IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NO. 11-9900

IN RE: FCC 11-161

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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GLOSSARY

IP	Internet Protocol
IXC	Interexchange Carrier
LEC	Local Exchange Carrier
PSTN	Public Switched Telephone Network
TDM	Time Division Multiplexing
VoIP	Voice over Internet Protocol

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FEDERAL RESPONDENTS' FINAL RESPONSE TO THE
WINDSTREAM PRINCIPAL BRIEF

ISSUE PRESENTED

Access charges are fees collected by local telephone companies from long-distance companies for originating or terminating long-distance calls. Federal Communications Commission ("FCC") rules traditionally have allowed local companies to charge for originating and for terminating calls placed on the legacy wireline telephone system. Until the orders on review, however, the FCC had never addressed whether or how those rules applied to calls that use a newer technology called Voice over Internet Protocol ("VoIP").

The orders on review, *Connect America Fund*, 26 FCC Rcd 17663 (2011) ("*Order*") (JA at 390), and *Second Order on Reconsideration*, 27 FCC Rcd 4648 (2012) ("*Second Reconsideration Order*") (JA at 1151), adopted (and then amended) a transitional access charge regime for VoIP calls as part of the agency's comprehensive reform of the system of payments between carriers. In the *Order*, the agency determined that, prospectively, local telephone companies may charge the FCC-regulated interstate rate for originating or terminating all long-distance VoIP calls, whether a call is inter- or intrastate. On reconsideration, however, in order to provide carriers with a measured transition away from access charges, the *Second Reconsideration Order* established an interim rule that for two years allows local exchange carriers to charge the state-established rate for originating intrastate long-distance VoIP calls. After the two-year transition period expires, the rate for originating an intrastate VoIP call will become the interstate rate.

The issue presented by Windstream's petition is whether the FCC engaged in reasoned decisionmaking when it established its transitional originating access charge regime for intrastate long-distance VoIP calls.

COUNTERSTATEMENT

A. Access Charges

When a telephone user places a long-distance call using the traditional wireline telephone system, the call travels from the facilities of the user's local telephone company, known as a local exchange carrier ("LEC"), to those of the long-distance company, known as an interexchange carrier

("IXC"). The IXC then transports the call to the facilities of the recipient's LEC, which connects the call to the called party. The caller's LEC may impose on the IXC by tariff an "originating" "access charge," and the recipient's LEC may impose a "terminating" access charge. *See Connect America Fund*, 26 FCC Rcd 4554, 4702-4703 (2011) ("*2011 NPRM*") (SA at 149-150). The access charge regime is a legacy of the breakup of AT&T and the introduction of competition into the long-distance marketplace. *Id*. ¶¶496-498 (SA at 150-152); *see also* FCC Preliminary Br. 4-5. Access charges are one part of the system of "intercarrier compensation" that has governed payments for the exchange of telephone traffic between carriers.[1]

As explained below, in the orders at issue here, the FCC fundamentally transformed the system of intercarrier compensation by determining that the current framework ultimately will be replaced by a "bill-and-keep" methodology in which each carrier "bills" its own subscriber and "keeps" the revenue. *See* FCC Preliminary Br. 32-33. Reform of the system was driven by the recognition that the existing access charge framework was deeply flawed in several ways. First, it was "based on outdated concepts and a per-minute rate structure from the 1980s." *2011 NPRM* ¶495 (SA at 150).

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[1] Calls that are transferred between local carriers without the involvement of an IXC have been governed by a system of "reciprocal compensation," which is also addressed in the orders on review but is not at issue here.

Second, payment for performing the same functions "var[ied] based on the type of provider and where the call originated." *Id.* Third, implicit subsidies in the form of above-cost rates both "create[d] incentives to retain old voice technologies" rather than invest in broadband facilities, and fostered opportunities for "arbitrage" practices generating unfair profit from disparate rate structures. *Id.*

Historically, access charges for *inter*state calls were subject to regulation by the FCC, and access charges for *intra*state calls were subject to state regulation. *See* FCC Preliminary Br. 4-5. Federally regulated interstate access rates typically have been lower than state-regulated intrastate rates. *2011 NPRM* ¶54 (SA at 21-22). Because a LEC's incremental cost of providing originating or terminating access to its network is close to zero, *Order* ¶753 (JA at 639), high intrastate rates amount to a subsidy paid by long-distance callers to local subscribers and their telephone company, keeping residential rates in some cases as low as $8.00 per month, *2011 NPRM* ¶54 (SA at 22).

The historical access charge regime that governed the traditional telephone system (*i.e.*, landline voice calls over legacy networks) did not apply to more recent communication technologies. Since 1994, for instance, cellular telephone companies have been barred from filing tariffs that compel

IXCs to pay originating or terminating access charges for long-distance calls placed from or completed on their networks. That is the case even though they perform essentially the same originating and terminating functions as a LEC. *See Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd 1411, 1479-1480 (1994); 47 C.F.R. §20.15(c). In the absence of an individually negotiated contract with a long-distance carrier, wireless carriers do not receive implicit subsidies but must recover any costs of access from their own subscribers and not from other carriers – effectively a "bill-and-keep" system. *See Order* ¶737 (JA at 631) (wireless carriers "have long been operating pursuant to what are essentially bill-and-keep arrangements").

B. Voice Over Internet Protocol

Some companies have begun to provide telephone service using broadband facilities of the same type used for Internet service. Newer broadband-based telephone service uses a technology – "Internet Protocol" – that works differently from traditional service. In traditional phone service, signals are transmitted in a format known as "time division multiplexing" or "TDM." Broadband-based service, known as "Voice over Internet Protocol" or "VoIP," divides a telephone call into packets of data, which are transmitted separately and then reassembled, a fundamentally different approach. *See*

Report to Congress, 11 FCC Rcd 11501, 11532 ¶64 (1998) (describing "packetized" Internet Protocol). A VoIP signal can be converted to or from TDM format in order to exchange calls with the traditional telephone network, which is known as the "public switched telephone network," or "PSTN." *See* 47 C.F.R. §9.3. Thus, a call can originate as a VoIP call and terminate as a TDM/PSTN call, or vice versa.

C. Application Of The Access Charge Regime To VoIP

Prior to the proceeding now before the Court, the FCC "ha[d] never addressed whether interconnected VoIP is subject to intercarrier compensation rules," including the access charge regime, "and, if so, the applicable rate for such traffic." *2011 NPRM* ¶608 (SA at 191-192). The topic had, however, long been a subject of regulatory inquiry: as early as 2001, the agency had sought comment on whether intercarrier compensation obligations should apply to calls that "originate or terminate on IP [Internet Protocol] networks." *Id.* ¶610 (SA at 192), citing *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, 9629 (2001). Despite considerable debate over the years, however, the agency had "declined to explicitly address" compensation obligations "associated with VoIP traffic." *2011 NPRM* ¶610 (SA at 192).

