.2d at 141. That is exactly what the FCC did here.

B. Parity Among Wireline Providers.

The *Order* also is backed by a second rationale: parity among wireline providers, including both among LEC and non-LEC VoIP providers and between VoIP and traditional providers. The *Order* articulates a broader policy of symmetry between VoIP and traditional providers. *See Order* ¶¶ 968-969, JA at 752. The "Commission has traditionally viewed facilities-based VoIP services as 'sufficiently close substitutes for local service to include them in the relevant product market,'" but not treated wireless carriers as competing in the same market. *Qwest Corp. v. FCC*, 689 F.3d 1214, 1221 n.4 (10th Cir. 2012) (internal citation omitted). As the *Order* explains, this policy would be undermined if some VoIP providers were cut off from access charges based on an unrelated distinction about how they had structured their businesses. Some VoIP providers have used the unitary model and some the partnership model "[b]ecause the Commission has not broadly addressed the classification of VoIP services…," and because of the Commission's "endorsement of [VoIP partnership] arrangements." *Order* ¶ 970 & n.2024, JA at 753-54. It would be arbitrary to penalize providers that chose the partnership model endorsed by the Commission when their business structure does not reflect any relevant difference in their services. *Id.*

AT&T argues that the parity sought by the *Order* is irrational because the retail provider in a VoIP partnership is situated similarly to a wireless carrier, in that neither tariffs access charges. AT&T Br. at 18-20. As detailed above, however, the FCC articulated valid reasons for looking beyond this superficial similarity. And as the Commission explained, wireless carriers' inability to tariff arises out of the Commission's long-standing policy of allowing market conditions to govern wireless compensation, whereas VoIP *can* be tariffed and a non-LEC VoIP provider's inability to file a tariff arises solely from its business structure. *See* p. 6 *supra*. In the end, the *Order* had to choose an access charge transition that aligned VoIP partnerships either with other wireline providers (both unitary VoIP providers and traditional wireline providers) or with wireless providers. The FCC made a rational election as to which kind of parity to maintain during the transition.[9]

C. Incentives to Invest in IP Technology.

The FCC also backed its decision with a third rationale that independently justifies the *Order*: avoiding penalizing investments in Internet Protocol ("IP").

"[O]ne of the goals of" the *Order* was to "promote investment in and deployment of IP networks." *Order* ¶ 968, JA at 752 . If the FCC had put in place a transitional regime where VoIP providers operating under a partnership model could not assess access charges (but others could), it would "disadvantage providers that have already made [IP] investments," *id*., merely because they chose a particular business model – one that the Commission had endorsed. The FCC reasonably articulated that such a state of affairs would not only be arbitrary, but could be counterproductive to its IP deployment objectives. *Id*.

Again, wireless providers were not similarly situated to VoIP providers: they could not have made investments in reliance on access charges, as they were not receiving any.

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[9] While the Commission established a slightly different compensation scheme for VoIP-PSTN traffic than for non-VoIP traffic during the transition, both kinds of traffic are subject to access charges; the only difference is the appropriate level of those charges, which the FCC has explained. *See* FCC Resp. Br. in Resp. to Windstream 23-27.

D. The *Order* Does Not Disregard AT&T's Claims of Competitive Harm.

The rule the FCC adopted has nothing to do with wireless providers. It neither changes the rights of wireless providers to collect access revenues nor uniquely affects their obligation to pay access charges to others. AT&T's repeated suggestion that the *Order* "imposed…regulatory disadvantage" on "wireless carriers," AT&T Br. 9, 18, bears little resemblance to the rule the *Order* actually implemented. In any event, AT&T's claim of "competitive harm," which it barely articulated below, was fully addressed by the *Order*.

AT&T principally argued below that letting VoIP partnerships tariff access charges was inconsistent with AT&T's view of then-prevailing law and could have unanticipated consequences on compensation for other kinds of services. *AT&T Letter* at 2-4, 5-6, JA at 3987-89, 3990-91. AT&T raised the argument on which it relies now – the claimed "competitive harm" to wireless providers, *see* AT&T Br. at 18 – only at the last minute (the last day party submissions were allowed) and in the most cursory statements, claiming that it would "arbitrarily pick winners and losers in the marketplace," *AT&T Letter* at 4-5, JA at 3989-90, but never explaining how that would be the case.[10]

[10] Given how generic and inchoate AT&T's claims of "competitive harm" were before the Commission, it is questionable whether AT&T preserved this particular issue for review at all. *See MCI Worldcom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000).

The economic reasoning argued without citation in AT&T's brief – that the rule somehow forces wireless carriers to charge higher "retail prices" AT&T Br. at 6 – is nowhere to be found in AT&T's arguments to the Commission. In any case, the Commission's analysis fully disposes of AT&T's claim. The FCC, as explained *supra*, considered the possibility of doing what AT&T wanted: "to immediately adopt a bill-and-keep methodology for VoIP traffic," thereby equalizing the treatment of VoIP and wireless providers for intercarrier compensation purposes right away. *Order* ¶ 952, JA at 739-40. The Commission acknowledged that this would "clearly facilitate the Commission's transition" to a regime in which all carriers are treated identically, but the Commission concluded that an immediate switch would not "appropriately balance[] other competing policy objectives." *Id.* AT&T may disagree with the FCC's judgment as a policy matter, but that judgment was the FCC's to make.

CONCLUSION

Intervenors respectfully request that the Court deny the petition.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, TYPE STYLE REQUIREMENTS, AND PRIVACY REDACTION REQUIREMENTS

1. This brief contains 3,153 words of the 21,400 words the Court allocated for the briefs of intervenors in support of the FCC in its October 1, 2012 Order Consolidating Case No. 12-9575 with Other FCC 11-161 Cases, Establishing Windstream Briefing Schedule, and Modifying Intervenor Participation. The intervenors in support of the FCC have complied with the type-volume limitation of that order because their briefs, combined, contain a total of fewer than 21,400 words, excluding the parts of those briefs exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

3. All required privacy redactions have been made.

/s/ Luke C. Platzer

July 29, 2013

CERTIFICATE OF DIGITAL SUBMISSION
Certificate of Compliance with Virus Scan

The Combined Responses of Federal Respondents and Supporting Intervenors to the AT&T Principal Brief were scanned for viruses with Symantec Endpoint Protection, version 11.0.7200.1147, updated on July 29, 2013, and according to the program are free of viruses.

/s/ James M. Carr
James M. Carr
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July 29, 2013

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2013, I caused the foregoing Combined Responses of Federal Respondents and Supporting Intervenors to the AT&T Principal Brief to be filed by delivering a copy to the Court via e-mail at FCC_briefs_only@ca10.uscourts.gov. I further certify that the foregoing document will be furnished by the Court through (ECF) electronic service to all parties in this case through a registered CM/ECF user. This document will be available for viewing and downloading on the CM/ECF system.

/s/ James M. Carr
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July 29, 2013