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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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FEDERAL RESPONDENTS' FINAL RESPONSE TO PETITIONERS' ADDITIONAL INTERCARRIER COMPENSATION ISSUES PRINCIPAL BRIEF

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TABLE OF CONTENTS

Table Of Authorities ii

Glossary iv

Issues Presented 1

Counterstatement 2

1. Limiting Explicit Subsidies Under The Recovery Mechanism To Incumbent LECs. 3

2. Combating Access Stimulation. 6

3. Accelerating The Transition To Bill-And-Keep For Non-Access Traffic That LECs Exchange With Wireless Providers. 12

Summary Of Argument 13

Argument 15

I. The FCC Reasonably Limited CAF Support Under The Recovery Mechanism To Incumbent LECs. 15

II. The FCC's Access Stimulation Rules For CLECS Are Reasonable. 22

III. The FCC Reasonably Adopted A Swifter Transition To Bill-And-Keep For Non-Access Wireless Traffic Than For Other Telecommunications Exchanged With A LEC. 27

Conclusion 35

TABLE OF AUTHORITIES

CASES

Alenco Commc'ns v. FCC, 201 F.3d 608 (5th Cir. 2000) 15, 28

American Tel. & Tel. Co. v. FCC, 454 F.3d 329 (D.C. Cir. 2006) 22

Ark Initiative v. U.S. Forest Service, 660 F.3d 1256 (10th Cir. 2011) 24

Covad Commc'ns Co. v. FCC, 450 F.3d 528 (D.C. Cir. 2006) 17, 27

Farley Transp. Co. v. Santa Fe Trail Transp. Co., 778 F.2d 1365 (9th Cir. 1985) 8

Farmers and Merchants Mut. Tel. Co. v. FCC, 668 F.3d 714 (D.C. Cir. 2011) 10

IMC Kalium Carlsbad, Inc. v. Interior Bd. Of Land Appeals, 206 F.3d 1003 (10th Cir. 2000) 26

MCI WorldCom, Inc. v. FCC, 209 F.3d 760 (D.C. Cir. 2000) 24

Nat'l Ass'n of State Util. Consumer Advocates v. FCC, 372 F.3d 454 (D.C. Cir. 2004) 18

Qwest Commc'ns Int'l Inc. v. FCC, 398 F.3d 1222 (10th Cir. 2005) 16

Rural Cellular Ass'n v. FCC, 588 F.3d 1095 (D.C. Cir. 2009) 15, 16, 21

Sorenson Commc'ns, Inc. v. FCC, 659 F.3d 1035 (10th Cir. 2011) 15, 21, 28, 35

Texas Office of Pub. Util. Counsel v. FCC, 265 F.3d 313 (5th Cir. 2001) 19

Worley Mills, Inc. v. NLRB, 685 F.2d 362 (10th Cir. 1982) 26

STATUTES

47 U.S.C. §201(b) 14

47 U.S.C. §204(a)(3) 8
47 U.S.C. §214(e) 19
47 U.S.C. §214(e)(2) 19
47 U.S.C. §251(b)(5) 28
47 U.S.C. §251(h) 2
47 U.S.C. §254(g) 9
47 U.S.C. §332 28
47 U.S.C. §1302 21

ADMINISTRATIVE DECISIONS

Access Charge Reform, 15 FCC Rcd 12962 (2000), *aff'd in part, remanded in part, Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001) 19

Access Charge Reform, 16 FCC Rcd 9923 (2001) .... *passim*

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 (1996) 12, 29, 30

Intercarrier Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151 (2001) 30

PrairieWave Telecomms., Inc. Petition for Waiver, 23 FCC Rcd 2556 (2008) 24, 25

GLOSSARY

1996 Act	Telecommunications Act of 1996
Act	Communications Act of 1934
APA	Administrative Procedure Act
ARC	Access Recovery Charge
Br.	Petitioners' Brief
CAF	Connect America Fund
CLEC	Competitive Local Exchange Carrier
COLR	Carrier of Last Resort
ETC	Eligible Telecommunications Carrier
FCC	Federal Communications Commission
ICC	Intercarrier Compensation
ISP	Internet Service Provider
ILEC	Incumbent Local Exchange Carrier
IXC	Interexchange Carrier
JA	Joint Appendix
LEC	Local Exchange Carrier
NECA	National Exchange Carrier Association
NTCA	National Telecommunications Cooperative Association
RICA	Rural Independent Competitive Alliance
SA	Supplemental Joint Appendix

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FEDERAL RESPONDENTS' FINAL RESPONSE TO PETITIONERS' ADDITIONAL
INTERCARRIER COMPENSATION ISSUES PRINCIPAL BRIEF

ISSUES PRESENTED

Whether the FCC acted within its discretion in:

(1) Limiting explicit Connect America Fund subsidies, available on a transitional basis, to incumbent local exchange carriers;

(2) Adopting rules to combat regulatory arbitrage schemes known as "access stimulation" or "traffic pumping"; and

(3) Adopting a swifter transition to a bill-and-keep framework for local ("non-access") wireless telecommunications traffic exchanged with local exchange carriers than for other types of traffic.

COUNTERSTATEMENT

In the *Order* on review,[1] the FCC adopted comprehensive intercarrier compensation ("ICC") reform for telecommunications traffic exchanged with local exchange carriers ("LECs"). There are two types of LECs: (1) "incumbent" LECs (or "ILECs") – companies that provided local telephone service on a monopoly basis at the time the Telecommunications Act of 1996 ("the 1996 Act") was enacted;[2] and (2) newer "competitive" LECs (or "CLECs") that have entered the local telephone marketplace since 1996.

For many years – and until the reforms adopted in the *Order* are fully implemented – federal and state regulators have generally required long-distance carriers (also known as "interexchange carriers" or "IXCs") to pay access charges to LECs that originate and terminate long-distance calls. *See* FCC Preliminary Br. 4-5. The origination or termination of these long-distance calls is sometimes called "access traffic." To promote universal service goals, the access charges long-distance carriers pay to incumbent LECs have been used to provide implicit subsidies to support the LECs' local

[1] *Connect America Fund*, 26 FCC Rcd 17663 (2011) ("*Order*") (JA at 390). On December 23, 2011, the FCC adopted a *sua sponte* order on reconsideration that also is pertinent to the issues presented in this case. *Connect America Fund*, 26 FCC Rcd 17633 (2011) ("*Reconsideration Order*") (JA at 1142).

[2] *See* 47 U.S.C. §251(h) (defining "incumbent local exchange carrier").

networks. *See id.* at 3-5. "Non-access" (or "local") telephone calls have been subject to a different intercarrier compensation framework. *See id.* at 11-12.

Under the new intercarrier compensation rules adopted in the *Order*, the FCC plans to transition both access and non-access traffic to a "bill-and-keep" framework under which intercarrier compensation obligations will be eliminated. *See Order* ¶¶736-737 (JA at 631). The *Order*'s ICC reforms address telecommunications traffic that CLECs and ILECs exchange with each other, as well as traffic that they each exchange with long-distance carriers and wireless providers. *See id.* ¶34 (JA at 403).

Petitioners – a trade association representing rural ILECs, another trade association representing CLECs, and various individual CLECs – collectively challenge three facets of the FCC's *Order*, each of which we address in this supplemental ICC brief.

1. Limiting Explicit Subsidies Under The Recovery Mechanism To Incumbent LECs.

The *Order* establishes a multi-year transition to bill-and-keep that initially caps intercarrier rates for *terminating* access and non-access telecommunications traffic at current levels, and then reduces many of these rates each year to reach bill-and-keep (in six years for price cap carriers, and in nine years for rate-of-return carriers). *Order* ¶801 (JA at 661-63). The FCC sought further comment on how to transition to a bill-and-keep

methodology with respect to the ICC rates for *originating* access (as well as other rate elements not specifically reduced by the *Order*). *Order* ¶¶1297-1305 (JA at 836-39). In the meantime, the *Order* caps (1) interstate and intrastate originating access charges for ILECs that are subject to price cap regulation (known as "price cap carriers"), and (2) interstate originating access charges for ILECs subject to rate-of-return regulation ("rate-of-return carriers"). *Order* ¶¶739, 800-801 (JA at 632, 660-63); *see also* FCC Preliminary Br. 10 & nn.7-8 (describing price cap and rate-of-return regulation of ILECs).