In the absence of governing rules, disputes increasingly arose among carriers and VoIP providers, with some parties claiming that the same access charge rules applied to VoIP as to traditional TDM traffic and others arguing that no compensation was due at all. *2011 NPRM* ¶610 (SA at 193). As part of its comprehensive restructuring of the entire intercarrier compensation regime, the FCC again sought comment on the appropriate compensation framework for VoIP traffic, proposing various alternatives, including bill-and-keep, VoIP-specific rates, or the same access charge rates applicable to TDM calls. *Id.* ¶¶613-619 (SA at 194-198).

D. Access Charge Reform

In the orders on review, the FCC adopted a comprehensive plan "to phase out regulated per-minute intercarrier compensation charges," including interstate and intrastate access charges, mostly over a multi-year transition period. *Order* ¶736 (JA at 631). Ultimately, "a uniform national bill-and-keep framework" will apply. *Id.* ¶34 (JA at 403).

For calls on the traditional telephone network currently subject to the access charge regime, the phase-out of *terminating* access charges begins immediately. All calls, inter- and intrastate, ultimately will be subject to the same terminating charge, which will gradually be reduced until traffic is exchanged under a bill-and-keep regime. *See Order* ¶801 & Fig. 9 (JA at

661-662). The FCC deferred action on *originating* access charges for calls placed on the traditional telephone network pending the receipt of further information, which the agency requested in a Further Notice of Proposed Rulemaking. *See id*. ¶¶1298-1305 (JA at 836-839). The FCC ordered a faster transition to bill-and-keep for local calls exchanged between LECs and wireless telephone companies. *Id*. ¶¶995-1000 (JA at 764-767); *see also* FCC Additional ICC Issues Br. 11-12, 27-35.

To mitigate the effect of its reforms on LEC revenues, the FCC created a "transitional recovery mechanism" during the changeover to bill-and-keep. *Order* ¶¶847-853 (JA at 683-688). In general, LECs like Windstream (so-called "price cap" LECs) will be able to recover some of the difference in revenue collected under the prior regime and the new regime through a combination of remaining access charges, charges on end users, and (if necessary) payments from the "Connect America Fund." *See generally* FCC Principal ICC Br. 45-47. That Fund was created as part of the *Order*'s universal service reforms. *See* FCC Preliminary Br. 24-25.

E. The Prospective Access Charge Regime For VoIP Calls

Recognizing the unique issues presented by VoIP traffic, the agency addressed VoIP calls in a separate section (¶¶933-975) of the *Order*, entitled "Intercarrier Compensation For VoIP Traffic." JA at 729-757. Resolving for the first time the question of payment obligations for VoIP calls, the FCC established a prospective rule that LECs may tariff both terminating and originating access charges for long-distance VoIP calls at the interstate terminating access rate for traditional telephone calls. *See Order* ¶933 (JA at 729).[2] That rate will decline over time, thus providing a "measured transition" to bill-and-keep. *Id*. ¶935 (JA at 730); *see id*. ¶945 (JA at 735).

The VoIP access charge regime applies to "*all* VoIP-PSTN traffic," which the FCC defined as "traffic exchanged over PSTN facilities that *originates and/or terminates* in IP format." *Order* ¶¶940, 943 (JA at 732-733, 735) (internal quotation marks omitted) (emphasis added).[3] The agency expressly "decline[d] to adopt an asymmetric approach that would apply VoIP-specific rates for only IP-originated or only IP-terminated traffic." *Id*. ¶942 (JA at 734).

The FCC also declined to "immediately adopt a bill-and-keep methodology" for VoIP calls. *Order* ¶952 (JA at 739). Instead, it favored an incremental transition that "provid[es] certainty regarding the prospective

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[2] The FCC did not address access charges for VoIP calls "for any prior periods," *Order* n.1874 (JA at 730), but established only "a prospective intercarrier compensation framework" for such traffic during the transition to bill-and-keep. *Id*. ¶933 (JA at 729).

[3] In this brief, we use the terms "VoIP call" or "VoIP traffic" to refer to calls that are within that definition of VoIP-PSTN traffic.

intercarrier compensation obligations for VoIP-PSTN traffic." *Id.* ¶946 (JA at 736). Access charges for VoIP calls were set to fall gradually in tandem with terminating access charges for traditional telephone calls.

F. Extension Of Intrastate Origination Rates For Two Years

Notwithstanding the FCC's definition of VoIP-PSTN traffic as including traffic that "originates and/or terminates in IP format" (*Order* ¶940 (JA at 733)), Windstream filed a petition for reconsideration with the FCC in which it asked the agency to "clarify" that "the *Order* does *not* apply to, and is not intended to displace, intrastate originating access rates for PSTN-originated calls that are terminated over VoIP facilities." Petition for Reconsideration at 21 (JA at 4076) (emphasis added). Alternatively, Windstream asked that the FCC reconsider the issue if it construed the *Order* to "limit originating access rates for intrastate PSTN-originated VoIP-PSTN calls to interstate levels." *Id.* at 27 (JA at 4082). After receiving and considering comment on Windstream's petition, the FCC granted it in part. *Second Reconsideration Order* ¶¶27-42 (JA at 1160-1171).

The agency first rejected Windstream's claim that the *Order* did not make clear whether the new regime applied to origination charges. The FCC explained that, although it had deferred reform of origination charges for traditional telephone traffic (*i.e.*, voice calls transported over landline networks entirely in TDM format), it had "adopted a distinct … framework" for the much newer category of VoIP traffic. *Second Reconsideration Order* ¶31 (JA at 1162). "[T]he text [of the *Order*] and the implementing rule" demonstrated that the VoIP framework applied to both terminating and originating access charges. *Id*.; *see also id*. n.87 (JA at 1163). For example, the *Order* defined the key term "VoIP-PSTN Traffic" to mean "traffic exchanged over PSTN facilities that *originates and/or terminates* in IP format," *Order* ¶940 (JA at 733) (internal quotation marks omitted; emphasis added), and specified that the VoIP access charge framework applies to all such traffic, *id*. ¶¶933, 943, 961 (JA at 729, 735, 746). The Rule similarly made the VoIP access charge regime applicable to calls that are "exchanged between a local exchange carrier and another telecommunications carrier in [TDM] format that originates and/or terminates in IP format." 47 C.F.R. §51.913 (JA at 905). Windstream's contrary argument rested on "discussion of originating access charges in other contexts" – *i.e.*, the legacy telephone network – unrelated to the "permissible origination charges for toll VoIP traffic," which had been addressed in a section of the *Order* devoted exclusively to VoIP. *Second Reconsideration Order* ¶31 (JA at 1162).

