ORAL ARGUMENT SCHEDULED FOR NOVEMBER 19, 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 AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

WIRELESS CARRIER UNIVERSAL SERVICE FUND REPLY BRIEF

(DEFERRED APPENDIX APPEAL)

RUSSELL D. LUKAS
DAVID A. LAFURIA
TODD B. LANTOR
LUKAS, NACE, GUTIERREZ & SACHS, LLP
8300 Greensboro Drive, Suite 1200
McLean, Virginia 22102
(703) 584-8678

Counsel for
Cellular Network Partnership, a Limited Partnership
Cellular South, Inc. d/b/a C Spire Wireless
DOCOMO Pacific, Inc.
Nex-Tech Wireless, LLC
PR Wireless, Inc.
United States Cellular Corporation

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Peter W. Huber, Michael K. Kellogg & John Thorne, *Federal Telecommunications Law* (2d ed. 1999) 24

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GLOSSARY

Act	Communications Act of 1934
Assistant Secretary	Assistant Secretary of Commerce for Communications and Information
Br.	Wireless Carrier Universal Service Fund Principal Brief
Broadband	high-speed Internet access service
Broadband Act	Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008)
Broadband Plan	*Connecting America: The National Broadband Plan*
CAF	Connect America Fund
Chapter 5	Chapter 5 of Title 47
Chapter 12	Chapter 12 of Title 47
Commerce Secretary	Secretary of Commerce
ETC	eligible telecommunications carrier
FCC	Federal Communications Commission
FCC Br.	Federal Respondents' Final Response to the Wireless Carrier Universal Service Fund Principal Brief
FCC Prin. USF Br.	Combined Responses of Federal Respondents and Supporting Intervenors to the Joint Universal Service Fund Principal Brief

FDA	Food and Drug Administration
JA	Joint Appendix
Jt. Br.	Joint Preliminary Brief of the Petitioners
1996 Act	Telecommunications Act of 1996
Recovery Act	American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009)
Telecom	Telecommunications
Title 47	Title 47 of the United States Code
Title II	Title II of the Act
Title III	Title III of the Act
Title VI	Title VI of the Act
USF	Universal Service Fund

INTRODUCTION

Congress demonstrated that it did not want the FCC to regulate broadband Internet access service in 2008, when it enacted Chapter 12 – Broadband and placed it outside the reach of the FCC's authority.[1] Congress subsequently did not authorize the FCC to implement its own *Broadband Plan*.[2] Exemplifying self-aggrandizement rivaled only by the FDA's attempt to regulate tobacco products,[3] the FCC proceeded to implement its *Broadband Plan* and is regulating broadband under the flimsiest of pretexts.

The FCC's comprehensive reform of its Title II USF program was expressly intended to "refocus" USF support to broadband.[4] The FCC heralded its *Order* as "the most significant policy step ever taken to connect all Americans to high-speed Internet."[5] The FCC told the public that it had created the CAF, with an annual budget

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[1] *See* Broadband Act, 47 U.S.C. §§ 1301-1305 (2008).

[2] *See* Recovery Act § 6001(k) (codified at 47 U.S.C. § 1305(k)).

[3] *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1872 (2013).

[4] *Connect America Fund*, 26 F.C.C.R. 17663, 17670 ¶11 (2011) ("*Order*") (JA at 397).

[5] *FCC Creates 'Connect America Fund' to Help Extend High-Speed Internet to 18 Million Unserved Americans; Creating Jobs & Increased Consumer Benefits*, 2011 WL 5114856, at *1 (Oct. 27, 2011) ("*CAF Announcement*").

of $4.5 billion, to "extend broadband infrastructure to the millions of Americans who currently have no access to broadband."[6]

Congress never authorized the FCC to regulate broadband, and the agency steadfastly classified broadband as an information service that was ineligible for USF support. Rather than classifying broadband as a USF-supported telecom service, the FCC purposefully misconstrued the phrase "facilities and services" in § 254(e) of the Act to enable it to funnel USF support to broadband, s*ee* FCC Br. at 14, while denying that it had authorized "support for broadband Internet access service itself." FCC Prin. USF Br. at 20.