Unlike ILEC access charges, CLEC access charges have not been subject to traditional – price cap or rate-of-return – rate regulation by the FCC. Rather, under the access charge regime that pre-dated the *Order*, CLECs were required to set their tariffed access charges at or below the rates charged by the incumbent LEC operating in each CLEC's service area (a regulatory method known as "benchmarking").[3] Under the reforms adopted in the *Order*, CLECs must reduce their intercarrier compensation rates

[3] In the 2001 *CLEC Access Charge Order*, the FCC permitted most CLECs, following a transitional period, to tariff their interstate access charges only if they are set at or below the levels contained in the access tariff of the ILEC in the area in which the two carriers compete. *Access Charge Reform*, 16 FCC Rcd 9923, 9944-45 ¶¶51-52, 54 (2001) ("*CLEC Access Charge Order*"). The FCC also provided for a limited exemption that permits certain rural CLECs to benchmark their rates to a higher threshold. *Id.* at 9955-56 ¶¶80-81.

according to the same schedules that govern the ILECs (both rate-of-return and price cap carriers) to which their rates are benchmarked. *Order* ¶801 & Figure 9 (JA at 661-63).[4]

As described in our Principal ICC Brief (Argument II), the FCC in the *Order* also adopted a transitional recovery mechanism – comprised of a capped federally tariffed end-user charge (the "Access Recovery Charge" or "ARC") and, if that is insufficient, direct subsidies from the Connect America Fund ("CAF") – to mitigate the effect of reduced ILEC intercarrier compensation revenues. *See generally Order* ¶¶847-932 (JA at 683-729).[5] CLECs also are permitted to recover reduced ICC revenues through end-user charges – but they (unlike ILECs) benefit from the ability to impose such charges without the caps to which the ARC is subject. *Id.* ¶864 (JA at 692-93).

Because, among other things, CLECs enjoy greater regulatory flexibility than ILECs with respect to their rates and service obligations, the FCC declined to further burden the limited resources of the universal service

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[4] The exchange of wireless traffic is subject to a different transition. *See* Argument III, below.

[5] Carriers "receiving CAF support to offset lost ICC revenues [must] … use the money to advance [the FCC's] goals for universal voice and broadband." *Order* ¶37 (JA at 404-05); *see also id.* ¶918 (JA at 721-22).

fund by augmenting end-user revenues for CLECs with explicit subsidies from the CAF. *Order* ¶¶864-865 (JA at 692-93).

2. Combating Access Stimulation.

In the *Order*, the FCC also took steps to reduce incentives for access stimulation – also known as "traffic pumping" – and to mitigate the harm to IXCs that are forced to pay inflated rates for traffic subject to such schemes. *Order* ¶¶656-701 (JA at 601-17).

a. Traffic pumping is a type of regulatory arbitrage that involves LECs that are able to charge relatively high per-minute rates for terminating access service, often because they operate in rural areas where their average per-minute costs historically have been high and are presumed to be high in the future.[6] In traffic-pumping schemes, LECs typically enter into contractual arrangements with providers of "high call volume operations" – such as "chat line[]" providers, "adult entertainment" service providers, and "conference call[ing]" companies. *Order* ¶656 (JA at 601). These businesses often generate huge volumes of incoming long-distance calls by offering their services to consumers for free. *See 2011 NPRM* ¶636 (SA at 205); *Order* ¶656 (JA at 601). As the LECs terminate more traffic by connecting these

[6] *Connect America Fund*, 26 FCC Rcd 4554, 4761 ¶648 (2011) (SA at 208-09) ("*2011 NPRM*"); *Order* ¶663 (JA at 602).

calls to their recipients, the LECs' average termination cost per minute drops sharply. But so long as IXCs keep paying access charges, the LECs' revenue per minute of traffic stays constant. The result is "a jump in revenues and thus inflated profits." *Order* ¶657 (JA at 601). Because these per-minute charges bear no reasonable relation to the LECs' actual costs of providing service, the FCC found that the access rates charged by LECs that engage in traffic pumping are "almost uniformly … unjust and unreasonable under section 201(b) of the Act." *Id.*

Under traffic-pumping or access-stimulation schemes, LECs share their revenues with the contracting entities (*e.g.*, the chat line providers or conference calling companies) pursuant to a pre-existing agreement. The revenue-sharing arrangement effectively subsidizes the purportedly "free" services that these entities offer to the public. But these services in fact come at a cost: the IXCs are paying for them, and ultimately pass those costs on to their long-distance customers. *See 2011 NPRM* ¶636 (SA at 205); *Order* ¶656 (JA at 601). Thus, there is a classic implicit cross-subsidy: one group of customers pays higher rates for one service (in this case, long-distance service) so that customers of other services (chat lines or conference calling) pay lower rates or, indeed, nothing at all.

Traffic pumping particularly concerns the FCC because it exploits several features of the existing regulatory system. First, traffic pumping relies on LECs' ability to unilaterally set tariffed, non-negotiated charges for terminating access services,[7] and on the fact that IXCs often cannot receive refunds of tariffed charges that are later found to be unreasonable. *See 2011 NPRM* ¶¶ 644, 646, 653-654 (SA at 207, 208, 210-11); 47 U.S.C. §204(a)(3) (providing that certain tariffs are "deemed lawful" if not rejected or suspended and investigated by the FCC).

Second, traffic pumping allows LECs to impose tariffed rates that are untethered to their actual costs. ILEC traffic pumpers do so by setting tariffed rates based on *historical* low-volume costs per minute, even as they use traffic pumping to sharply increase their traffic volume. *See 2011 NPRM* ¶648 (SA at 208-09); *Order* ¶662 (JA at 602). CLEC traffic pumpers accomplish a similar decoupling of rates and costs by charging benchmarked rates equal to those of the competing ILEC, or to a higher benchmark that is

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[7] In contrast with an individually negotiated contract, a tariff is a schedule of charges, terms, and conditions of service that a communications carrier unilaterally determines and files with the FCC (for interstate service) or a state commission (for intrastate service). Unless the relevant regulator suspends or rejects the tariff, those rates, terms, and conditions are "binding on the parties and ha[ve] the force of law." *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 778 F.2d 1365, 1372 (9th Cir. 1985).

available to certain CLECs that serve rural areas.[8] A traffic-pumping CLEC's actual per-minute costs generally are far lower than its benchmarked rates. *See 2011 NPRM* ¶¶649-650 (SA at 209); *Order* ¶689 (JA at 612-13).

Third, traffic pumping takes advantage of rules that prohibit IXCs from blocking traffic to certain LECs or certain telephone numbers. If IXCs could refuse to deliver traffic pumped pursuant to these schemes, they often would do so. *See 2011 NPRM* ¶654 (SA at 210-11); *see also Order* ¶734 (JA at 630) (discussing the prohibition on call blocking).

Finally, traffic pumping relies on IXCs' regulatory obligation to charge their own customers geographically averaged rates. *See* 47 U.S.C. §254(g). If IXCs could recover the cost of traffic-stimulation schemes from the particular customers who use the chat-line and other services at issue, those customers would effectively pay for the services they received, and the nominally "free" services would be less appealing to them. *See 2011 NPRM* ¶654 (SA at 210-11); *Order* ¶663 (JA at 602). As a result, under the existing regulatory framework preceding the *Order*, users of these "free" calling services had every incentive to continue to use them, while LECs that profit from traffic pumping had every incentive to continue to do so.

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[8] *See* note 3, above; *see also CLEC Access Charge Order*, 16 FCC Rcd at 9944-45 ¶¶51-52, 54, 9955-56 ¶¶80-81.

b. Looking at the extensive record evidence before it, the FCC found that traffic pumping costs IXCs hundreds of millions of dollars per year, and billions over the past five years. *See Order* ¶664 (JA at 603) (relying on "estimates that the total cost of access stimulation to IXCs has been more than $2.3 billion over the past five years" and that "the overall costs to IXCs [are] between $330 and $440 million per year"). These costs not only cause all users of long-distance services to pay more; they also reduce "the amount of capital available to invest in broadband deployment and other network investments that would benefit consumers." *Id.* ¶¶663-664 (JA at 602-03).

The FCC further concluded that traffic pumping distorts the market for services such as conference calling, "harm[ing] competition by giving companies that offer a 'free' calling service a competitive advantage over companies that charge their customers for the service." *Order* ¶665 (JA at 603). And that practice spawns disputes that consume scarce judicial and administrative resources, as well as imposing additional costs on the parties to those disputes. *See id.* ¶664 & n.1093 (JA at 603); *Farmers and Merchants Mut. Tel. Co. v. FCC*, 668 F.3d 714 (D.C. Cir. 2011) (reviewing FCC resolution of traffic-pumping dispute).

c. In light of these widespread harms associated with traffic pumping, the FCC adopted measures that – while not entirely prohibiting revenue-sharing by LECs, as some commenters had urged (*see Order* n.1112 (JA at 606)) – reduce the incentives to engage in traffic pumping and mitigate the harms it causes to IXCs and consumers. The FCC first set criteria to determine which LECs are engaging in traffic pumping.[9] LECs that meet those criteria must file new tariffs with rates that usually will be significantly lower than those they otherwise would be permitted to file. *See Order* ¶679 (JA at 609). For rate-of-return ILECs, the new rate must be based on their projected costs, taking into account the expected increase in volume from traffic pumping. *See Order* ¶¶680-687 (JA at 609-12). For CLECs, the new rate – which the *Order* refers to as the "benchmark" rate – must be the same as the lowest rate for terminating access charged by any price cap LEC in the same state. *See id.* ¶¶688-694 (JA at 612-15). The FCC set this requirement based in part on AT&T's showing that in several states, traffic-pumping CLECs were terminating three-to-five times as much traffic as the largest ILEC in the state. *See id.* ¶689 & n.1160 (JA at 613).