The FCC also rejected Windstream's contention that requiring a uniform rate for all VoIP calls would amount to a "flash cut" to its originating access charge rate. That argument wrongly "assume[d]" that LECs already "were receiving intrastate originating access for intrastate [long-distance] VoIP traffic under the status quo prior to" the *Order*. *Second Reconsideration Order* ¶32 (JA at 1163-1164). But the FCC had never, in fact, previously resolved whether LECs had a right to receive access payments for VoIP calls. *See* pages 6-7, *supra*. Moreover, the administrative record showed that "compensation for VoIP traffic," including originating traffic, "was widely subject to dispute and varied outcomes." *Id*. ¶32 & n.91 (JA at 1164).

The FCC nevertheless granted Windstream's petition for reconsideration in part. New evidence in the record on reconsideration showed that "there were fewer disputes and instances of non-payment or under-payment of *origination* charges billed at intrastate originating access rates for intrastate toll VoIP traffic than was the case for *terminating* charges for such traffic." *Second Reconsideration Order* ¶33 (JA at 1164) (emphasis added). LECs therefore were collecting some amount of originating access charges for intrastate long-distance VoIP calls. Thus, if originating charges were immediately capped at the interstate rate as directed in the *Order*, LECs would "experience annual reductions in originating access revenues." *Id.*

The FCC accordingly "reconsider[ed] the balancing of policy interests underlying the *Order*'s approach to VoIP." *Second Reconsideration Order* ¶34 (JA at 1164). Rather than switching the originating access rate for intrastate calls directly to the (lower) interstate rate, the agency granted LECs (including Windstream) a two-year transition window: until June 30, 2014, they will be allowed to collect (higher) intrastate rates for originating access charges for VoIP intrastate long-distance calls. After two years, the rate for intrastate origination transitions to the rate for VoIP termination. *Id*. ¶35 (JA at 1165).

The FCC explained that, in appropriately balancing the competing policy issues, it should not unduly delay the transition toward bill-and-keep. *Second Reconsideration Order* ¶35 (JA at 1166). The agency's fundamental policy goal remained "mov[ing] away from the pre-existing, flawed … regimes that have applied to traditional telephone service," *id*., and any delay in achieving that goal disserved the policies behind it. The FCC also observed that subjecting VoIP-PSTN calls to an intrastate origination rate rather than the lower interstate rate would undermine two core policy goals: "moving away from reliance on [intercarrier compensation] revenues," and "encouraging a migration to all IP networks." *Second Reconsideration Order* ¶35 (JA at 1166). Indeed, the evidence showed that VoIP customers could end up paying higher rates to fund the intrastate rates on originating calls, which would make the new technology less attractive. *Id.* ¶36 & nn.102-103 (JA at 1166). Therefore, the agency determined, a strict limit on the use of intrastate rates was "necessary to ensure that migration to IP services is adequately promoted." *Id.* ¶36 (JA at 1166).

A limited two-year window, the agency determined, did not unjustifiably delay that goal, while giving carriers "the opportunity to make significant progress transitioning their business plans away from extensive reliance" on access charges. *Id*. ¶36 (JA at 1166). In short, the two-year interim rule would give carriers sufficient opportunity to adjust to the new regulatory framework, while ensuring that the ultimate objective of bill-and-keep is reached within a reasonable period of time.

The FCC also explained that VoIP origination charges must be considered "in the context of the … VoIP intercarrier compensation framework" as a whole. *Second Reconsideration Order* ¶35 (JA at 1166). Overall, any loss of originating access revenue would be offset by increased terminating access revenue. *Id*. Prior to the *Order*, the FCC had not determined whether LECs could impose access charges on VoIP calls, and many IXCs had refused to pay them, especially for terminating calls. Under the new prospective rules, LECs like Windstream could expect "additional revenues for previously disputed" charges. *Id.* LECs would also "realize savings associated with reduced litigation and disputes." *Id*.

Windstream, alone among all local exchange carriers, now challenges the new VoIP access charge regime.

SUMMARY OF ARGUMENT

In the orders on review, the FCC for the first time expressly permitted LECs like Windstream prospectively to tariff access charges on VoIP calls, and the agency allowed them to collect high intrastate originating access charges on intrastate VoIP calls for two years. Despite having received those substantial benefits, Windstream accuses the agency of imposing an unexplained "flash cut" on intrastate VoIP access charges.

The agency reasonably explained all of its VoIP policy judgments. In particular, rather than requiring interstate rates for VoIP originating access charges immediately, the FCC allowed the use of higher intrastate rates for two years as part of a measured transition, deferring achievement of critical policy goals in order to ease the transition to bill-and-keep. The FCC predicted (and Windstream does not contest) that the new benefits accorded to LECs will largely offset the change in revenue. There accordingly has been little or no cut at all, let alone a "flash cut."

1. Windstream's repeated claims that the FCC did not intend the *Order* to apply to originating access charges were properly rejected in paragraph 31 of the *Second Reconsideration Order* (JA at 1162). The agency correctly interpreted its own prior *Order*. The initial *Order* defined the key term "VoIP-PSTN Traffic" to mean "traffic exchanged over PSTN facilities that *originates and/or terminates* in IP format." *Order* ¶940 (JA at 733). Every use of that term throughout the VoIP section of the *Order* thus necessarily referred to originating access. The agency specified that access charge "rates" for all long-distance VoIP-PSTN traffic would be "equal to interstate access rates," *id*. ¶933 (JA at 729), and it expressly rejected "an asymmetric approach that would apply VoIP-specific rates for only IP-originated or only IP-terminated traffic." *Id*. ¶942 (JA at 734). Finally, the Rule promulgated by the *Order* specifies that the transitional VoIP access charge regime applies to calls that are "exchanged between a local exchange carrier and another telecommunications carrier in [TDM] format that originates and/or terminates in IP format." 47 C.F.R. §51.913 (JA905).