The FCC rationalizes that it is simply disbursing USF support on the condition that the ETC-recipients both deploy "broadband-capable networks," FCC Br. at 3, and provide "broadband service (although that service itself is *not* supported under the *Order*)." *Id.* at 21 (emphasis in original). The agency had to go to such lengths, because it was trying to circumvent limitations on its authority that left it powerless to provide USF support directly to broadband.

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[6] *CAF Announcement,* 2011 WL 5114856, at *1.

The FCC did not want the benefits of USF support to go to broadband free of "public interest obligations," only free of the obligations imposed on ETCs by Congress under Title II. *See* FCC Br. at 21-23. Accordingly, it exercised its Title II rulemaking authority to promulgate USF rules mandating ETCs to provide broadband service that meets "certain basic performance requirements and to report regularly on associated performance measures." *Id.* at 23 (quoting *Order* ¶ 86 (JA at 422)).

The *Order* subjects ETC-provided, USF-supported broadband service to regulation that is of the FCC's choosing, but is necessarily exercised under its Title II authority. Yet, the FCC readily admits that broadband is an "information service," *see id.* at 19, which is exempt from Title II regulation. *See id.* at 14. And it is a service that Congress has not authorized the FCC to regulate.

The FCC does not get *Chevron* deference,[7] when it goes beyond unambiguous statutory limitations on its authority.[8] The FCC went beyond three such limitations when it refocused the USF program

[7] *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[8] *See City of Arlington*, 133 S. Ct. at 1874.

to support a service that cannot be supported under Title II,[9] and is not subject to the agency's delegated authority under the Act.[10]

The FCC knew the risks it was taking, when it disregarded the advice of its General Counsel, and stuck to its "information service classification" of broadband. Br. at 5. Having been forewarned that its suspect classification would be challenged on jurisdictional grounds, the FCC should not be heard to plead that rescinding USF support to information service providers would "decimate" the USF program. FCC Br. at 17.

ARGUMENT

I. THE FCC IS WITHOUT AUTHORITY TO PRESCRIBE RULES TO CARRY OUT THE PROVISIONS OF § 706 OF THE 1996 ACT

In determining that the FCC had the authority to implement the local-competition provisions of the 1996 Act, the Supreme Court found significant "the clear fact that the 1996 Act was adopted, not as a freestanding enactment, but as amendment to, and hence *part*

[9] *See* 47 U.S.C. §§ 153(51), 214(e)(1) & 254(e).

[10] *See Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010) (the FCC acknowledged that it has "no express statutory authority" over broadband Internet access service).

of, [the] Act." *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 n.5 (1999) (emphasis in original). This case involves § 706 of the 1996 Act, which Congress *did not* make part of the Act. *See* Jt. Br. at 14.

The FCC contends that it has "independent authority" under § 706 to "support broadband facilities and services," FCC Br. at 6, or to "fund the deployment of broadband." *Id.* at 24. However, the FCC is without authority to promulgate rules to implement the "statutory objectives" of § 706. *Id.* at 6.

The Act is codified in Chapter 5.[11] Congress unambiguously vested the FCC with the general authority to administer Chapter 5,[12] but it also unambiguously limited the FCC's rulemaking authority to promulgating rules necessary to carry out the provisions of Chapter 5.[13]

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[11] *See* 47 U.S.C. § 609 ("This chapter may be cited as the 'Communications Act of 1934'").

[12] *See id.* § 151 (the FCC "shall execute and enforce the provisions of this chapter").

[13] *See id.* §§ 201(b), 303(r) (the FCC may prescribe such rules and regulations as may be necessary "to carry out the provisions of this chapter").

The FCC recognizes that § 706 is not part of the Act.[14] Originally a note to § 157 of the Act, Congress codified § 706 in Chapter 12 as part of the Broadband Act. *See* 47 U.S.C. § 1302. But Congress did not give the FCC either the general authority to administer the broadband provisions of Chapter 12,[15] or the authority to prescribe rules to implement those provisions.[16]

Because its rulemaking authority is limited to prescribing rules to carry out the provisions of Chapter 5, and since it has no rulemaking authority under Chapter 12, § 706 provided the FCC with no statutory authority to amend its rules that implement the USF provisions of Chapter 5. Accordingly, § 706 did not empower the FCC to support broadband service, to fund broadband deployment, or to take any action inconsistent with the USF regulatory framework that Congress constructed in §§ 214(e) and 254 of the Act.