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[9] These criteria, which petitioners do not challenge in this case, include the presence of revenue-sharing; and sharp increases in volume, or a high ratio of terminating to originating access traffic. *See Order* ¶¶667-678 (JA at 604-09).

3. Accelerating The Transition To Bill-And-Keep For Non-Access Traffic That LECs Exchange With Wireless Providers.

While the FCC set multi-year transitions to bill-and-keep for the exchange of telecommunications between LECs and other wireline carriers, *see Order* ¶801 (JA at 661-63), it required a faster transition for the exchange of non-access (*i.e.*, local or "intraMTA") telecommunications traffic between LECs and wireless providers.[10] As modified in the *Reconsideration Order*, the transition allows existing interconnection agreements without "change of law" provisions to continue in effect until expiration, and it allows agreements containing such provisions to continue in effect at least until July 1, 2012. *See Reconsideration Order* ¶¶6-7 (JA at 1144-46).[11] That decision, the FCC explained, was based on particular concerns about traffic pumping involving non-access wireless traffic and the lack of significant reliance

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[10] An MTA – or Major Trading Area – is the largest FCC-authorized license area for wireless carriers. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16014 ¶1036 (1996) ("*Local Competition Order*"). IntraMTA wireless traffic is treated as local traffic for regulatory purposes, while traffic that travels outside a wireless provider's MTA is deemed to be long-distance or "access" traffic. *Id.*

[11] Change of law provisions specify how to take account of intervening changes in the law (such as new FCC regulations) after the agreement is executed. *See* p. 28, below.

interests of LECs involved in such traffic pumping. *See Order* ¶¶995-997, 1000 (JA at 764-66, 767); *Reconsideration Order* ¶¶5-7 (JA at 1144-46).

SUMMARY OF ARGUMENT

Contrary to petitioners' claims, the FCC acted well within its broad discretion in adopting the reforms discussed above.

I. The FCC reasonably decided to provide ILECs (but not CLECs) with explicit subsidies from the Connect America Fund to replace some of the intercarrier compensation revenues that are reduced by the *Order*'s reforms. The FCC explained that CLECs are not subject to the same level of regulation as ILECs, and thus have more flexibility to adjust their end-user rates and to choose the areas and customer classes they wish to serve. *Order* ¶864 (JA at 692-93). Moreover, ILEC access rates traditionally had been set to include implicit subsidies to support the local network. *Id.* ¶¶857-858, 917, 919 (JA at 689-90, 721, 722). Given these factors, and the fact that explicit universal service subsidies under the Communications Act are designed to benefit customers and not carriers, it was reasonable for the FCC to decline to create new duplicative subsidies for CLECs (which typically operate in the same area as an ILEC). Indeed, the FCC's decision not to do so is consistent with its actions to eliminate duplicative subsidies in other portions of the *Order*. Providing CAF subsidies to CLECs would only

further burden the limited resources of the CAF and the consumers who ultimately contribute to it.

II. The FCC also acted within its discretion in taking steps to combat traffic pumping (or access stimulation) – regulatory arbitrage schemes that, if left unchecked, "almost uniformly" lead to unjust and unreasonable interstate access charges that violate 47 U.S.C. §201(b). *Order* ¶657 (JA at 601); *see id.* ¶¶656-701 (JA at 601-17). The administrative record amply supported the FCC's decision to require traffic-pumping CLECs to benchmark their interstate access charges to the lowest rate for terminating access charged by any price cap LEC in the same state. *Id.* ¶¶688-694 (JA at 612-15). And the agency's decision to adopt this benchmarking approach was well within its broad discretion to fashion effective and readily administrable solutions to complex regulatory problems.

III. Finally, the FCC reasonably determined that a swifter transition to bill-and-keep was warranted for non-access wireless traffic than for other traffic exchanged with LECs. Not only were concerns about abusive access stimulation particularly acute in the context of non-access wireless traffic (*Order* ¶995 (JA at 764-65)), the evidence showed that LECs had no substantial reliance interests with respect to that traffic that would justify a longer transition to bill-and-keep for such traffic. *Id.* ¶¶996-997 (JA at 765-

66). The FCC's decision easily satisfies the "especially deferential" standard of review this Court accords "transitional" measures. *Sorenson Commc'ns, Inc. v. FCC*, 659 F.3d 1035, 1046 (10th Cir. 2011) (citation omitted).

ARGUMENT

I. THE FCC REASONABLY LIMITED CAF SUPPORT UNDER THE RECOVERY MECHANISM TO INCUMBENT LECS.

Petitioner Rural Independent Competitive Alliance ("RICA") challenges the FCC's decision to provide revenue replacement subsidies from the CAF to ILECs, rather than to "*all* carriers." Br. 11. That claim fails from the start, because it overlooks that such federally-funded subsidies are intended to promote universal service, and "[t]he purpose of universal service [under 47 U.S.C. §254] is to benefit the customer, not the carrier." *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009) ("*RCA*") (quoting *Alenco Commc'ns v. FCC*, 201 F.3d 608, 621 (5th Cir. 2000)). CAF funds are recovered through contributions from interstate telecommunications service providers (among others), and are "almost always pass[ed on] … to their customers," *RCA*, 588 F.3d at 1099 – that is, virtually anyone who pays monthly cell phone or landline phone bills. As a result, unnecessary CAF expenditures may "detract from universal service by causing rates unnecessarily to rise." *Alenco*, 201 F.3d at 620; *accord RCA*, 588 F.3d at

1103. Indeed, this Court has noted the potential of "excessive subsidization" to "affect the affordability of telecommunications services." *Qwest Commc'ns Int'l Inc. v. FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005). Accordingly, nothing in the Communications Act requires the FCC to provide duplicative CAF subsidies to CLECs, which typically operate in the same area as an ILEC.[12]

In the *Order*, the FCC reasonably explained why it reserved CAF subsidies for incumbent LECs, and did not unnecessarily extend additional subsidies to CLECs. Competitive LECs, the FCC stressed, have regulatory advantages over ILECs. To begin with, CLECs' end-user charges "are not subject to … rate regulation" that is "comparable" to that applied to ILECs, leaving CLECs greater flexibility to raise those charges as their ICC revenues decline. *Order* ¶864 (JA at 692-93); *see id.* n.1670 (JA at 692) (noting, for example, that the FCC does not regulate CLEC subscriber line charges). In addition, while ILECs typically have been subject to state carrier-of-last-resort ("COLR") obligations that require them to provide service (including in high-cost areas) where no other provider will do so, CLECs are free from

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[12] *See, e.g.*, *Order* ¶316 (JA at 506) (concluding, with respect to Mobility Fund Phase I support, that, "as a general matter, the Commission should not award … support to more than one provider per area"); *id.* ¶¶498-511 (JA at 552-57) (eliminating "identical support rule," which entailed unnecessary duplicative subsidies).

such obligations. *Id.* ¶864 (JA at 692-93). Thus, unlike ILECs, CLECs may elect to provide service only where it is most profitable. *See id.* ¶864 & n.1675 (JA at 693) (CLECs may define their service areas to target "only the lowest-cost customers.").

Notwithstanding the greater regulatory flexibility that CLECs enjoy, RICA contends that, lacking market power, CLECs' end-user charges are *competitively* constrained by the ILECs' end-user charges, which (unlike their own) are supplemented by universal service subsidies. Br. 12 & n.5, 13.

This contention, however, does not undermine the FCC's line-drawing judgment. *See Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 541 (D.C. Cir. 2006) (courts are "generally unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn … are patently unreasonable, having no relationship to the underlying regulatory problem"). As an initial matter, ILECs are eligible to receive CAF support under the recovery mechanism only if the ARC end-user charges available to them are insufficient to recover all of the revenues to which the carrier is entitled. *Order* ¶918 (JA at 721). Accordingly, ILECs' end-user rates, in many instances, are not actually supplemented by CAF subsidies.