Contrary to Windstream's claim that the FCC failed to explain its new access charge framework, the *Order* and the *Second Reconsideration Order* articulated multiple reasons for limiting (after two years) intrastate access rates for originating VoIP traffic to general interstate rate levels. The existing access charge system, with differential rates for similar services, was deeply flawed, and it therefore made no sense to extend the outdated system into a new area for any amount of time beyond that necessary to allow for a measured transition to bill-and-keep. Rather, the central purpose of the entire rulemaking proceeding was to eliminate the antiquated system in favor of a symmetrical approach with uniform charges. Uniform rates avoid marketplace distortions and arbitrage, and Windstream itself had asked the agency to take steps to reduce arbitrage in originating access. Preservation of high intrastate rates, by contrast, provides an incentive for carriers to retain old TDM technology rather than switching to modern IP technologies, a result that would undermine one of the FCC's core policies. Those reasons amply satisfy the agency's burden of explanation.

Windstream is wrong in claiming that the FCC promised to defer taking action on originating access charges in the context of VoIP calls. The agency deferred consideration of *legacy network* origination charges, but it addressed *VoIP* in a different section of the *Order* that applied only to VoIP. The FCC correctly found that the "discussion of originating access charges in other contexts do[es] not constrain the interpretation of permissible origination charges for toll VoIP traffic." *Second Reconsideration Order* ¶31 (JA at 1162).

Windstream fares no better in arguing that the FCC was obligated to treat VoIP in lockstep with its treatment of legacy telephone calls. LECs had long relied on an undisputed entitlement to collect tariffed access charges for legacy network calls at established inter- or intrastate rates. The intercarrier compensation obligations for VoIP, by contrast, had never been resolved by the agency. The FCC therefore reasonably created a regime unique to VoIP.

2. For similar reasons, Windstream misses the mark in contending that the FCC did not explain its refusal to adopt an explicit revenue recovery mechanism in addition to the two-year extension on intrastate originating rates granted to Windstream and other LECs. Unlike the legacy phone system, replacement revenue was unnecessary in "the context of the Commission's overall VoIP intercarrier compensation framework." *Second Reconsideration Order* ¶35 (JA at 1166). By virtue of the FCC's explicit recognition (for the first time) that VoIP calls would be prospectively subject to access charges, the agency predicted that "most providers will receive … *additional revenues* for previously disputed terminating VoIP calls and will also realize savings associated with reduced litigation and disputes." *Id.* (emphasis added). Moreover, even if increased termination charges and reduced litigation expenses do not recover all lost revenue, under the *Second Reconsideration Order* LECs may impose intrastate originating charges at

high intrastate rates for *two years*. The FCC reasonably predicted that those measures, taken as a whole, will give LECs "the opportunity to make significant progress transitioning their business plans away from extensive reliance" on access charges. *Id*. ¶36 (JA at 1166).

ARGUMENT

THE FCC'S VOIP ORIGINATING ACCESS CHARGE RULE IS THE PRODUCT OF REASONED DECISIONMAKING.

Windstream challenges the FCC's VoIP originating access charge rule on two main grounds: first, that the agency did not make clear that the Rule applied to originating access at all and did not explain why it adopted the Rule; and second, that the agency unreasonably did not provide a specific revenue recovery mechanism to offset any reduction in originating intrastate access rates. Those claims fail. The FCC fully explained both the coverage of the VoIP Rule and why it did not adopt a specific revenue recovery mechanism.

A. The FCC Reasonably Explained The Grounds For Its VoIP Originating Access Charge Regime.

1. The FCC Made Clear That The *Order* Addressed Both Originating And Terminating Charges.

Windstream repeatedly claims that the *Order* cannot reasonably be read to apply to VoIP originating access charges at all. Br. 12-13, 15-16, 17-18, 20, 21, 28. Reading the *Order* as expressing an intent to regulate VoIP originating charges, Windstream asserts, is simply a "linguistic possibilit[y]" grounded in a single sentence, Br. 22, but otherwise unreflected in the *Order*. The agency properly rejected that claim in the *Second Reconsideration Order*, pointing out that "the text [of the *Order*] and the implementing rules demonstrate that the intercarrier compensation framework for toll VoIP traffic" applies to "both … origination and termination charges." *Second Reconsideration Order* ¶31 (JA at 1163). That interpretation was sound and is entitled to deference on review. *See Colorado Interstate Gas Co. v. FERC*, 791 F.2d 803, 810 (10th Cir. 1986).

First and foremost, the FCC defined the term "VoIP-PSTN traffic" – the central subject of the VoIP section of the *Order* – to mean "traffic exchanged over PSTN facilities that *originates and/or terminates* in IP format." *Order* ¶940 (JA at 733) (internal quotation marks omitted) (emphasis added). That definition – and each use of it in the VoIP section of the *Order* – clearly encompasses the calls about which Windstream is concerned: those that originate in TDM format and terminate in IP format.[4]

After defining the traffic to which its VoIP framework would apply, the agency then specified that access charges for all covered traffic would be subject to the interstate rate. The agency not only stated that the new VoIP compensation framework applied to "*all* VoIP-PSTN traffic," without qualification, *id*. ¶943 (JA at 735) (emphasis added), but declared further that all long-distance VoIP traffic "will be subject to charges not more than originating and terminating interstate access rates," *id*. ¶961 (JA at 746); *see id*. ¶933 ("rates" for long-distance VoIP-PSTN traffic would be "equal to interstate access rates") (JA at 729). The FCC also expressly "decline[d] to adopt an asymmetric approach that would apply VoIP-specific rates for only IP-originated or only IP-terminated traffic." *Id*. ¶942 (JA at 734). Not grappling with originating charges would "perpetuate" and "expand" opportunities for "artificial regulatory advantages" and arbitrage based on

[4] The FCC adopted that definition directly from a proposal by Windstream itself and other carriers. *Order* ¶940 (JA at 733), citing Joint Letter (JA at 3145). Moreover, in another proposal known as the "ABC Plan," Windstream and other carriers asked the FCC to classify all VoIP traffic as interstate, which would have precluded using intrastate rates for originating traffic. *Second Reconsideration Order* n.88 (JA at 1163). The ABC Plan also asked the FCC to address arbitrage "involving both *originating* and terminating traffic." ABC Plan Att. 1 at 10 (JA at 2998) (emphasis added).

differential rates. *Id*. Thus, addressing "the prospective payment obligations for VoIP traffic exchanged in TDM between a LEC and another carrier," the *Order* initially established that all calls would be subject to the same interstate rate and that "all carriers originating and terminating VoIP calls will be on equal footing," *id*. ¶40 (JA at 405). *See Second Reconsideration Order* n.87 (JA at 1163).

