Appellate Case: 11-9900 Document: 01019099633 Date Filed: 07/29/2013 Page: 1

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 THE BRIEF OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

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TABLE OF CONTENTS

Table Of Authorities ii

Glossary iv

Issue Presented 1

Introduction And Summary Of Argument 1

Argument 5

I. The FCC Justified The ARC Under Specific Grants Of Statutory Authority. 5

II. The ARC Lawfully Recovers Both Interstate And Intrastate Revenues That Are Reduced By ICC Reforms. 6

III. The *Order* Lawfully Permits Eligible Recovery To Be Allocated To ARCs On A Holding-Company Basis. 8

Conclusion 13

TABLE OF AUTHORITIES

CASES

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) 3, 6

Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984) 7

Connecticut Office of Consumer Counsel v. FCC, 915 F.2d 75 (2d Cir. 1990) 12

Nat'l Ass'n of Reg. Util. Comm'rs v. FCC, 737 F.2d 1095 (D.C. Cir. 1984).................... 4, 11

Nat'l Ass'n of State Util. Consumer Advocates v. FCC, 372 F.3d 454 (D.C. Cir. 2004)....................8

Reservation Tel. Coop. v. FCC, 826 F.2d 1129 (D.C. Cir. 1987)....................11

Rural Cellular Ass'n v. FCC, 588 F.3d 1095 (D.C. Cir. 2009)....................12

Sorenson Commc'ns, Inc. v. FCC, 567 F.3d 1215 (10th Cir. 2009) 5

Sorenson Commc'ns, Inc. v. FCC, 659 F.3d 1035 (10th Cir. 2011) 3, 5, 10

Sw. Bell Tel. Co. v. FCC, 153 F.3d 523 (8th Cir. 1998)....................8

Texas Office of Pub. Util. Counsel v. FCC, 265 F.3d 313 (5th Cir. 2001) 8

STATUTES

47 U.S.C. §201(b).................... 3, 5, 6

47 U.S.C. §202(a).................... 10, 11

47 U.S.C. §251(b)(5).................... 3, 5, 6

47 U.S.C. §405(a).................... 3, 5, 10

ADMINISTRATIVE DECISIONS

Access Charge Reform, 12 FCC Rcd 15982 (1997), *aff'd Sw. Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998)....................8

Access Charge Reform, 15 FCC Rcd 12962 (2000), *aff'd in pertinent part*, *Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001)....................8

GLOSSARY

ARC	Access Recovery Charge
Br.	Petitioner's Brief
CAF	Connect America Fund
FCC	Federal Communications Commission
ICC	Intercarrier Compensation
ILEC	Incumbent Local Exchange Carrier
JA	Joint Appendix
LEC	Local Exchange Carrier
NASUCA	National Association of State Utility Consumer Advocates
SLC	Subscriber Line Charge

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FEDERAL COMMUNICATIONS COMMISSION

FEDERAL RESPONDENTS' FINAL RESPONSE TO THE BRIEF OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

ISSUE PRESENTED

Whether the Federal Communications Commission ("FCC") lawfully established a transitional Access Recovery Charge ("ARC") that incumbent local exchange carriers ("incumbent LECs" or "ILECs") may charge their end-user customers to recover some of the revenues that are reduced pursuant to the agency's intercarrier compensation ("ICC") reforms.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the *Order* on review,[1] the FCC started a comprehensive reform of the way local exchange carriers are compensated when they exchange telecommunications with other telecommunications providers. The revised regime "phase[s] out regulated per-minute intercarrier … charges," *Order*

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

¶736 (JA at 631), and replaces them over time with "a uniform national bill-and-keep framework as the ultimate end state for all telecommunications traffic exchanged with a LEC," *id*. ¶34 (JA at 403). The FCC determined that a bill-and-keep framework – under which the LEC looks to its own subscribers (and, if necessary, explicit universal service subsidies) to recover its network costs (*id.* ¶737 (JA at 631)) – would "eliminat[e] the existing opaque implicit subsidy system under which consumers pay" billions of dollars to support other carriers' networks, and would help ensure that "consumers pay only for services that they choose and receive." *Id.* ¶738 (JA at 631); *see also id.* ¶¶748-751 (JA at 636-38). The FCC also determined that a bill-and-keep framework was well within its authority to replace implicit subsidies with explicit ones and to adopt a regulatory framework for telecommunications traffic that LECs exchange with other providers. *See Order* ¶¶747, 760-781 (JA at 636, 641-52); *see also* FCC Preliminary Brief 32-37.