More fundamentally, there is no reason to believe – and petitioners have not shown – that CLECs need CAF support in order to effectively

compete with ILECs.[13] CLEC interstate access charges *never* have been set on the basis of CLECs' own costs, but rather have been benchmarked to ILECs' regulated rates for well over a decade. *See CLEC Access Charge Order*, 16 FCC Rcd at 9944-45 ¶¶51-52, 54. The ILEC interstate access charges to which CLEC rates have been benchmarked, moreover, historically have been set to cover not only the ILECs' own access service costs, but also implicit subsidies for their local telephone network. *See Order* ¶¶857-858, 917, 919 (JA at 689-90, 721, 722); *see Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 372 F.3d 454, 457 (D.C. Cir. 2004) ("*NASUCA*").

The CAF funding mechanism, in these circumstances, does not unfairly burden CLECs. Rather, it is fully consistent with past ICC recovery mechanisms that employed explicit universal service subsidies for ILECs "to help offset the reduction in implicit subsidies" occasioned by required transitions from intercarrier to end-user ILEC charges. *NASUCA*, 372 F.3d at 458 (describing *Access Charge Reform*, 15 FCC Rcd 12962 (2000), *aff'd in*

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[13] Even if petitioners could make such a showing, universal service subsidies are not distributed to carriers for the purpose of enabling them to compete with other providers. Universal service support is designed "to benefit the customer, not the carrier." *RCA*, 588 F.3d at 1103. Thus, carriers "are not entitled to the expectation of any particular level of support, or even any support, so long as the level of support provided is sufficient to achieve universal service goals." *Order* ¶510 (JA at 557); *see also id.*¶¶318, 319 (JA at 507) (noting that "the statute's goal is to expand availability of service to end users," "not to subsidize competition through universal service").

part, remanded in part, Texas Office of Pub. Util. Counsel v. FCC, 265 F.3d 313 (5th Cir. 2001)). Indeed, the FCC has never adopted an explicit *CLEC* recovery mechanism in connection with ICC reforms.[14]

RICA contends that the FCC erred in relying on the fact that CLECs have greater regulatory freedom than ILECs insofar as they (unlike most ILECs) are not subject to COLR requirements. Br. 15. According to RICA, this distinction is irrelevant because CLECs must qualify as eligible telecommunications carriers – or "ETCs" – in order to be eligible for any universal service subsidies, and therefore must provide supported services throughout their service areas in any event. *Id.* (citing 47 U.S.C. §214(e)). This contention misses the point that, unlike state-imposed COLR obligations, which typically are *mandatory* for ILECs, ETC status is *voluntary* for CLECs. *See* 47 U.S.C. §214(e)(2) (qualifying carriers may "request" ETC designation). In short, RICA offers no reason to question the

[14] Although the FCC has never previously adopted explicit subsidies for CLECs explicitly, under the "identical support rule," ILECs' per-line universal service support was available to carriers – mostly wireless providers, but including some CLECs (*see Order* n.827 (JA at 552)) – that were designated as competitive eligible telecommunications carriers pursuant to 47 U.S.C. §214(e). The FCC eliminated the identical support rule in the *Order*, explaining that it did not promote universal service goals. *See Order* ¶¶498-511 (JA at 552-57). *See also* FCC Response to Wireless Carrier USF Principal Br. 31-36 (addressing challenges to elimination of the identical support rule).

FCC's finding that CLECs "typically can elect whether to enter a service area" or "serve particular classes of customers." *Order* ¶864 (JA at 693).

Nor is the FCC's limitation of CAF subsidies to ILECs undermined by the agency's prior determination (in 2001) that some rural CLECs' access charges should not be benchmarked to those of competing ILECs that operate state-wide. *See* Br. 15-16 (citing *CLEC Access Charge Order*, 16 FCC Rcd at 9949-50); *see also* note 3, above. The *CLEC Access Charge Order* explained that ILECs with state-wide operations set geographically averaged rates that use "low-cost, urban and suburban operations to subsidize their higher cost, rural operations." *CLEC Access Charge Order*, 16 FCC Rcd at 9949-51 ¶¶64, 66 & n.140, 9955-56 ¶¶80-81. Because such ILECs may engage in that cross-subsidization, the *CLEC Access Charge Order* allowed rural CLECs that competed with those ILECs to adopt a different benchmarking methodology: rather than benchmarking their rates to those of the local ILEC, they could use as their guidepost the rates of the nation's smallest, highest-cost ILECs, which pool their costs and charge access rates specified in a tariff filed by the National Exchange Carrier Association ("NECA"). *CLEC Access Charge Order*, 16 FCC Rcd at 9949-51 ¶¶64, 66 & n.140, 9955-56 ¶¶80-81. That decision *benefits* rural CLECs. And those benefits are continued under the current *Order*: whether or not CLECs

subject to this alternative benchmarking approach have higher costs than their competing ILECs, the *Order* on review allows them to continue to benchmark their ICC rates to those of the very highest-cost ILECs during the transition to bill-and-keep (provided that they do not engage in access stimulation). *See Order* ¶801, Figure 9 & n.1499 (JA at 661-63).

Finally, RICA argues (Br. 18-19) that denying CAF support to CLECs under the recovery mechanism will discourage the deployment of advanced services to rural areas of the country, contrary to the objectives of section 706 of the 1996 Act, 47 U.S.C. §1302. But nothing in the Communications Act or the 1996 Act requires duplicative universal service subsidies, and the FCC reasonably determined that extending such support to CLECs – whose existing rates "[are] not based on any demonstrated level of need" – was unwarranted. *Order* ¶866 (JA at 693-94); *see id.* ¶¶864-865 (JA at 692-93). The FCC's reasonable choice in balancing various policy goals – including the need to avoid unnecessary waste and inefficiency in administering federal funds – is entitled to deference. *See RCA*, 588 F.3d at 1103 (FCC "enjoys broad discretion" in balancing competing universal service policies); *Sorenson*, 659 F.3d at 1045 (the FCC "has discretion to balance" competing statutory objectives).

II. THE FCC'S ACCESS STIMULATION RULES FOR CLECS ARE REASONABLE.

The FCC properly found that traffic pumping causes substantial harms to IXCs, their customers as a group, and the public interest. Indeed, petitioners Core Communications, Inc. ("Core") and North County Communications Corp. ("North County") do not challenge the FCC's finding that – absent prophylactic regulatory measures – traffic pumping "almost uniformly" yields unjust and unreasonable rates that violate section 201(b) of the Communications Act. *Order* ¶657 (JA at 601). *See* pp. 6-11, above. Rather, these two CLECs contend that the FCC acted arbitrarily in determining how best to tackle this regulatory problem. Petitioners face a particularly heavy burden in showing that the agency exceeded its broad discretion in crafting appropriate remedial measures to enforce the Act. *See, e.g., American Tel. & Tel. Co. v. FCC*, 454 F.3d 329, 334 (D.C. Cir. 2006) ("agency discretion is … at zenith" when fashioning remedies for statutory violations) (internal quotation marks omitted).

In light of its undisputed findings about the detrimental effects of access stimulation, the FCC reasonably determined that it should take actions to reduce the economic incentives to engage in such schemes. The agency did precisely that by requiring traffic-pumping LECs to file new tariffs with rates that usually will be significantly lower than those they otherwise would

be permitted to file. *See Order* ¶679 (JA at 609). Under the *Order*'s benchmark rule, CLECs must tariff rates no higher than the lowest rate for terminating access charged by any price cap LEC in the same state. *See id.* ¶¶688-694 (JA at 612-15). The FCC set this requirement based in part on record evidence submitted by AT&T showing that in several states, traffic-pumping CLECs were terminating three-to-five times as much traffic as the largest ILEC in the state. *See id.* ¶689 & n.1160 (JA at 612-13).

Core and North County argue (Br. 31-32) that the FCC did not sufficiently explain why, instead of adopting the benchmark rule, it would not *permit* CLECs to submit cost studies of the kind traffic-pumping ILECs are *required* to submit. That assertion lacks merit. One commenter, Bluegrass Telephone Co., made this suggestion – albeit only in a cursory manner. *See* Bluegrass Section XV Comments 14-15 (April 1, 2011) (JA at 1995-96). In rejecting it, the FCC cited the comments of Free Conferencing Corporation,[15] a traffic-pumping participant, which had explained that "a bright line approach" to benchmarking CLEC rates "'is particularly desirable given the current legal and practical difficulties involved with comparing CLEC rates to any objective standard of reasonableness.'" Free Conferencing Section XV Comments 35 (April 1, 2011) (JA at 1933) (quoting *CLEC Access Charge*

[15] *See Order* ¶694 & n.1172 (JA at 614).