If that were not enough, the language of the VoIP Rule adopted in the *Order*, 47 C.F.R. §51.913, plainly applies to both originating and terminating traffic. The Rule specifies that the VoIP access charge regime applies to calls that are "exchanged between a local exchange carrier and another telecommunications carrier in [TDM] format that originates and/or terminates in IP format." JA at 905. And it adds that a call "originates and/or terminates in IP format if it originates from and/or terminates to an end-user customer of a service that requires Internet protocol-compatible customer premises equipment." JA at 906. The Rule makes all covered traffic "subject to a rate equal to the relevant interstate access charges." JA at 905. That language, which was promulgated in the *Order*, *see id*. Appendix A (JA at 881), necessarily applies the interstate access charge rate to all calls that originate in TDM and terminate in IP (and vice versa).

Windstream mistakenly relies on footnote 1976 of the *Order* for the proposition that the Commission deferred action on VoIP origination charges to the further notice proceeding. Br. 21. But that footnote does not address VoIP calls specifically; it discusses "section 251(b)(5) traffic" – *i.e.*, all traffic over which the FCC was asserting federal authority, which includes legacy network traffic as well. JA at 746. The footnote neither undermines the FCC's interpretation of the *Order* as having addressed originating VoIP charges nor overcomes unequivocal statements in the text of the *Order* itself and the Rule that support the agency's reading.

2. The FCC Reasonably Explained The Policy Balance Behind The VoIP Originating Access Charge Rule.

a. Windstream next contends that the FCC "provided no … explanation for reducing intrastate VoIP originating access rates to interstate levels." Br. 20. That contention fails. In a section of the *Order* addressed specifically to VoIP access charges, the FCC gave substantial reasons for establishing (after the first two years) a uniform interstate rate for all VoIP access charges. The FCC thus "explain[ed] why it has exercised its discretion" as it did, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983), and that is all the law requires, *Sorenson Communications, Inc. v. FCC*, 659 F.3d 1035, 1048 (10th Cir. 2011).

First, the FCC explained that the central purposes of the intercarrier compensation rulemaking proceeding were to eliminate the antiquated access charge system and to end carrier reliance on the subsidies implicit in those charges. *See Order* ¶948 (JA at 737). That policy applied with special force to VoIP, a relatively new technology that the FCC had never previously determined to be subject to the access charge regime. It therefore made no sense to extend more than absolutely necessary a failed regulatory approach – which the FCC was spending considerable effort to reform – into a new area. Given the "known flaws of [the] existing … rules," the FCC explained, expanding "the pre-existing … regime that applies in the context of traditional telephone service," including differential inter- and intrastate rates, would require the agency to "enunciate a policy rationale for expressly imposing that regime on VoIP-PSTN traffic." *Id*. But the agency could see no good policy reason to extend the flawed regime further in light of "the recognized need to move in a different direction." *Id*. *See also Second Reconsideration Order* ¶35 (allowing VoIP originating charges at intrastate rates is "in tension with our overall policy goal of … moving away from reliance on [access charge] revenues") (JA at 1166).

Second, the FCC explained that "addressing [VoIP] traffic … comprehensively," rather than engaging in piecemeal regulation of termination and origination charges, "helps guard against new forms of arbitrage." *Order* ¶941 (JA at 733). The agency determined that "symmetrical" VoIP rules that apply equally to both originating and terminating traffic "avoid[] the marketplace distortions that could arise from an asymmetrical approach to compensation" in which different calls are subject to different rates. *Id.* ¶948 (JA at 737); *accord id.* ¶942 (JA at 734). Indeed, the ABC Plan, submitted by Windstream itself and other carriers, had identified market problems and asked the FCC to take steps to prevent arbitrage "involving *both originating and terminating* traffic." ABC Plan Att. 1 at 10 (JA at 2998) (emphasis added).[5] Agreeing with that suggestion, the FCC recognized that addressing only terminating access charges and not originating charges for VoIP traffic "would perpetuate and expand" opportunities for arbitrage. *Order* ¶942 (JA at 734). *See Second Reconsideration Order* ¶¶41-42 (JA at 1169).

Third, the FCC explained that the preservation of implicit subsidies through intrastate access rates would impede its policy of "encouraging a

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[5] Moreover, in comments submitted to the FCC in a related proceeding involving access charges, Windstream recognized that because "[t]he same local exchange network is used to both originate and terminate traffic, … maintaining a disparity in originating and terminating rates does not make economic sense." Comments of Windstream Communications, Inc., WC Docket 08-152 at 12 (Aug. 21, 2008) (available at http://apps.fcc.gov/ecfs/document/view?id=6520041248).

migration to all IP networks," *Second Reconsideration Order* ¶35 (JA at 1166), because such rates "create incentives to retain old voice technologies" rather than invest in new IP-based broadband technologies, *2011 NPRM* ¶495 (SA at 150); *see id*. ¶506 (the current intercarrier compensation system is "hindering progress to all IP networks") (SA at 156).

b. Windstream claims that the FCC failed to "reconcile" its treatment of VoIP originating access with its "repeated statements that any action on originating access was being deferred." Br. 22. But the FCC said no such thing about VoIP traffic. The *Order* considered regulation of VoIP traffic in a specific section – entitled "Intercarrier Compensation For VoIP Traffic" – dedicated uniquely to VoIP. *Order* ¶¶933-975 (JA at 729-757). As the agency explained when it rejected Windstream's interpretation in the *Second Reconsideration Order*, it would be incorrect to understand "statements in other sections of the [*Order*] discussing … originating access … [to] imply that" the agency took the same approach "to origination charges for VoIP traffic." *Second Reconsideration Order* ¶31 (JA at 1162). Rather, "discussion of originating access charges in other contexts [in the *Order*] do[es] not constrain the interpretation of permissible origination charges for toll VoIP traffic." *Id*. Simply put, the FCC reasonably determined that the *Order*'s treatment of the *legacy network* does not apply automatically to

VoIP, where, as here, the agency has devoted a separate section of the *Order* to VoIP.

The FCC reasonably recognized that this relatively new technology called for a different approach during the transition to the ultimate goal of bill-and-keep for all traffic. Because the FCC had never resolved whether VoIP was subject to the access charge regime, carriers could place less reasonable reliance on the expectation of receiving VoIP-related revenue. *Id.* n.84 (JA at 1162). Indeed, Windstream itself suggested that the FCC "treat VoIP traffic differently from non-VoIP traffic." Comments of Windstream *et al.* filed Aug. 24, 2011 at 35 (JA at 3450). And, as noted above, the ABC Plan to which Windstream subscribed recognized that arbitrage was a problem with *both* originating and terminating VoIP access and asked the agency to take countermeasures. ABC Plan Att. 1 at 10 (JA at 2998).