To implement its bill-and-keep methodology, the FCC established a transitional federally-tariffed ARC that incumbent LECs may bill to their end users. *Id.* ¶¶906-916 (JA at 714-21). The ARC is part of a recovery mechanism (which also includes direct subsidies from the Connect America Fund ("CAF")) that the FCC established to enable incumbent LECs to

recover some of the intercarrier compensation revenues that the *Order* reduces over time. *Id.* ¶905 (JA at 714); *see generally* Argument II of the FCC's Principal ICC Brief (describing the operation of the recovery mechanism).

Petitioner National Association of State Utility Consumer Advocates ("NASUCA") challenges the lawfulness of the ARC in three respects.

I. NASUCA contends (Br. 5-8) that the FCC failed to identify its legal authority to adopt the ARC in the *Order*, and therefore cannot do so before this Court. This claim is barred by 47 U.S.C. §405(a) because no party presented it to the agency in the administrative proceedings below. *Sorenson Commc'ns, Inc. v. FCC*, 659 F.3d 1035, 1044 (10th Cir. 2011) ("*Sorenson II*"). The claim is baseless, in any event, because the FCC's *Order* fully explained the statutory basis for the ARC: 47 U.S.C. §§201(b) & 251(b)(5). *Order* ¶¶760-781 (JA at 641-52).

II. The FCC lawfully designed the ARC to recover *intra*state, as well as interstate, ICC revenues reduced under the reforms adopted in the *Order*. *Compare* Br. 8-11. As the Supreme Court held in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999) ("*AT&T*"), the FCC has authority to implement section 251(b)(5), which requires LECs to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." That

provision plainly covers intrastate telecommunications. *See Order* ¶761 (JA at 642). Accordingly, under established Supreme Court precedent, the FCC acted lawfully in establishing the ARC to recover intrastate revenues.

III. The Court also should reject NASUCA's assertion (Br. 11-14) that it was arbitrary, and unlawfully discriminatory, for the FCC to permit ILECs to determine "at the holding company level" how eligible recovery will be allocated among subsidiary ILECs' ARCs. NASUCA's discrimination claim is barred by section 405(a) because it was not presented to the agency. Its claim fails on the merits, in any event, because the FCC provided a "neutral, rational basis" for the holding-company rule. *Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 737 F.2d 1095, 1133 (D.C. Cir. 1984) ("*NARUC*"). As the FCC explained, that rule spreads out ARC recovery over a broader class of customers and helps reduce burdens on the CAF at the same time it maintains consumer protections to ensure that end-user rates remain reasonable. *Order* ¶910 (JA at 717). Although NASUCA may disagree with the FCC's policy judgment, the agency's balancing of factors is entitled to significant deference and should be affirmed.

ARGUMENT

I. THE FCC JUSTIFIED THE ARC UNDER SPECIFIC GRANTS OF STATUTORY AUTHORITY.

The Court should dismiss NASUCA's claim (Br. 5-8) that the FCC failed to cite any authority for the ARC. No one presented this argument before the FCC. It thus is barred by section 405(a) of the Communications Act, which prevents review of "questions of fact or law upon which the [FCC] … has been afforded no opportunity to pass." 47 U.S.C. §405(a); *accord Sorenson II*, 659 F.3d at 1044; *Sorenson Commc'ns, Inc. v. FCC*, 567 F.3d 1215, 1227-28 (10th Cir. 2009) ("*Sorenson I*").