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[14] *See* Brief for Appellee/Respondents at 68, *Verizon v. FCC*, No. 11-1555 (D.C. Cir. 2012).

[15] The FCC shares the authority to administer the provisions of Chapter 12 with the Commerce Secretary, *see* 47 U.S.C. §§ 1303(d), 1304(b)(1), and the Assistant Secretary. *See id.* § 1305(a).

[16] Congress only gave limited Chapter 12 rulemaking authority to the Assistant Secretary. *See* 47 U.S.C. § 1305(m).

When the FCC interprets a provision of the Act, the preconditions to *Chevron* deference are satisfied, because Congress has "unambiguously vested the FCC with general authority to administer the … Act through rulemaking and adjudication," and its interpretation was "promulgated in the exercise of that authority." *City of Arlington,* 133 S. Ct. at 1874. When the FCC interpreted § 706, however, the preconditions to *Chevron* deference could not be satisfied.

The FCC construed § 706, which is a provision of Chapter 12. Because Congress did not authorize the FCC to administer Chapter 12 through rulemaking, the preconditions to *Chevron* deference could not be satisfied. Therefore, no *Chevron* deference is due the FCC's expansive interpretation of § 706. *See id.*

The FCC's attempt to promulgate rules to implement the policies of § 706, *see* FCC Br. at 23-26, must fail because, as we have shown, the FCC's rulemaking authority is limited to prescribing rules to carry out the provisions of Chapter 5. Accordingly, the FCC acted beyond its rulemaking authority and, therefore, its actions were *ultra vires*. *See City of Arlington*, 133 S. Ct. at 1869. Insofar as the promulgation of the FCC's interpretation

of § 706 was *ultra vires*, it is ineligible for *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 227 n.6 (2001) (*Chevron* deference assumes "in each case, of course, that the agency's exercise of authority … does not exceed its jurisdiction").

II. CONGRESS DID NOT IMPLICITLY DELEGATE AUTHORITY TO THE FCC TO REFOCUS USF SUPPORT TO BROADBAND SERVICE

Deference under *Chevron* is "premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). *See* Br. at 12. Accordingly, we made a *Chevron* step one showing that the unambiguous language of §§ 151, 153(24), (51) & (53), 154(i), 214(e)(1), and 254(c)(1) & (e) of the Act, when construed harmoniously in the context of the structure of the Act, left the FCC with no gap-filling authority to require ETCs to use USF support to deploy broadband facilities that provide information services on a non-common carrier basis. *See* Br. at 12-19. The FCC did not respond to our showing.[17] However, the FCC's attempts to garner

[17] The FCC simply assumed that §§ 153(51), 214(e)(1) and 254 are ambiguous, and jumped to *Chevron* step two. With respect to §§

Chevron deference only serve to show that the Court need not go past *Chevron* step one.

The FCC argues that it reasonably relied on the USF principles listed in § 254(b) to "inform its reading" of its authority under § 254(e). FCC Br. at 2. This reading rests on the thin reed of the word "facilities," which Congress employed only once in § 254.

The FCC claims that it discovered authority in § 254(e) to reform the USF in the word "facilities" in the phrase "facilities and services." The FCC claims that, by referring to "facilities" and "services" as "distinct items" for which USF support may be used, Congress granted the agency the "flexibility" not only to designate the "types of telecommunications services" to be supported, but also to require the deployment of the "types of facilities" that will best achieve the USF principles listed in § 254(b)(2) and (b)(3). *Id.* at 14 (quoting *Order* ¶ 64 (JA at 412)). In short, the FCC alleges that it

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153(51) and 254, the FCC essentially repeated the refrain that our reading of those provisions is either unreasonable or not compelled by the statutory text, while its alternative construction of them is reasonable and should be upheld under *Chevron*. *See* FCC Br. at 4 (§ 254(e)), 13 (§ 254(b)), 14 (§ 254(e)), 15 (§ 254(b)(2) & (b)(3)), 18 (§ 153(51)).

found an implicit delegation of authority in the phrase "facilities and services."