Windstream also mistakenly argues that the agency's refusal to defer action on VoIP origination charges is arbitrary because, as the agency found on reconsideration, originating access has been subject to fewer disputes between carriers than terminating access. Br. 22-24. Reducing disputes was an important reason to adopt rules governing VoIP traffic. But it was not the *only* reason, and the FCC's rationale for permitting access charges applied equally to both termination and origination charges and did not turn solely on reducing disputes. The agency was also concerned about maintaining symmetrical VoIP rate structures to avoid arbitrage, eliminating outmoded regimes based on per-minute charges that no longer had any economic basis, and preserving incentives for LECs to implement more modern broadband facilities. *See* pages 3-4, 13, 23-25, *supra*.

In any event, in the *Second Reconsideration Order*, the FCC took full account of new evidence by allowing LECs like Windstream to recover originating access charges at intrastate rates on VoIP calls for two years in order to forestall a sudden drop in revenue. That action required the agency to "reconsider the balancing of policy interests," *Second Reconsideration Order* ¶34 (JA at 1164) – *i.e.* to temporarily defer achievement of its policy goals in order to ease the transition for some carriers. The agency thus accommodated newly submitted evidence showing fewer disputes over originating charges while at the same time preserving its overarching framework for VoIP traffic.

In doing so, the FCC "provide[d] carriers with a measured transition while balancing the [agency's] other goals." *Second Reconsideration Order* n.94 (JA at 1165); *see Order* ¶952 (JA at 739) (FCC's approach "balances … competing policy objectives"). That decision accommodated multiple competing policies, including the need to avoid a sudden cut in carrier revenue while at the same time replacing an outdated regulatory regime as soon as possible. The agency also determined that the two-year window would give carriers "the opportunity to make significant progress transitioning their business plans away from extensive reliance" on access charges. *Second Reconsideration Order* ¶36 (JA at 1166). In such circumstances, "only the Commission may decide how much precedence particular policies will be granted when several are implicated in a single decision." *Melcher v. FCC*, 134 F.3d 1143, 1154 (D.C. Cir. 1998) (internal quotation marks omitted); *see Sorenson*, 659 F.3d at 1045 (FCC has discretion to balance competing policy objectives).

B. The FCC Reasonably Declined To Provide A Dedicated Revenue Recovery Mechanism.

Although the FCC allowed LECs like Windstream to recover some of the revenue they will lose as terminating access charges on traditional network calls are eliminated, *Order* ¶¶847-853 (JA at 683-688), it did not create a similar direct recovery mechanism beyond the two-year extension on intrastate rates for originating VoIP calls, *Second Reconsideration Order* ¶35 & n.97 (JA at 1165-1166). Windstream argues that the differential treatment was "unaccompanied by any reason for that decision." Br. 26.

In fact, the FCC discussed the issue and explained that explicit replacement revenue was unnecessary in "the context of the Commission's overall VoIP intercarrier compensation framework." *Second Reconsideration Order* ¶35 (JA at 1166). Because the agency accorded LECs a prospective right to payments for handling VoIP traffic, it predicted that "most providers will receive … additional revenues for previously disputed terminating VoIP calls and will also realize savings associated with reduced litigation and disputes." *Id.*

As discussed, prior to the *Order*, LECs had no recognized entitlement to access charges for terminating VoIP calls (the FCC had not resolved the matter). Thus, in many cases, LECs were unable to collect terminating charges at all, and in many others they had to pay substantial legal fees to collect anything. *See Order* ¶937 (JA at 731). Going forward, the new VoIP terminating access regime largely solves those problems and thus should bring LECs, as a whole, substantially more revenue and lower expenses in connection with terminating VoIP calls. With that offsetting compensation in place for any reduction in originating access charges, the agency explained that it was "not necessary" to permit origination charges at intrastate rates beyond the minimum time necessary to ensure a "measured transition" to interstate rates. *Second Reconsideration Order* ¶35 (JA at 1166).

That explanation defeats Windstream's claim that the FCC failed to explain its decision and fully satisfies the agency's burden under the APA.

See Sorenson, 659 F.3d at 1048. Windstream does not challenge the FCC's prediction that increases in terminating access revenue would make up for the (eventual) fall in originating access revenue, and in this regard, the Court is "particularly deferential when … reviewing an agency's predictive judgments, especially those within the agency's field of discretion and expertise." *Franklin Sav. Ass'n v. Director, Office of Thrift Supervision*, 934 F.2d 1127, 1146 (10th Cir. 1991).

Moreover, Windstream's argument rests on the unstated assumption that the FCC was required to treat VoIP calls the same as it treated traditional network calls. But as shown at pages 25-26 above, because the two types of calls have not been subject to the same regulatory regime, carriers do not have the same reliance interests in the revenue generated by those calls. The agency accommodated carriers' expectations in VoIP-related revenue by giving carriers two years of breathing room at intrastate rates as an "opportunity to make significant progress transitioning their business plans away from extensive reliance on" access charges. *Second Reconsideration Order* ¶36 (JA at 1166). When adopting interim regimes such as the two-year intrastate rate for VoIP origination charges, the FCC is entitled to "substantial deference." *Sorenson*, 659 F.3d at 1046.

The predicted offset to reductions in originating access revenue also refutes Windstream's argument that the VoIP originating access Rule will result in a "flash cut" that could threaten LECs' ability to invest in their networks. Br. 25-26. As we have explained above, much of the revenue lost from the eventual reduction in VoIP originating access charges will be made up elsewhere from terminating access charges and the savings from less litigation over disputed access charges. Even if Windstream – which is the only LEC that challenges the new VoIP regime – could show that it will recover a lower proportion of its prior revenues than most carriers (a showing it does not even attempt to make), the agency's predictive judgment – which applies to the local exchange industry as a whole – remains reasonable.[6]

Equally important, under the *Second Reconsideration Order*, LECs may impose intrastate originating access charges at high intrastate rates for *two years* – which, the agency observed, is longer than the time allowed to

[6] In addition, if Windstream could show that it will receive lower total revenue than it did before the FCC's decision, the FCC did not promise – even with regard to the traditional network – that any recovery mechanism would be "revenue neutral," *i.e.,* that it would compensate completely for any lost revenue. *Order* ¶¶881, 924 (JA at 699, 723).

impose such charges for intrastate termination rates. *Id*. n.104 (JA at 1167).[7] To the degree there is any cut in total compensation, it cannot plausibly be described as a "flash" cut.