The claim is meritless, in any event, because the agency set out in detail its statutory authority to adopt the ICC reforms *of which the ARC is a part*. *Order* ¶¶760-781 (JA at 641-52). The FCC determined that 47 U.S.C. §§201(b) & 251(b)(5), among other provisions, empowered it to adopt rules establishing how LECs are compensated when they exchange traffic that originates or terminates on their networks. *Order* ¶760 (JA at 641-42). Acting under those provisions, the FCC adopted bill-and-keep as the end point of its ICC reforms, while allowing a gradual transition from the existing regime. *Order* ¶¶736-739 (JA at 631-32). Because the ARC provides a portion of the compensation ILECs may receive during that transition, *id* ¶¶906-916 (JA at 714-21), and forms an integral part of the overarching

mechanism for transitioning to bill-and-keep, it falls squarely within the *Order*'s detailed explanation of the agency's statutory authority to adopt a bill-and-keep framework, *id*. ¶¶760-81 (JA at 641-52).[2]

II. THE ARC LAWFULLY RECOVERS BOTH INTERSTATE AND INTRASTATE REVENUES THAT ARE REDUCED BY ICC REFORMS.

NASUCA argues (Br. 8-11) that the FCC lacks authority to regulate intrastate access traffic and that the ARC therefore must be unlawful, because it is designed to offset reductions in intrastate (as well as interstate) access charges. This claim is baseless.

The FCC reasonably found authority to adopt rules governing *all* telecommunications – intrastate, as well as interstate – exchanged with a LEC. *See Order* ¶¶760-762 (JA at 641-42). The FCC explained that the Supreme Court had confirmed its authority under 47 U.S.C. §201(b) to adopt rules implementing the Communications Act, including section 251(b)(5). *Id.* ¶760 (JA at 641-42) (citing *AT&T*, 525 U.S. at 378). The agency further determined that section 251(b)(5), by its terms, covers intrastate "telecommunications" exchanged with a LEC. *Order* ¶761 (JA at 642). Because the ARC recovers some of the intrastate access revenues reduced by

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[2] NASUCA's argument (Br. 6-8) that the FCC lacks ancillary authority to adopt the ARC is irrelevant because the FCC never invoked such authority for the ARC.

the *Order* pursuant to that federal authority, the ARC falls well within the FCC's statutory powers. The FCC's reasonable construction of the statute is entitled to deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). *See* FCC Principal ICC Brief, Argument I (explaining in detail the FCC's statutory authority to adopt comprehensive ICC reform).

In light of this statutory authority for establishing the ARC, NASUCA misses the point in emphasizing (Br. 8-11) that the FCC's earlier precedents involving interstate access charges do not themselves establish the agency's authority for the ARC. The FCC merely mentioned those precedents as examples of analogous reforms the agency had previously undertaken. *Order* ¶852 (JA at 685); *see also id.* ¶¶906-916 (JA at 714-21).

In those prior decisions, which were upheld on judicial review, the FCC had moved incrementally to phase out certain per-minute interstate charges that LECs had imposed on long-distance carriers, in favor of flat monthly end-user charges (called "subscriber line charges" or "SLCs") that did not vary with subscribers' usage. The FCC determined that switching from intercarrier charges to end-user charges would better reflect cost-causation principles and reduce implicit subsidies that had been embedded

within the intercarrier charges.[3] These decisions fully support the reasonableness of the ICC reforms adopted in the *Order*.

III. THE *ORDER* LAWFULLY PERMITS ELIGIBLE RECOVERY TO BE ALLOCATED TO ARCS ON A HOLDING-COMPANY BASIS.

In designing the ARC, the FCC adopted numerous safeguards to ensure that consumers will see only small increases in their monthly bills. It capped at $0.50 per year any increases in the monthly ARC charged to residential and single-line business customers. *Order* ¶909 (JA at 716). It capped at $1.00 (per line) per year any increases in the monthly ARC for multi-line business customers, and it required "potential revenue from such increases to be imputed to carriers" – whether or not they actually imposed those charges – thereby reducing the revenues eligible for recovery through ARCs charged to residential consumers. *Id.* Price cap LECs may adopt annual increases in the ARC for only five years, and rate-of-return LECs for only six years. *Id.* ¶908 (JA at 715). Additionally, the FCC adopted a $30.00 per month