Order, 16 FCC Rcd at 9939 ¶41). The FCC was not required to say more to respond to an argument that a commenter hardly bothered to develop. *See MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000) ("[I]t is one thing to preserve a point for judicial review and quite another to raise the issue with sufficient force to require the agency to formally respond."); *accord Ark Initiative v. U.S. Forest Service*, 660 F.3d 1256, 1262 (10th Cir. 2011).

Petitioners' claim (Br. 31-32) that the FCC acted arbitrarily in distinguishing between ILECs and CLECs for purposes of submission of cost studies also fails. *First*, the FCC reasonably predicted that the price cap LEC-based benchmark is "appropriate and reasonable" based on the volume of traffic that traffic-pumping CLECs generate. *Order* ¶689 (JA at 613). *Second*, the burden of such studies would fall not just on the CLECs themselves, but also on the FCC and the IXCs that would have to review the studies carefully.[16] *Third*, the FCC's benchmarking approach was entirely consistent with its prior decisions to curb CLEC abuses – whenever possible

[16] *See CLEC Access Charge Order*, 16 FCC Rcd at 9939 ¶41 (discussing the "legal and practical difficulties involved with comparing CLEC rates to any objective standard of 'reasonableness'"); *PrairieWave Telecomms., Inc. Petition for Waiver*, 23 FCC Rcd 2556, 2561 ¶14 (2008) (rejecting CLEC request to waive benchmarking rule and to tariff cost-based access rates in light of "administratively difficult cost study analysis" that would be required).

– without applying to CLECs the legacy, cost-based regulations long applicable to the access services of ILECs.[17] It was thus reasonable and consistent with longstanding precedent for the FCC to reject a "one-size-fits-all" approach to CLECs and ILECs with respect to the submission of cost studies.

Core and North County finally contend that the FCC's benchmark arbitrarily applies "regardless of whether a CLEC operates in the territory of a rate-of-return LEC." Br. 32-33 (emphasis omitted). The FCC's adoption of the benchmark, however, was based explicitly on the agency's finding that the access traffic volumes of traffic-pumping CLECs were more like those of price cap LECs than those of the smaller rate-of-return LECs. *See Order* ¶689 & n.1160 (JA at 613) ("AT&T shows that 'rural' access stimulating competitive LECs in Iowa, Minnesota and South Dakota collectively are terminating three to five times as many minutes as the *largest* incumbent LEC operating in the same state.") (citing AT&T Dec. 3, 2009 Ex Parte Letter, Attach. at 4 (JA at 1536)) (emphasis added); *see also Order* n.1158

[17] *See CLEC Access Charge Order*, 16 FCC Rcd at 9939 ¶41; *PrairieWave Telecomms.*, 23 FCC Rcd at 2561 ¶14. *See also Order* ¶¶692, 694 (JA at 614-15) (explaining decision to deal with CLEC traffic-pumping abuses within the parameters of the existing CLEC benchmarking regulatory structure for access charges).

(JA at 612) (citing additional evidence submitted by AT&T in 2011).[18] By contrast, Core and North County did not identify their own traffic volumes before the FCC, nor did any traffic-pumping CLECs. This omission is significant, as the traffic-pumpers themselves are best positioned to offer evidence about their own volumes. The FCC was entitled to draw an adverse inference from the fact that they declined to provide such information and then argued that the record had been insufficiently developed.

In short, petitioners have shown no evidentiary basis for overturning the FCC's considered judgment. *See IMC Kalium Carlsbad, Inc. v. Interior Bd. Of Land Appeals*, 206 F.3d 1003, 1011 (10th Cir. 2000) (an agency "may draw reasonable inferences from the evidence," which "'are not to be overturned on review unless they lack a reasonable basis'") (quoting *Worley Mills, Inc. v. NLRB*, 685 F.2d 362, 365 (10th Cir. 1982)). And petitioners present no basis for second-guessing the agency's determination regarding the best remedy for the undisputed problem of access stimulation: the benchmark the FCC adopted and fully explained was a reasonable choice

[18] This evidence refutes petitioners' claim that there was no "evidence in the record comparing the volumes of traffic terminating to [traffic-pumping LECs] with [that terminating to] … the RBOC/ILEC carriers." Br. 34-35.

among alternative remedies, some stricter[19] and others more lenient. No more was required. *See Covad Commc'ns*, 450 F.3d at 541 (petitioners challenging FCC line-drawing decision must "demonstrate that lines drawn … are patently unreasonable").

III. THE FCC REASONABLY ADOPTED A SWIFTER TRANSITION TO BILL-AND-KEEP FOR NON-ACCESS WIRELESS TRAFFIC THAN FOR OTHER TELECOMMUNICATIONS EXCHANGED WITH A LEC.

Petitioners North County, the National Telecommunications Cooperative Association ("NTCA"), and U.S. TelePacific Corp. ("U.S. TelePacific") challenge (Br. 20-31) the FCC's decision to adopt a more accelerated transition to bill-and-keep for non-access (or local) wireless traffic than for other types of telecommunications exchanged with a LEC. As shown below, the FCC fully explained its reasons for the schedule it adopted. That explanation easily satisfies the "especially deferential" standard of APA

[19] The FCC adopted its benchmarking approach as a more tailored alternative to "declar[ing] revenue sharing to be a *per se* violation of section 201(b) of the Act," which numerous parties urged but which the agency considered "overly broad." *Order* ¶672 (JA at 606).

review that applies to "transitional" measures. *Sorenson*, 659 F.3d at 1046 (quoting *Alenco*, 201 F.3d at 616).[20]

As an initial matter, petitioners' challenges (Br. 20) rest in part on their mistaken premise that the FCC adopted a "flash cut" to bill-and-keep for such traffic. That is not what the agency did. The FCC stressed in the *Order* that it was "not abrogating existing commercial contracts or interconnection agreements." *Order* ¶1000 (JA at 767). Thus, any existing interconnection agreements would continue to apply according to their own terms, which might or might not contain "change of law" provisions allowing for renegotiation or the addition of contractual language reflecting the new regulatory landscape. *See id.* Moreover, in the subsequent *Reconsideration Order*, the FCC delayed the effective date of the bill-and-keep default rule by 6 months – from December 29, 2011, to July 1, 2012 – for carriers that were exchanging non-access wireless traffic pursuant to interconnection agreements that already existed at the time the *Order* was adopted. *Reconsideration Order* ¶¶6-7 (JA at 1144-46). The effect of that change was

[20] Although their challenge focuses almost exclusively on reasoned decisionmaking claims, petitioners briefly contest (Br. 22) the FCC's statutory authority to adopt a bill-and-keep framework for non-access wireless traffic. As explained in the FCC's Principal ICC Brief (at 12-22, 24-25), the FCC has two independently sufficient statutory bases to adopt a bill-and-keep framework for such traffic: 47 U.S.C. §§ 251(b)(5) and 332. *See Order* ¶1001 (JA at 767-68).

to ensure no such carrier would be required to convert to bill-and-keep before the FCC's recovery mechanism went into effect in July 2012, even if its interconnection agreement had a change of law provision that "relate[d] back to the [December 29, 2011] effective date of the new rule." *Id.* ¶6 (JA at 1145). The FCC also reaffirmed on reconsideration that carriers operating pursuant to long-term interconnection agreements without change of law provisions would be able to continue under the terms of those agreements until they expired. *Id.* n.30 (JA at 1147). Accordingly, although the FCC provided carriers with a shorter transition period than some might have preferred, there can be no dispute that the agency provided a transition – and not a "flash cut" – to bill-and-keep for non-access wireless traffic. Nor do petitioners identify any actual problems with the transition the FCC adopted, which ended well before they filed their brief in this case.

Petitioners nonetheless contest the deadline. They point out that the FCC previously declined to "singl[e] out [wireless]-LEC traffic and subject[] it to bill-and-keep" when it undertook comprehensive ICC reform in 1996,[21] and that "it was unwilling to adopt" bill-and-keep for Internet Service

[21] Br. 23 (citing *Local Competition Order*, 11 FCC Rcd at 16058 ¶1118).

Provider ("ISP")-bound traffic in 2001.[22] That is true, but irrelevant. Neither of those decisions discussed the pace of incremental reform during a transition period. In the 1996 *Local Competition Order*, which first adopted rules to implement the 1996 Act, the FCC declined to mandate bill-and-keep for "all LEC-[wireless]" traffic "[i]n light of the overall … policy" adopted in that decision, which rejected a bill-and-keep framework for *any* traffic. 11 FCC Rcd at 16058 ¶1118. Similarly, in the 2001 *ISP Remand Order*, the FCC was "unwilling" to take any action that would result in permanently different rates for "local voice and ISP-bound traffic" based on an administrative record that failed to establish any "inherent differences" in the cost of delivering the two types of traffic. 16 FCC Rcd at 9194 ¶90. Here, by contrast, the FCC adopted the same regime – bill-and-keep – as the end point for *all* traffic exchanged with a LEC, and it fully justified the different transition paths it adopted for non-access wireless traffic and other traffic.