Finally, Windstream complains that the FCC did not overturn the *Order*'s imposition of interstate rates on originating access "for the six months between the original Order and the … effective date" of the *Second Reconsideration Order*. Br. 29. When it granted LECs like Windstream the two-year right to impose intrastate originating access charges, the agency altered a codified rule. *See Second Reconsideration Order* ¶52 & App. A (JA at 1172, 1174). The FCC reasonably made that change in its rule prospective-only in light of the Administrative Procedure Act. That statute describes a "rule," such as the change in origination rates, as having "future effect." 5 U.S.C. §551(4). *See JEM Broadcasting Co., Inc. v. FCC*, 22 F.3d 320, 325 (D.C. Cir. 1994) ("rules, by definition, must have prospective application"). Indeed, where rates are concerned, the courts particularly

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[7] Moreover, because LECs "typically provide … long distance service through an affiliate" in offering bundled service to customers, originating access charges may not amount to "real" revenue, but only to the transfer of money from one division of the company to another. The FCC thus has questioned "whether the originating access revenues associated with … the … LEC's own long distance affiliate should be viewed as additional revenue to the incumbent LEC." *Public Notice*, 26 FCC Rcd 11112, 11126 n.55 (2011) (JA at 363); *see also* FCC Preliminary Br. 16.

disfavor retroactive agency action. *See Consolidated Edison Co. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003) (regulator may not adjust current rates to make up for over- or under-collection in a prior period).

The remainder of Windstream's brief argues that the pending rulemaking proceeding in which the FCC will address originating access charges for the legacy network is insufficient to sustain the agency's actions. Br. 29-30. The argument is a red herring – the FCC did not justify its regulatory choices for VoIP traffic by holding out the possibility of addressing originating access charges in the pending rulemaking. Rather, the agency's policy determinations rest on the explanations set forth fully in the orders on review.

CONCLUSION

Windstream's petition for review should be denied.

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limitations, Typeface Requirements, Type Style Requirements, and 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 Windstream Principal Brief was certified to be 6,993 words in length. Therefore, the FCC may file a response brief up to 8,041 words in length. This brief contains 6,880 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

BRIEF OF INTERVENORS SUPPORTING RESPONDENTS IN RESPONSE TO THE WINDSTREAM PRINCIPAL BRIEF

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, intervenors Cox Communications, Inc., the National Cable & Telecommunications Association ("NCTA"), Verizon, and Verizon Wireless respectfully submit the following corporate disclosure statements:

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

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

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.

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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

FCC	Federal Communications Commission
FCC Br.	Federal Respondents' Response to the Windstream Principal Brief (filed Mar. 27, 2013)
ICC	Intercarrier Compensation
LEC	Local Exchange Carrier
Order	Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17663 (2011)
PSTN	Public Switched Telephone Network
Second Reconsideration Order	Second Order on Reconsideration, *Connect America Fund*, 27 FCC Rcd 4648 (2012)
VoIP	Voice over Internet Protocol
Windstream	Windstream Corporation, Windstream Communications, Inc., and Windstream Corporation's wholly owned regulated subsidiaries

INTRODUCTION AND SUMMARY OF ARGUMENT

In the *Order*, the FCC adopted new, prospective rules authorizing LECs to charge their federally tariffed access charges to other carriers for originating or terminating VoIP calls that begin or end on a traditional telephone network (referred to as "VoIP-PSTN" calls). In the *Second Reconsideration Order*, the FCC partially granted Windstream's petition for reconsideration of that determination and concluded that, for two years (until June 30, 2014), LECs would also be permitted to charge their (generally higher) state tariffed access charges for *originating* intrastate VoIP-PSTN calls, before moving to the (lower) federal rates.

Even though the FCC *granted* Windstream substantial relief on reconsideration, Windstream seeks this Court's review, claiming that the FCC failed adequately to explain its treatment of originating charges for VoIP-PSTN calls. The FCC's brief ably refutes that claim. Intervenors write separately to emphasize three points.

I. The FCC demonstrates that the rule it adopted in the *Order* unambiguously authorized LECs, prospectively, to bill for originating and terminating VoIP-PSTN traffic at no higher than their federally tariffed rates. Contrary to Windstream's claim (at 16), the *Second Reconsideration Order* amended that rule *not* to make the original rule clearer, but to codify the additional relief the FCC granted to Windstream in that order.

II. Windstream's assertion that the FCC could not have intended, in the *Order*, to apply interstate access rates to originating VoIP-PSTN traffic ignores Windstream's own proposal (in conjunction with other carriers) urging the FCC to treat all VoIP-PSTN traffic as interstate for jurisdictional purposes. The FCC expressly noted in the *Order* that the compensation rule for VoIP traffic it adopted in the *Order* is the same one that would have applied had the FCC agreed that all VoIP-PSTN traffic is jurisdictionally interstate — state tariffed rates do not apply to originating or terminating VoIP-PSTN traffic.

III. The FCC, in the *Second Reconsideration Order*, established a multi-year transition for originating VoIP traffic, not a "flash cut." Windstream's complaints about that transition — and the eventual reduction to federally tariffed rates for originating traffic — ignore the additional revenue it will receive from the new rules. They are also inconsistent with Windstream's own SEC disclosures.

ARGUMENT

I. THE *ORDER* MADE CLEAR THAT ITS VoIP RULE APPLIED FEDERAL RATES TO ORIGINATING VoIP TRAFFIC

The FCC's rule for VoIP traffic, promulgated in the *Order*, unambiguously applied federally tariffed rates to all ICC charges for VoIP traffic — originating and terminating. Specifically, that rule provided that "Access Reciprocal Compensation . . . between a local exchange carrier and another telecommunications carrier" for "originat[ing] and/or terminat[ing]" VoIP-PSTN traffic would "be subject to a rate equal to the relevant interstate access charges specified by this subpart [of the FCC's regulations]." *Order*, 26 FCC Rcd at 18178-79 (promulgating 47 C.F.R. § 51.913(a)) (JA at 905-06). As the FCC explains, that language "plainly applies to both originating and terminating traffic." FCC Br. 22; *see Second Reconsideration Order* ¶ 31 (the *Order*'s "text and the implementing rules demonstrate that the intercarrier compensation framework for toll VoIP traffic limits both default origination and termination charges to the level of interstate access rates") (JA at 1163).