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[3] *See*, *e.g.*, *Access Charge Reform*, 12 FCC Rcd 15982, 16007-09 ¶¶69-71 (1997), *aff'd Sw. Bell Tel. Co. v. FCC*, 153 F.3d 523, 557-59 (8th Cir. 1998); *Access Charge Reform*, 15 FCC Rcd 12962, 12975-76 ¶¶30-33 (2000), *aff'd in pertinent part*, *Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 321-23 (5th Cir. 2001). *See also Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 372 F.3d 454, 456-60 (D.C. Cir. 2004) (describing migration from intercarrier charges to end-user charges and rejecting NASUCA's challenge to that process).

residential rate ceiling for both price cap and rate-of-return LECs, *id.* ¶913 (JA at 718), so that a LEC may not charge residential consumers an ARC if it would drive above $30.00 the consumer's aggregate monthly bill for the federal SLC, the ARC, and assorted local service charges, *id.* ¶¶913-914 (JA at 718-19).

Subject to these consumer protections, the FCC also allowed parent ILEC holding companies to pool the amounts their subsidiary ILECs are eligible to recover under the *Order*, and then reallocate those amounts among the ILEC subsidiaries for purposes of calculating the ARCs that each may charge. *Id.* ¶910 (JA at 717). This does not alter the total revenues that the related ILECs collectively may recover, but it does potentially affect the amount and source of each subsidiary ILEC's recovery.[4] Assume, for example, that Holding Company X has two ILEC subsidiaries – ILEC A and ILEC B. Assume, further, that a $0.25 ARC increase (below the $0.50

[4] The *Order*'s methodology for calculating eligible recovery allows each ILEC to recover a portion of its annual reduction in ICC revenues resulting from reform. For any given carrier, the size of the required annual reduction depends on the level of its *existing* charges for the rate elements subject to reform. *See Order* ¶801 & Figure 9 (JA at 661-63) (showing timetable and size of intercarrier rate reductions); *id* ¶¶867-920 (JA at 694-723) (describing recovery mechanism). Because each carrier's existing ICC rate levels are likely to differ (depending on prior state regulatory policies), the calculation of any two ILECs' eligible recoveries under the FCC's reforms is likely to yield different results.

annual cap on ARC increases) will recover all of ILEC A's eligible recovery in Oklahoma, without resort to CAF subsidies. And assume that a full $0.50 ARC increase by ILEC B in Colorado is insufficient to recover all of that company's eligible recovery without turning to explicit subsidies from the CAF. The holding-company rule permits the carriers to reallocate some of ILEC B's eligible recovery to ILEC A, thus permitting ILEC A to recover more of the companies' combined eligible revenues through the ARC, while requiring ILEC B to make offsetting reductions in its subsidy demands on the CAF.

NASUCA argues that the holding-company rule requires "consumers in states that have previously reduced their intrastate access charges as well as jurisdictions that have no such charges" to "pick up the burden from states that have not done so" – an outcome it characterizes as arbitrary and contrary to the statutory prohibition against "'unjust or unreasonable discrimination in charges.'" Br. 12, 13 (quoting 47 U.S.C. §202(a)).

The Court should not consider NASUCA's unreasonable discrimination claim because it was not presented to the FCC. *See* 47 U.S.C. §405(a); *Sorenson II*, 659 F.3d at 1044.

NASUCA's challenge is unsound in any event. By its terms, section 202(a) prohibits only "*unjust or unreasonable* discrimination in charges." 47

U.S.C. §202(a) (emphasis added); *see also NARUC*, 737 F.2d at 1133 (section 202(a) addresses "*unjustifiably* different rates for the same service") (emphasis added). That provision does not bar rates that have "a neutral, rational basis." *NARUC*, 737 F.2d at 1133; *accord Reservation Tel. Coop. v. FCC*, 826 F.2d 1129, 1136 (D.C. Cir. 1987). The ARC rates that the *Order* permits pursuant to the holding-company rule have such a neutral and rational basis.