In cases of agency self-aggrandizement, such as this, courts do not determine "the meaning – or ambiguity – of certain words or phrases" by examining them in isolation. *Brown & Williamson,* 529 U.S. at 132. Rather, they are guided "by common sense as to the manner in which Congress is likely to delegate a policy of such economic or political magnitude to an administrative agency." *Id.* at 133 (citing *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994)).

In *City of Arlington,* the Supreme Court held that reviewing courts can minimize the risk of agency self-aggrandizement:

> The fox-in-the-henhouse syndrome is to be avoided … by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow.[18]

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[18] *City of Arlington,* 133 S. Ct. at 1874. The Court was responding to the argument that no *Chevron* deference should be afforded to agencies' jurisdictional interpretations on the "foxes should not guard henhouses" theory that deference poses too great a risk of agency self-aggrandizement. Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences,* 2009 U. Ill. L. Rev. 1497, 1551

Congress established at least three clear lines that the FCC knowingly crossed by its *Order*. First, Congress drew a clear line by granting the FCC express authorization to regulate a common carrier under Title II, but giving the agency no express authority to regulate a broadband (information) service provider under Titles II, III, or VI, the three subchapters that delegate authority under the Act.[19] A second line was drawn in the 1996 Act, which specified that the FCC can treat a telecommunications carrier "as a common carrier under this chapter [5] only to the extent that it is engaged in providing telecommunications services."[20] Congress clearly established a third line by mandating that a "common carrier designated as an [ETC] … *shall* be eligible to receive [USF] support in accordance with [§] 254,"[21] and by providing that "*only* an [ETC] designated under [§] 214(e) … *shall* be eligible to receive [USF] support."[22]

(2009).

[19] *See Comcast*, 600 F.3d at 654 ("it is Titles II, III and VI that do the delegating").

[20] 47 U.S.C. § 153(51).

[21] *Id.* § 214(e)(1) (emphasis added).

[22] *Id.* § 254(e).

The FCC clearly intended to circumvent those limitations by construing § 254(e) – which provides that only ETCs designated under § 214(e) are eligible to receive USF support[23] – to authorize it to refocus the entire USF program to support broadband (information) services that are ineligible for support, and to impose "public interest" obligations on broadband service providers that it cannot regulate.[24] The Court should rigorously apply the statutory limitations the FCC is circumventing by following *Brown & Williamson* and *MCI Telecommunications* and considering the likelihood that Congress intended to delegate the FCC the authority to refocus the USF program, by employing the phrase "facilities and service" in a subsection – with the heading "Universal service support" – which provides:

> [O]nly an [ETC] designated under [§] 214(e) of this title shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision,

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[23] *See* 47 U.S.C. § 254(e).

[24] *See supra* pp. 1-4. The FCC did not dispute that its General Counsel recommended that the agency "reclassify" broadband, or the transmission component of the service, as a telecom service and regulate it under Title II. *See* Br. at 5. Had it done so, the FCC would have made broadband eligible for USF support and for inclusion in its list of USF-supported telecom services.

> maintenance, and upgrading of *facilities and services* for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.[25]

Congress used the phrase "facilities and services" in a provision that unambiguously mandates that an ETC can only use USF support for the purposes "for which the support is intended." The Court must conclude that Congress could not have intended to delegate the discretion to the FCC to take "the most significant policy step ever taken to connect all Americans to high-speed Internet" by hiding the three-word phrase "facilities and services" in a provision that does not speak at all to the agency's authority.[26]

III. THE FCC COULD NOT REASONABLY FIND AUTHORITY IN § 254 TO REFOCUS USF SUPPORT TO BROADBAND

If it reaches *Chevron* step two, the Court will find itself barred by *stare decisis* from affording *Chevron* deference to the FCC's reading of the USF principles listed at § 254(b)(2) and (b)(3). And

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[25] 47 U.S.C. § 254(e) (emphasis added).