In the 2011 *Order* on review, moreover, the FCC found evidence of "a significant and growing problem of traffic stimulation and regulatory arbitrage in LEC-[wireless] non-access traffic." *Order* ¶995 & n.2099 (JA at 764) (citing record evidence). The FCC also saw little evidence of similar

[22] Br. 23 (citing *Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, 9194-95 ¶90 (2001) ("*ISP Remand Order*")).

traffic pumping for non-access wireline traffic,[23] and it emphasized the risk that – absent FCC action – existing traffic-pumping schemes involving access traffic could be "quickly adapt[ed]" to the non-access wireless traffic context. *See id.* ¶995 (JA at 765).

Petitioners speculate (Br. 25) that traffic pumping could not occur with non-access wireless traffic, because rates for such traffic are too low to make traffic pumping profitable. But they ignore the record evidence that many CLECs were seeking to impose high rates on non-access wireless traffic (as much as $0.011 or $0.015 per minute, when most ILECs exchange such traffic for $0.0007 or less). *See* Verizon 6/28/10 Ex Parte at 6-7 (JA at 1660-61); *see also* CTIA 11/24/10 Ex Parte at 1 & Attach. (JA at 1754, 1756-63) (noting that wireless carriers are involved as victims of traffic pumping in more than 60 disputes nationwide); *Order* ¶991 & n.2085 (JA at 762) (citing additional record evidence of CLEC attempts to impose high rates); *id.* ¶997

[23] By contrast, the traffic pumping schemes involving wireline communications that pose the greatest concerns about regulatory arbitrage involve access or long-distance traffic. *See Order* ¶995 (JA at 764).

(JA at 765-66) (noting lower ILEC charges).[24] Petitioners' argument also overlooks the FCC's findings that per-minute rates need only be above incremental cost to enable significant arbitrage, and that the cost of delivering voice service is nearly zero (as low as $0.0000001 per minute). *See id.* ¶752 (JA at 638).

The FCC further explained that, in the context of non-access traffic between CLECs and wireless carriers, there were no reliance interests requiring a longer transition to bill-and-keep. First, under pre-existing law, CLECs "had no basis" for relying on the assumption that they would receive ICC payments for non-access wireless traffic; "until recently [the agency] had no pricing methodology applicable" to CLEC-wireless traffic. *Order* ¶996 (JA at 765). Accordingly, the FCC determined that, "in setting a methodology [for such traffic] for the first time," it was reasonable to require swifter compliance by CLECs, "particularly given that [they] are not subject to retail rate regulation in the manner of [ILECs], and therefore have flexibility to adapt their businesses more quickly." *Id.*

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[24] Petitioners posit (Br. 24-25) that the more accelerated transition to bill-and-keep for non-access wireless traffic (as compared with other traffic) itself may lead to arbitrage. But the FCC explained at length that bill-and-keep would lead to more efficient pricing, not wasteful arbitrage. *See Order* ¶¶744-759 (JA at 634-41). Petitioners do not even attempt to show how a swift transition to bill-and-keep would encourage arbitrage.

Petitioners complain (Br. 26) that one reason CLECs did not receive payment for non-access wireless traffic in the past was a lack of clarity in the FCC intercarrier compensation rules governing such traffic. That claim does not advance petitioners' argument, however. Indeed, precisely because the law was unclear, CLECs "had no basis for reliance" on the premise that they would be entitled to such payments. *See Order* ¶996 (JA at 765).

Petitioners also cite (Br. 27) two filings that *post-date* the *Order*, in which CLECs identified pre-*Order* agreements allowing CLECs to receive payments for the exchange of non-access wireless traffic. But petitioners ignore the fact that the FCC addressed such evidence on reconsideration, when it deferred the effective date of its bill-and-keep rule to July 1, 2012. *See Reconsideration Order* ¶¶6 & n.21, 8 (JA at 1145, 1146-47) (discussing late-filed letters). Nor do petitioners explain why the FCC's extension of the effective date did not give CLECs sufficient time to adapt to the new rule. *See id.* ¶7 (JA at 1145-46).

As for incumbent LECs, the FCC noted that some – those without interconnection agreements with wireless providers setting a rate for such traffic – "do not receive any compensation" for transport and termination of non-access wireless traffic today. *Order* ¶997 (JA at 766). And most of those ILECs that do get paid under existing agreements are receiving

"$0.0007 or less." *Id.* Petitioners challenge the relevance of the $0.0007 figure (Br. 29-30) on the ground that such rates were "all but mandated" by an earlier FCC order. But that objection misses the point: the FCC's focus was on adopting a transition period that would "minimize market disruption." *Reconsideration Order* ¶7 (JA at 1145). To do so, it was appropriate – indeed necessary – for the agency to consider existing compensation rates.

Finally, petitioners cite (Br. 29) some pre-*Order* agreements (mostly involving rate-of-return ILECs) with higher rates for non-access wireless traffic. But petitioners do not seriously challenge the FCC's finding that the record contained no evidence that a prompt transition to bill-and-keep for such traffic "would have a harmful impact." *Order* ¶997 (JA at 766). That was particularly so in light of other safeguards the FCC adopted in the *Order*, such as the new recovery mechanism and a special rule for rate-of-return carriers limiting their responsibility for the cost of transport for non-access wireless traffic. *Id.* ¶¶997, 999 (JA at 765-67).[25]

[25] Petitioners offer the conclusory assertion that "the recovery mechanisms the FCC adopted do not protect [rate-of-return LECs] from flash cuts." Br. 30 (citing petitioners' joint principal ICC and USF briefs). Neither of the cited briefs addressed the FCC's special transport rule for rate-of-return LECs. *See Order* ¶¶997, 999 (JA at 765-67). And the FCC demonstrates in Argument II of its Principal ICC Brief that challenges to the recovery mechanism are meritless.

In sum, the FCC fully explained why its longer transitions to bill-and-keep for other types of traffic were justified by the different circumstances that traffic presents. Under the "especially deferential" standard of review that applies to such FCC action, the Court should reject petitioners' challenge to the transition schedule for the exchange of non-access wireless traffic. *Sorenson,* 659 F.3d at 1046 (citation omitted).

CONCLUSION

The petitions for review should be denied.

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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 Additional Intercarrier Compensation Issues Brief was certified to be 6,942 words in length. Therefore, the FCC may file a response brief up to 7,983 words in length. This brief contains 7,386 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

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

INTERVENORS' BRIEF IN SUPPORT OF THE RESPONSE OF THE RESPONDENTS TO THE ADDITIONAL INTERCARRIER COMPENSATION ISSUES BRIEF

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, the Intervenors joining this brief hereby submit these disclosure statements in connection with the above-captioned case.

AT&T is a publicly traded corporation that, through its wholly owned affiliates, is principally engaged in the business of providing communications services and products to the general public. AT&T has no parent company, and no publicly held company owns ten percent 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 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.

Sprint Nextel has no parent corporation, and no publicly-held corporation owns 10% or more of Sprint Nextel's stock.[1]

T-Mobile, USA, Inc., a Delaware corporation, is a wholly owned subsidiary of T-Mobile US, Inc., a Delaware corporation. T-Mobile US, Inc. (NYSE: TMUS) is a publicly traded company listed on the New York Stock Exchange ("NYSE"). T Mobile Global Holding GmbH, a Gesellschaft mit beschränkter Haftung organized and existing under the laws of the Federal Republic of Germany ("Holding"), owns more than 10% of the shares of T-Mobile US, Inc. Holding is, in turn, a direct wholly owned subsidiary of T-Mobile Global Zwischenholding GmbH, a Gesellschaft mit beschränkter Haftung organized and existing under the laws of the Federal Republic of Germany ("Global"). Global is a direct wholly owned subsidiary of Deutsche Telekom AG, an Aktiengesellschaft organized and existing under the laws of the Federal Republic of Germany ("Deutsche Telekom"). The principal trading market for Deutsche Telekom's ordinary shares is the Frankfurt Stock Exchange. Deutsche Telekom's ordinary shares also trade on the Berlin, Düsseldorf, Hamburg, Hannover, München, and Stuttgart stock

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[1] On October 15, 2012, SoftBank Corp. and certain of its wholly-owned subsidiaries and Sprint Nextel entered into an Agreement and Plan of Merger ("Merger Agreement"), which is currently subject to shareholder and regulatory approval. If the Merger Agreement is consummated, SoftBank – a publicly-held corporation – will own 10% or more of Sprint Nextel's stock. *Sprint Nextel's 10Q* at page 1 (filed Feb. 28, 2013) *available at* http://www.sec.gov/Archives/edgar/data/101830/000010183013000006/sprint2012 10-k.htm.

exchanges in Germany. Deutsche Telekom's American Depositary Shares ("ADSs"), each representing one ordinary share, trade on the OTC market's highest tier, OTCQX International Premier (ticker symbol: "DTEGY").