First, allowing eligible revenue recovery to be reallocated among subsidiary ILECs enables carriers to "spread the recovery" through the ARC "among a broader set of customers," thereby potentially "minimizing the increase experienced by any one customer." *Order* ¶910 (JA at 717). Second, by enabling a holding company's subsidiary ILECs (as a group) to receive a higher proportion of their overall eligible recovery through the ARC, the holding-company rule "limit[s] the potential impact on the CAF," which provides carriers with direct subsidies if the ARC is insufficient to generate all of the revenues to which carriers are entitled. *Id.*; *see also id.* ¶¶917-919 (JA at 721-22) (describing the role of the CAF under the recovery

mechanism).[5] Third, while the holding-company rule provides these benefits, "[t]he ARC's modest and capped size, its interim nature, … [its revenue imputation feature], … [and] the $30 Residential Rate Ceiling" all combine to "ensure that overall rates remain affordable and set at reasonable levels." *Order* n.1791 (JA at 717). The FCC "enjoys broad discretion" when conducting such balancing, particularly in the universal service context. *RCA*, 588 F.3d at 1103.

Finally, *Connecticut Office of Consumer Counsel v. FCC*, 915 F.2d 75 (2d Cir. 1990), undermines rather than supports NASUCA's discrimination claim. *See* Br. 13. Although the court in that case upheld an FCC decision to permit AT&T to pass through to its Connecticut customers, alone, the costs of that state's gross receipts tax, it did not hold that state-specific costs always must be recovered from in-state consumers to avoid unlawful discrimination. Indeed, the court acknowledged the lawfulness of the underlying interstate regulatory regime at the time, which, in general, called for ratemaking on the basis of a nationwide pooling of fixed costs across state

[5] Although NASUCA complains that the holding-company rule may require consumers to pay higher ARCs in some states to cover revenue losses in other states, a similar result would occur if the *absence* of the rule led to increased demands on the CAF. That is so because CAF funds are recovered through contributions from telecommunications providers *nationwide* and are "almost always pass[ed on] … to their customers." *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1099 (D.C. Cir. 2009) ("*RCA*").

lines. *Id.* at 76-77, 79. Like the holding-company rule here, that nationwide system of pooling lawfully permitted carriers to recover some costs incurred in one state through charges imposed on customers in other states.

CONCLUSION

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

Respectfully submitted,

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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 Brief of The National Association of State Utility Consumer Advocates was certified to be 2,429 words in length. Therefore, the FCC may file a response brief up to 2,793 words in length. This brief contains 2,570 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

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Federal Communications Commission

BRIEF OF INTERVENORS SUPPORTING RESPONDENTS IN RESPONSE TO THE BRIEF OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, intervenors AT&T Inc., Verizon, and Verizon Wireless respectfully submit the following corporate disclosure statements:

AT&T Inc. AT&T Inc. 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 Inc. has no parent company, and no publicly held company owns 10 percent or more of its stock.

Verizon and Verizon Wireless. 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 laws 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 10 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

CORPORATE DISCLOSURE STATEMENTS i

TABLE OF AUTHORITIES iv

STATEMENT OF RELATED CASES vi

GLOSSARY vii

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. THE *ORDER* EXPLAINS THE FCC'S AUTHORITY TO ADOPT THE ARC 2

II. ALLOCATING THE ARC AT THE HOLDING-COMPANY LEVEL DOES NOT VIOLATE 47 U.S.C. § 202 4

CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES

Allnet Communications Servs., Inc. v. National Exch. Carrier Ass'n, Inc., 741 F. Supp. 983 (D.D.C. 1990) 4

Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993) 2

Diamond Int'l Corp. v. FCC, 627 F.2d 489 (D.C. Cir. 1980) 5

MCI Telecomms. Corp. v. FCC, 750 F.2d 135 (D.C. Cir. 1984)....................3

National Ass'n of Regulatory Util. Comm'rs v. FCC, 737 F.2d 1095 (D.C. Cir. 1984) 3

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

Sorenson Communications, Inc. v. FCC, 659 F.3d 1035 (10th Cir. 2011) 3

Union Tel. Co. v. Qwest Corp., 495 F.3d 1187 (10th Cir. 2007) 5

US West, Inc. v. FCC, 778 F.2d 23 (D.C. Cir. 1985) 4

STATUTES

Communications Act of 1934, 47 U.S.C. § 151 *et seq.* 4

47 U.S.C. § 153(11) 4

47 U.S.C. § 201....................2

47 U.S.C. § 202....................5

47 U.S.C. § 202(a) 1, 4, 5

47 U.S.C. § 251(b)(5) 2

47 U.S.C. § 332 2

STATEMENT OF RELATED CASES

Intervenors adopt the Statement of Related Cases set forth in the Federal Respondents' Response to the Joint Preliminary Brief of the Petitioners.