[26] *See Brown & Williamson*, 529 U.S. at 160-61 (Congress could not have intended to delegate to the FDA the authority to decide to regulate tobacco products "in so cryptic a fashion"); *MCI Telecommunications,* 512 U.S. at 231 (highly unlikely that Congress would leave the determination of whether an industry would be rate-regulated to the FCC's discretion by such a "subtle device").

the plain meaning of the conjunctive "and" suffices for the Court to conclude that the FCC's interpretation of the phrase "facilities and services" is both wholly unreasonable and "manifestly contrary to the statute." *Center for Legal Advocacy v. Hammons*, 323 F.3d 1262, 1267 (10th Cir. 2003).

A. Section 254(b)(2) and (b)(3)

The FCC seeks *Chevron* deference for its reading of the principles listed at § 254(b)(2) and (b)(3) as imposing some sort of duty on the agency to provide USF support for broadband. *See* FCC Br. at 2-3, 10-13. To defer to the FCC's interpretation of those two principles would require the Court to overrule *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001) (*"Quest I"*) and *Qwest Communications International Inc. v. FCC*, 398 F.3d 1222 (10th Cir. 2005) (*"Qwest II"*), and to reject the Fifth Circuit's construction of § 254(b) in *Texas Office of Public Utility Counsel v. FCC,* 183 F.3d 393 (5th Cir. 1999) ("*TOPUC I")* and *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001) ("*TOPUC II*").

The FCC makes the baseless claim that this Court held that the § 254(b) principles provide the agency "not only with the authority, but also a duty, to ensure that the objectives in that

provision are realized." FCC Br. at 2-3 (citing *Qwest I,* 258 F.3d at 1200, 1204 and *Qwest II,* 398 F.3d at 1238). The *Qwest I* Court examined the FCC's claim that two § 254(b) principles *did not* impose a duty on it and concluded: [27]

> The plain text of the statute mandates that the FCC "shall" base its universal [service] policies on the principles listed in § 254(b). This language indicates a mandatory duty on the FCC. However, each of the principles in § 254(b) internally is phrased in terms of "should." The term "should" indicates a recommended course of action but does not itself imply an obligation associated with "shall."[28]

Thus, this Court joined the Fifth Circuit in rejecting the notion that the FCC is under a statutory duty to ensure that the objectives of the individual § 254(b) principles are realized. *See TOPUC I,* 183 F.3d at 421("§ 254(b) identifies several principles the FCC should consider in developing its policies; it hardly constitutes a series of specific statutory commands"). Indeed, in *TOPUC II,* the court upheld the FCC's interpretation of the 254(b) principles as "merely

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[27] *Qwest I*, 258 F.3d at 1199 (where the FCC denied that § 254(b)(3) and (b)(5) imposed a duty on it to provide "sufficient support such that rates in rural and urban areas are reasonably comparable").

[28] *Id*. at 1200 (citations omitted). *See TOPUC I*, 183 F.3d at 418 ("Generally speaking, courts have read 'shall' as a more direct statutory command than words such as 'should' or 'may'").

aspirational." 265 F.3d at 321. In the eyes of the *Qwest II* Court, the principles set forth in § 254(b)(2) and (b)(3) are "but [two] of seven principles identified by Congress to guide the Commission in drafting policies to preserve and advance universal service." 398 F.3d at 1234.

With respect to the FCC's suspect claim that the § 254(b)(2) and (b)(3) principles served to "inform its reading" of its authority under § 254(e), FCC Br. at 10, the *Qwest I* Court recognized that the § 254(b) principles "may be overcome by the limitations of the FCC's jurisdiction." 258 F.3d at 1199 n.6 (citing *TOPUC I*, 183 F.3d at 421). Thus, when balancing the § 254(b) principles, the Court held that the FCC "must work to achieve each one unless there is a direct conflict between it and another listed principle or some other obligation or *limitation on the FCC's authority*." *Id.* at 1199 (emphasis added). It follows that the § 254(b) principles are subject to the statutory limits on the FCC's authority and could not inform the FCC's reading of § 254(e) as a delegation of authority to comprehensively reform the USF program. *See supra* pp. 8-13.

B. Section 254(e)

As we have shown, the conjunctive phrase "facilities and

services" cannot be deemed ambiguous in the context of this case. *See supra* pp. 8-13. Regardless, the FCC purposefully misconstrued the phrase by reading the word "and" to be disjunctive. *See* Br. at 27.