T-Mobile's general nature and purpose are to provide wireless voice and data services to customers throughout the United States.

The **Verizon companies** participating in this filing are Cellco Partnership d/b/a Verizon Wireless and the regulated, wholly owned subsidiaries of Verizon Communications Inc. Cellco Partnership, a general partnership formed under the law of the State of Delaware, is a joint venture of Verizon Communications Inc. and Vodafone Group Plc. Verizon Communications Inc. and Vodafone Group Plc indirectly hold 55 percent and 45 percent partnership interests, respectively, in Cellco Partnership. Both Verizon Communications Inc. and Vodafone Group Plc are publicly traded companies. Verizon Communications Inc. has no parent company. No publicly held company owns ten percent or more of Verizon Communications Inc.'s stock. Insofar as relevant to this litigation, Verizon's general nature and purpose is to provide communications services, including broadband Internet access services provided by its wholly owned telephone company and Verizon Online LLC subsidiaries and by Verizon Wireless.

TABLE OF CONTENTS

Page

Table of Authorities v

Glossary vi

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. Intervenors Offer No Additional Argument on the First Point Raised in Petitioners' Additional ICC Brief 2

II. The Commission has Unquestioned, Plenary Authority Over Intercarrier Compensation for all LEC-CMRS Traffic 2

III. The Commission's Access Stimulation Rules Are a Reasonable Response to a Widespread Problem of Traffic Pumping Schemes 8

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases and Other Administrative Decisions

Iowa Utilities Board v. *FCC*,
120 F.3d 753 (8th Cir. 1997) 4

Local Competition Order,
11 FCC Rcd. 15499 (1996) 3

MetroPCS California, LLC v. FCC,
644 F.3d 410 (D.C. Cir. 2011) 4

Qwest Corporation v. *FCC*,
252 F.3d 462 (D.C. Cir. 2001) 4

Statutes and Other Authorities

47 U.S.C. §152(b) 3

47 U.S.C. §251(b)(5) 1, 2, 5, 6

47 U.S.C. §252(d)(2) 1, 5

47 U.S.C. §332 ....*passim*

47 C.F.R. §51.701(b)(2) 3

H.R. Conf. Rep. No. 103-213 (Aug. 4, 1993) 3

GLOSSARY

1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (amending the Communications Act of 1934, 47 U.S.C. §151 *et seq.*)
Communications Act ('the Act")	Communications Act of 1934, as amended (47 U.S.C. §151 *et seq.*)
CLEC	Competitive Local Exchange Carrier
CMRS	Commercial Mobile Radio Service
FCC	Federal Communications Commission
FCC Prin. Br.	Federal Respondents' Response to the Joint Intercarrier Compensation Principal Brief of Petitioners (filed Mar. 6, 2013)
ICC	Intercarrier Compensation
JA	Joint Appendix
LEC	Local Exchange Carrier
MTA	Major Trading Area
Order	Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd. 17663 (2011)
Pet. Add. Br.	Additional Intercarrier Compensation Brief of Petitioners (filed November 6, 2012)
USF	Universal Service Fund

INTRODUCTION AND SUMMARY OF ARGUMENT

I. The FCC's Response to Petitioners' Additional Intercarrier Compensation Brief concisely demonstrates the flaws in Petitioners' first argument—that the Commission improperly denied USF support to rural CLECs—and Intervenors offer no further argument.

II. Petitioners' second argument, that the Commission erred by implementing bill-and-keep for CMRS-LEC Traffic and in doing so more rapidly than for LEC-LEC traffic, is wrong for the following reasons:

A. Petitioners err in arguing that the Commission's new wireless regulations are "dependent upon the validity" of the wireline rules. Pet. Add. Br. 22. The Commission has *independent* (and plenary) statutory authority under Section 332 to establish and oversee the intercarrier compensation regime for all wireless traffic without regard to its authority under Section 251(b)(5).

B. Petitioners' claim that bill-and-keep infringes on the authority of state commissions under Section 252(d)(2) is irrelevant with respect to LEC-CMRS traffic. Again, the Commission has unquestioned authority over intercarrier compensation for wireless traffic under Section 332 and that authority extends to adoption of bill-and-keep for wireless traffic.

C. Petitioners' argument that the Commission's bill-and-keep implementation schedule for wireless traffic is "arbitrary and capricious" is

incorrect. The Commission fully articulated compelling reasons for the difference between the wireless and wireline schedules.

III. Petitioners' argument that the Commission's new access stimulation rules are arbitrary and capricious also lacks merit. Those rules are a reasonable response to a widespread problem of traffic pumping schemes. Such schemes pose particular problems in the wireless context, which fully justifies retaining the new wireless rules without regard to the Commission's authority under Section 251(b)(5).

ARGUMENT

I. Intervenors offer no additional argument on the first point raised in Petitioners' Additional ICC Brief.

II. The Commission has Unquestioned, Plenary Authority Over Intercarrier Compensation for all LEC-CMRS Traffic.

A. Petitioners' primary ICC argument in this appeal—that the FCC lacks authority under §251(b)(5) to preempt state regulation of intrastate access charges—is meritless for the many reasons the FCC and intervenors have explained in separate briefs. Furthermore, the Commission's separate authority under §332 over intercarrier compensation for *all* wireless traffic was unquestioned in the FCC proceeding and remains so before this Court. Accordingly, "[w]ith respect to traffic exchanged with wireless carriers," §332 "provide[s] ... independent authority for the FCC to adopt its reforms." FCC Prin. Br. 6.

The Commission's reliance on its §332 authority to establish and oversee the intercarrier compensation regime for all wireless traffic is well founded. In 1993, Congress limited the states' historical authority over intrastate rates by prohibiting them from exercising "any authority to regulate" wireless entry and rates. *See* 47 U.S.C. §332(c)(3)(A). At the same time, the 1996 Act made clear that it was the FCC, not the states, that has authority over intercarrier compensation for wireless traffic by *exempting* the amended §332 from the restrictions that §2(b) of the Act, 47 U.S.C. §152(b), had imposed on FCC jurisdiction over intrastate traffic, *see also* H.R. CONF. REP. NO. 103-213, at 497 (Aug. 4, 1993). Finally, the 1993 Act empowered the FCC to order any LEC to interconnect with a wireless carrier and to establish the terms and conditions for the exchange of all traffic. *See id.* §332(c)(1); *see also Order,* ¶834.

Significantly, "[t]he Eighth and D.C. Circuits have confirmed that 47 U.S.C. § 332 provides the FCC with independent authority to establish reciprocal compensation terms with respect to wireless traffic exchanged with a LEC." FCC Prin. Br. 24. In 1996, the Commission's *Local Competition Order,* 11 FCC Rcd. 15499 (1996), adopted the "intraMTA rule," *see* 47 C.F.R. §51.701(b)(2), which had the effect of prohibiting LECs from imposing access charges (including *intrastate* access charges) on mobile-to-land calls that originate and terminate within the same Major Trading Area ("MTA"). LECs argued on appeal that the

FCC did not possess the authority to eliminate intrastate access charges. In *Iowa Utilities Board* v. *FCC*, 120 F.3d 753, 900 n.21 (8th Cir. 1997), the Eighth Circuit rejected this LEC argument based on the statutory provisions discussed above. No one challenged this portion of this Eighth Circuit ruling in the subsequent appeal of this decision to the Supreme Court.

The D.C. Circuit has twice acknowledged the Commission's plenary authority over all intercarrier compensation for LEC-CMRS calls. First, in *Qwest Corporation* v. *FCC*, 252 F.3d 462 (D.C. Cir. 2001), Qwest appealed an FCC order enforcing one of the wireless rules the Eighth Circuit had affirmed in *Iowa Utilities Board*. The D.C. Circuit ruled that, because "[t]he Petitioners did not seek certiorari as to the Eighth Circuit's holding on § 332," the decision was a "final judgment with preclusive effects." 252 F.3d at 466. More recently, the D.C. Circuit's decision in *MetroPCS California, LLC v. FCC*, 644 F.3d 410, 414 (D.C. Cir. 2011), also acknowledged that the Commission has broad §332 authority to preempt state authority over intrastate rates affecting wireless companies but has no duty to do so, thus upholding the Commission's election at the time to delegate to state regulators certain rate-setting responsibilities. The *Order* fully justified the FCC's decision to alter that decision and to establish a federal bill-and-keep methodology for LEC-wireless traffic. *Order*, ¶ 993.