GLOSSARY

ARC	Access Recovery Charge
Communications Act or Act	Communications Act of 1934, as amended (47 U.S.C. § 151 *et seq.*)
FCC	Federal Communications Commission
FCC Br.	Federal Respondents' Response to the Brief of the National Association of State Utility Consumer Advocates (filed Mar. 18, 2013)
ICC	Intercarrier Compensation
LEC	Local Exchange Carrier
NASUCA	National Association of State Utility Consumer Advocates
Order	Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17663 (2011)
Pet. Br.	Brief of the National Association of State Utility Consumer Advocates (filed Oct. 23, 2012)

INTRODUCTION AND SUMMARY OF ARGUMENT

The FCC shows in its brief that NASUCA's challenges to the *Order*'s adoption of the ARC were not preserved for judicial review and lack merit. Intervenors write separately to emphasize two points.

I. Contrary to NASUCA's claim, the *Order* clearly identifies the FCC's legal authority to adopt the ARC. The *Order* explains that the ARC is an interim measure that is part of the agency's efforts to facilitate the transition to bill-and-keep, *see*, *e.g.*, *Order* ¶ 847 (JA at 683), and the *Order* contains a subsection that sets forth the FCC's authority to adopt such transition mechanisms, *see id.* ¶¶ 809-810 (JA at 665). Nothing more was required.

II. NASUCA's argument that permitting carriers to allocate the ARC at a holding-company level violates the prohibition of unreasonable discrimination in 47 U.S.C. § 202(a) is equally without merit. As the FCC explains (at 10-11), holding-company flexibility serves neutral purposes that are consistent with § 202(a). But NASUCA's argument also fails for a more basic reason. Section 202(a) applies only to "common carriers," and holding companies are not common carriers.

ARGUMENT

I. THE *ORDER* EXPLAINS THE FCC'S AUTHORITY TO ADOPT THE ARC

As the FCC demonstrates, the ARC forms an important component of the *Order*'s comprehensive ICC reforms. *See* FCC Br. 5-6. The *Order* fully explains the FCC's legal authority to adopt those broader ICC reforms under 47 U.S.C. §§ 201, 251(b)(5), and 332. *See Order* ¶¶ 760-781 (JA at 641-52). Nonetheless, NASUCA argues (at 5) that the FCC's explanation of the ARC is deficient because the FCC supposedly failed to "mention" its "legal authority" in the specific subsection of the *Order* "devoted to the Recovery Mechanism."

But, in the very first paragraph NASUCA cites as lacking sufficient explanation, *see* Pet. Br. 5 & n.2 (citing *Order* ¶¶ 847-932 (JA at 683-729)), the FCC made clear that the ARC is a "transitional recovery mechanism" intended to facilitate a "gradual transition" to bill-and-keep, *Order* ¶ 847 (JA at 683); *see also*, *e.g.*, *id.* ¶¶ 36-38, 849, 910 n.1791 (JA at 404-05, 684, 717). The *Order* contains a separate subsection in which the FCC expressly identified its legal authority to "[s]pecify the [t]ransition" to bill-and-keep. *Id.* ¶¶ 809-810 (JA at 665). The FCC had no obligation to repeat that analysis every time it adopted a specific transition measure. *See Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993) (noting that the FCC "need not repeat itself incessantly").