Windstream is thus wrong to claim repeatedly (at 16, 20, 28) that the FCC, in the *Second Reconsideration Order*, "amended" and "revise[d]" the FCC's "rules" to make that initial decision clear. Instead, the FCC amended the rule to codify the substantial relief given to Windstream on reconsideration — namely, a two-year period in which LECs such as Windstream are authorized to charge higher state tariffed rates for originating intrastate VoIP-PSTN calls. *See Second Reconsideration Order*, 27 FCC Rcd at 4671 (amending 47 C.F.R. § 51.913 to divide subsection (a) into paragraphs, with paragraph (1) defining the ICC rules for terminating VoIP-PSTN traffic and originating interstate VoIP-PSTN traffic and paragraph (2) specifying the transition period for originating intrastate VoIP-PSTN traffic) (JA at 1174).

No different from the rule promulgated in the *Order*, the FCC's amended rule expressly authorizes the charging of federally tariffed rates for all VoIP traffic. The only substantive difference between the two rules is that the old rule made the change effective immediately, whereas the new rule provides a two-year transition period (until June 2014) in which LECs such as Windstream are expressly authorized to bill for originating intrastate VoIP traffic at their (generally higher) state tariffed rates.

II. THE *ORDER* REACHED A RESULT CONSISTENT WITH THE JURISDICTIONAL CLASSIFICATION WINDSTREAM AND OTHER CARRIERS HAD PROPOSED

As the FCC shows (at 8-10), Windstream's challenges to the *Order*'s treatment of VoIP traffic are based on portions of the order addressing traditional telecommunications traffic rather than the separate section of the order specific to VoIP traffic.

Moreover, as the FCC explained in the *Order*, the compensation rule it adopted for all VoIP traffic was consistent with an industry proposal that Windstream joined. As the FCC noted, Windstream and others urged the FCC to find that "all VoIP-PSTN traffic should be treated as interstate" for jurisdictional purposes. *Order* ¶ 959 (JA at 744-45). In the *Order*, the FCC did not adopt that jurisdictional classification of VoIP traffic, but it expressly recognized that the compensation rule it adopted would produce the same outcome — default rates for

VoIP traffic "equal to interstate access rates" — as if it had classified all VoIP-PSTN traffic as jurisdictionally interstate. *Id.*; *see also Second Reconsideration Order* ¶ 31 n.88 (noting that the industry proposal contained "no explanation of how the [FCC] would (or could) both classify all VoIP traffic as interstate and nonetheless adopt intrastate originating access rates" for that traffic) (JA at 1163).

The FCC's discussion in the *Order* of the industry proposal that Windstream joined thus provides further refutation of its assertion (at 21) that the FCC's clear treatment of originating charges for VoIP-PSTN traffic in the *Order* was not "conscious[ ]" or was merely a "linguistic possibilit[y]."

III. WINDSTREAM'S COMPLAINTS ABOUT A "FLASH CUT" AND LOST REVENUE ARE ERRONEOUS AND UNSUPPORTED

Windstream's repeated complaints about a "flash cut" (at 2, 17, 20-21, 24) are wrong. Windstream ignores the relief it was granted in the *Second Reconsideration Order*: it now has an express authorization through June 30, 2014, to charge its state tariffed rates for originating intrastate VoIP-PSTN traffic. *See Second Reconsideration Order* ¶¶ 34-35 (JA at 1164-66). It did not have that express authorization before the *Second Reconsideration Order*.[1] Moreover, two years' advance notice that Windstream's rate for originating intrastate VoIP traffic

[1] Nor did Windstream previously have an express FCC rule authorizing interstate rates for originating interstate VoIP-PSTN traffic (or terminating any VoIP-PSTN traffic).

will be no greater than its federal tariffed rate is not a "flash cut." It is a lengthy, generous transition period that the agency reasonably predicted will give Windstream and other LECs ample time to adjust their business plans. *See id.* ¶ 36 (JA at 1166).

Windstream also complains (at 29) about the six-month gap between the *Order* and the effective date of the relief granted in the *Second Reconsideration Order*. But Windstream offers no basis to conclude that it lost any revenue during that period. It points to no record evidence about the rates it charged (or the amounts it collected) during that period. And there is some evidence that Windstream continued to charge its state rates based on its erroneous argument that the *Order*'s VoIP rule did not apply to originating charges.[2]

Finally, Windstream's suggestion (at 27) that it will suffer "significant revenue losses" once the transition occurs in 2014 ignores the agency's reasonable predictive judgment about the benefits of clear, prospective VoIP rules — which expressly authorize Windstream to charge federal tariffed rates for VoIP traffic (an area previously subject to much dispute). *See Order* ¶ 930 (predicting that the new rules "may increase the proportion of traffic for which intercarrier compensation

[2] *See* Letter from Windstream to Texas PUC (Mar. 6, 2012) (acknowledging that Windstream's 2012 tariff revisions did not limit access charges on originating intrastate VoIP-PSTN traffic to interstate rates), *available at* http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/27385_7575_720105.PDF.

can be collected," "will provide LECs, including incumbent LECs, with more certain revenue throughout the transition, and will also allow them to avoid the litigation expense associated with attempts to collect access charges for VoIP traffic") (JA at 727). Indeed, Windstream's claims here conflict with its own disclosures to regulators and investors, where it has stated that it does "not believe the Order's reform of intercarrier compensation will have a material impact on [its] results of operation, cash flows or [its] financial condition."[3]

CONCLUSION

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

[3] Windstream Corp. Form 10-Q for Q2 2012, at 55 (SEC filed Aug. 9, 2012), *available at* http://www.sec.gov/Archives/edgar/data/1282266/000128226612000030/a201263010q.htm.

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1. This brief contains 1,418 words of the 21,400 words the Court allocated for the briefs of intervenors in support of the FCC in its October 1, 2012 Order Consolidating Case No. 12-9575 with Other FCC 11-161 Cases, Establishing Windstream Briefing Schedule, and Modifying Intervenor Participation. The intervenors in support of the FCC have complied with the type-volume limitation of that order because their briefs, combined, contain a total of fewer than 21,400 words, excluding the parts of those briefs exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 10th Cir. R. 32(a) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

3. All required privacy redactions have been made.

/s/ *Scott H. Angstreich*
Scott H. Angstreich

July 9, 2013

CERTIFICATE OF DIGITAL SUBMISSION
Certificate of Compliance with Virus Scan

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

/s/ Joel Marcus
Joel Marcus
Counsel

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 Windstream Principal Brief to be filed by delivering a copy to the Court via e-mail at FCC_briefs_only@ca10.uscourts.gov. I further certify that the foregoing document will be furnished by the Court through (ECF) electronic service to all parties in this case through a registered CM/ECF user. This document will be available for viewing and downloading on the CM/ECF system.

/s/ Joel Marcus
Joel Marcus
Counsel

July 29, 2013