In sum, the FCC has authority under §332 and D.C. Circuit precedent to impose the *Order*'s reforms of wireless intercarrier compensation, including establishing a default bill-and-keep regime.

B. With respect to LEC-LEC traffic, Petitioners argue in their Principal ICC Brief that the Commission's adoption of bill-and-keep infringed on the authority of state commissions under §252(d)(2). With respect to LEC-CMRS traffic, that claim is irrelevant—again, the Commission has unquestioned authority over intercarrier compensation for wireless traffic under §332.

Several Petitioners—in an argument not joined by the vast majority of the Petitioners in this appeal—argue that the Commission elected to move to bill-and-keep for LEC-CMRS traffic *because* it had imposed that regime on LEC-LEC traffic under §251(b)(5). Pet. Add. Br. 21-22. But there is nothing in the *Order* that suggests that the Commission intended the adoption of bill-and-keep for LEC-CMRS traffic to hinge on the adoption of bill-and-keep for LEC-LEC traffic. Indeed, the reasons the Commission articulated in the *Order* for moving to bill-and-keep apply equally to LEC-LEC and CMRS-LEC traffic, including that bill-and-keep:

- "brings market discipline to intercarrier compensation because it ensures that the customer who chooses a network pays the network for the services the subscriber receives" (¶742);
- is "less burdensome" than other options because it "reduces significant regulatory costs" (¶743);

- "eliminates arbitrage and marketplace distortions" (¶752);
- ensures that "success in the marketplace will reflect a carrier's ability to serve customers efficiently, rather than its ability to extract payments from other carriers" (¶756); and
- is "most consistent with the models used for wireless and IP networks, models that have flourished and promoted innovation and investment" (*id.*).

In addition, the Commission did not simply adopt bill-and-keep generically—it did so specifically for "wireless traffic exchanged with a LEC," including for both "interstate and intrastate traffic." ¶779. Moreover, the Commission did so pursuant to "separate authority under sections 201 and 332(c)," quite apart from its §251(b)(5) authority over LEC-LEC traffic. *Id.*

C. Certain Petitioners present a jumble of arguments to the effect that the FCC's bill-and-keep implementation schedule for wireless traffic is "arbitrary and capricious" because it is different from the one the Commission adopted for landline traffic. These arguments may be simplified to the claims that: (1) the "FCC's dissimilar treatment of similar traffic is arbitrary and capricious," Pet. Add. Br. 23; and (2) the agency's approach unlawfully "reverses" prior FCC findings without acknowledgment or explanation, *id.* at 23. These claims are erroneous.

First, the argument that the *Order* treats LEC-LEC and LEC-CMRS traffic differently for no reason is incorrect. In fact, the Commission gave sensible reasons for the difference in treatment, including:

- The "need for immediate application of a bill-and-keep methodology in [the] context" of LEC-CMRS non-access traffic is greater than for LEC-LEC traffic because of "a significant and growing problem of traffic stimulation and regulatory arbitrage" for "LEC-CMRS non-access traffic" (¶995); and
- Because the Commission "until recently had no pricing methodology applicable to competitive LEC-CMRS traffic," CLECs "had no basis for reliance on such a [non-bill-and-keep] methodology in their business models." (¶996).

The *Order* thus appropriately treats LEC-CMRS traffic differently because of an irrefutable record of new, growing arbitrage problems, and because the Commission is not "transitioning" from an existing regime at all, but rather filling a void as to which CLECs had no detrimental reliance interests.

In attempting to refute the FCC's conclusion that a quicker transition for CMRS-LEC traffic would cause fewer market disruptions, Petitioners present contradictory arguments: that CLECs' inability to collect compensation results from the FCC's inaction, and that CLECs in fact have been collecting considerable compensation. Pet. Add. Br. 26-28. Petitioners cannot have it both ways. In any event, neither of these arguments undermines the FCC's reasoned justifications for treating LEC-CMRS traffic differently. Moreover, as the FCC pointed out, *see* FCC Add. Br. at 28, many of Petitioners' arguments stem from their mistaken belief that the Commission adopted a "flash cut" to bill-and-keep for LEC-CMRS traffic. In fact, the Commission declined to abrogate existing interconnection agreements, and extended the implementation deadline by six months for carriers

with existing agreements—the "effect of that change was to ensure no such carrier would be required to convert to bill-and-keep" without a further "transition" period. *Id.* at 28-29.

Second, there is no unexplained reversal of course here. Petitioners' arguments that the Commission declined to "singl[e] out LEC-CMRS traffic and subject[] it to bill-and-keep" in 1996, and that "it was unwilling to adopt" bill-and keep for ISP-bound traffic in 2001, Pet. Add. Br. 23, are "true, but irrelevant," FCC Add. Br. 30. As the Commission explained, those earlier decisions declined to mandate bill-and-keep for wireless traffic in light of the Commission's overall policy at the time of *not* adopting a bill-and-keep framework more broadly. *See id*. "Here, by contrast, the FCC adopted the same regime—bill-and-keep—as the end point for *all* traffic exchanged with a LEC," and the only issue was the "pace of ... reform during the transition period" for LEC-CMRS versus LEC-LEC traffic. *Id*. With respect to *that* issue, the Commission has reasonably explained that it makes sense to move more quickly with respect to LEC-CMRS traffic.

III. The Commission's Access Stimulation Rules Are a Reasonable Response to a Widespread Problem of Traffic Pumping Schemes.

Only two petitioners—Core Communications, Inc. and North County Communications Corp.—claim that the FCC acted arbitrarily in addressing the problem of traffic pumping (or "access stimulation"). They challenge only one aspect of the FCC's new traffic pumping rules: the FCC's refusal to permit CLECs

to submit cost studies to support higher rates for their pumped traffic. The FCC ably responds to those claims and correctly notes that its "findings about the detrimental effects of access stimulation" are "undisputed." FCC Add. Br. 22.

However, in the course of challenging the FCCs's bill-and-keep implementation schedule for wireless traffic, the petitioners joining the Additional ICC Brief *do* dispute the existence of traffic pumping. To the contrary, the record is replete with evidence of serious, systematic traffic pumping schemes involving multiple carriers and multiple states. *See Order* ¶ 663-66; *see also* Comments of MetroPCS Communications, Inc. (April 18, 2011) (JA at 2313-2345) (referencing traffic pumping disputes plaguing CMRS providers before at least six state PUCs and at least three federal courts); CTIA Ex Parte at 1-2 & Attach. at 1-8 (Nov. 24, 2010) (JA at 1754-1763) (listing pending disputes); Verizon and Verizon Wireless Ex Parte at 5-7 (June 28, 2010) (JA at 1659-1661) (identifying recent increase in disputes). Moreover, the record reflects that these problems were by no means limited to interstate traffic—traffic pumping was equally prevalent for intrastate traffic. *See, e.g.,* Reply Comments of MetroPCS (Feb. 21, 2012) (JA at 4241-4253).

Given their denial of the existence of traffic pumping, Petitioners do not even attempt to offer any public interest justification for revenue sharing schemes that stimulate traffic. But the very existence of these schemes demonstrates that

the termination charges of traffic pumpers are excessive. Traffic-pumping CLECs can only afford to pay third parties to drive traffic to the carriers for termination *because* there is substantial excess intercarrier compensation revenue—so much so that the terminating carrier is able to "share" its revenues with its business partners. *See* FCC Add. Br. 31-32 (CLECs sought rates as high as "$0.011 or $0.015" for "non-access wireless traffic," which in some cases was likely 10,000 times higher than necessary rates).

This problem of traffic stimulation in the CMRS market led the Commission to conclude that the "need for immediate application of a bill-and-keep methodology in [the] context" of LEC-CMRS non-access traffic is greater than for LEC-LEC traffic because of "a significant and growing problem of traffic stimulation and regulatory arbitrage" for "LEC-CMRS non-access traffic." *Order* ¶995. The FCC-recognized need for an accelerated glide path to a bill-and-keep regime for LEC-CMRS traffic further justifies retaining the Commission's new intercarrier compensation rules governing wireless under its §332 authority regardless of whether it is sustained for all other services resulting in a uniform regime.

CONCLUSION

For the foregoing reasons, and those set forth in the FCC's brief, the Court should deny the petitions for review insofar as they relate to issues presented in the Additional ICC Issues brief.

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1. This brief contains 2,215 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 2010 in 14-point Times New Roman font.

3. All required privacy redactions have been made.

/s/
Christopher J. Wright

July 10, 2013

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/s/ Laurence N. Bourne
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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 Additional Intercarrier Compensation Issues 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.

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July 29, 2013