As the *Order* explains, transitional measures have long been a "'standard tool of the [FCC]'" that permit it to "'avoid excessively burdening carriers'" as they "'adjust to [a] new pricing system.'" *Id.* ¶ 809 (quoting *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1135-36 (D.C. Cir. 1984)) (JA at 665). Courts afford the FCC "'substantial deference'" when it adopts such interim measures. *Id.* (quoting *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1106 (D.C. Cir. 2009)); *see Sorenson Communications, Inc. v. FCC*, 659 F.3d 1035, 1046 (10th Cir. 2011) ("Because the provisions under review are merely transitional, our review is especially deferential.") (internal quotation marks omitted); *MCI Telecomms. Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984) (FCC has authority to adopt "[i]nterim solutions" to ameliorate "unfairness of abruptly shifting policies").

Although NASUCA intimates (at 6) that the ARC is a "novel charge," it does not dispute that the ARC is an interim measure that falls well within the FCC's authority to specify the transition to bill-and-keep.[*] Nor could it, for the ARC is an integral component of the uniform ICC regime adopted in the *Order*. *See* FCC Br. 5-6. The ARC facilitates the gradual implementation of bill-and-keep

[*] The FCC ably refutes NASUCA's claim (at 8-11) that the ARC, unlike past transition measures such as the subscriber line charge (which NASUCA concedes (at 3) "was within [the FCC's] established authority"), improperly offsets reductions in past intrastate access charge revenues. *See* FCC Br. 6-8.

by providing carriers a cushion against the revenue losses associated with declining ICC payments. *See Order* ¶¶ 847-849, 905-907 (JA at 683-84, 714-15). Moreover, consistent with the FCC's broader ICC reforms, the ARC provides carriers with recovery from customers rather than other carriers. *See id.* ¶¶ 906-907 (JA at 714-15).

II. ALLOCATING THE ARC AT THE HOLDING-COMPANY LEVEL DOES NOT VIOLATE 47 U.S.C. § 202

The FCC reasonably provided the parent companies of incumbent LECs the flexibility to allocate ARCs at the holding-company level. *See Order* ¶ 910 (JA at 717); FCC Br. 8-13. NASUCA maintains (at 13) that such flexibility constitutes "'unjust or unreasonable discrimination'" in violation of 47 U.S.C. § 202(a), because it allows different incumbent LEC subsidiaries of a single holding company to charge different ARCs in different states.

NASUCA's discrimination argument fails at the threshold because § 202(a) applies only to common carriers, and holding companies are not "engaged as a common carrier for hire, in interstate or foreign communication by wire." 47 U.S.C. § 153(11) (defining common carrier); *see US West, Inc. v. FCC*, 778 F.2d 23, 26 (D.C. Cir. 1985) (explaining that "holding companies" are not "common carriers" and that the FCC's primary jurisdiction extends only to "holding companies' subsidiaries"); *Allnet Communications Servs., Inc. v. National Exch. Carrier Ass'n, Inc.*, 741 F. Supp. 983, 984 (D.D.C. 1990) (rejecting tariff challenge

against association because "title II" of the Communications Act, which includes § 202, "proscribe[s] the activities of common carriers" and "NECA is not a common carrier"); *cf. Union Tel. Co. v. Qwest Corp.*, 495 F.3d 1187, 1195 (10th Cir. 2007) (§ 202(a) provides that "telecommunications carriers may not unreasonably discriminate").

Thus, any variation among the ARCs that a holding company's different subsidiary LECs in different states charge their customers does not implicate § 202(a). Indeed, that has been settled law for more than 30 years: § 202(a) has never "require[d] that [tariff] charges be identical in each state. Rather, it is to be expected under the statutory scheme that there will be variations from state to state." *Diamond Int'l Corp. v. FCC*, 627 F.2d 489, 493 n.7 (D.C. Cir. 1980) (per curiam).

CONCLUSION

For the foregoing reasons, and those set forth in the FCC's brief, the Court should deny NASUCA's petition for review.

Respectfully submitted,

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1. This brief contains 991 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.

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July 9, 2013

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/s/ Laurence N. Bourne
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July 29, 2013

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I hereby certify that on July 29, 2013, I caused the foregoing Combined Responses of Federal Respondents and Supporting Intervenors to the National Asociation of State Utility Consumer Advocates' 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