The word "and" is plainly conjunctive given that it is defined to mean "along or together with."[29] Hence, Congress' use of the conjunctive "and" precluded the FCC from reasonably construing the phrase "facilities and services" to make facilities a "distinct item" from services for purposes of the use of USF support. *See id.* at 27 & n.22.

Remarkably, the FCC attempts to find support for its construction of the phrase in the *Qwest II* Court's interpretation of the conjunctive "and" in the phrase "preserve and advance universal service." *See* FCC Br. at 15. In fact, the Court's rejection of the FCC's "unnatural" reading of the phrase "preservation and advancement of universal service" in § 254(b), *Qwest II*, 398 F.3d at 1236, renders its reading of the § 254(e) phrase equally unnatural.

The *Qwest II* Court "first note[d] that in each instance that

[29] *Random House Webster's Unabridged Dictionary* 76-77 (2d ed. 2001).

Congress employed the words 'preserve' or 'preservation,' the terms were *conjoined* with 'advance' or 'advancement.'" 398 F.3d at 1235 (emphasis added). The use of the word "conjoined" was purposeful since it means "joined together, united, or linked."[30] That was evident when the Court construed § 254(b), (d) and (f) as follows:

> The use of the conjunctive "and" in the phrase "preserve and advance universal service," or "preservation and advancement of universal service," clearly indicates that the Commission cannot satisfy the statutory mandate by simply doing one or the other. The Commission is charged under the Act with concurrent duties.[31]

The Court reasoned that the FCC's "construction ultimately fails because it seeks to define separately 'universal service' as it applies to each verb [preserve and advance] or noun [preservation and advancement]." *Qwest II*, 398 F.3d at 1236. Here, the FCC made the same grammatical "error" when it misconstrued the § 254(e) phrase "facilities and services for which the support is intended." It interpreted § 254(e) by modifying each noun (facilities and services) separately by the prepositional phrase "for which the support is intended." Had it followed the teaching of *Qwest II,* and

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[30] *Random House,* at 430.

[31] *Qwest II*, 398 F.3d at 1236.

applied the dictionary meaning of the word "and," the phrase "for which the support is intended" modifies the noun "facilities" *along or together with* the noun "services."[32]

The FCC claims that we gave § 254(e) a "novel reading," FCC Br. at 17, when we construed it "to limit ETCs to using support only to provide the telecom services that are designated for support, *as well as for* any network components used for the provision of such services." Br. at 18 (emphasis added). The FCC failed to note that we incorporated its long-standing definition of "facilities" into our interpretation of § 254(e). *See id.* In fact, the agency specifically cited its definition when it construed the phrase "facilities and services." *See Order* ¶ 64 n.69 (JA at 412). Moreover, the term "facilities" is defined in the FCC's new USF rules to mean "any

[32] The FCC's construction of § 254(e) is also foreclosed by "the grammatical 'rule of the last antecedent,' according to which a limiting clause or phrase … should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 343 (2005) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). Under that rule, the limiting phrase "for which the support is intended" is read as modifying only the preceding noun "services" or the phrase "facilities and services," not both the noun "services" and the noun "facilities."

physical components of the telecommunications network that are used in the transmission or routing of the services that are designated for support." 47 C.F.R. § 54.201(e).

In light of the FCC's definition of "facilities," the Court can give no credence, much less *Chevron* deference, to its claim to have construed the phrase "facilities and services" to make facilities a "distinct item" for USF support. The agency clearly understood that Congress intended the plain meaning of the word "and" and that the phrase "facilities and services" conjoined facilities with services.

IV. THE FCC CANNOT BOOTSTRAP ITS AUTHORITY TO SUPPORT DUAL-USE FACILITIES TO REGULATE INFORMATION SERVICES

The FCC argues that our "novel reading" of §§ 153(51) and 254(e) would prohibit USF support for "dual-use" facilities. FCC Br. at 17. Not so, because the FCC can continue to provide USF support to ETCs employing dual-use facilities under the "bifurcated regulatory scheme" that applies to wireless companies that provide both mobile-voice service, which is subject to common carrier regulation under Title II, and mobile-data service, which is exempt

from regulation under Titles II and III.[33] *Cellco Partnership v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012).

Because the FCC conceded that mobile-data service is an "information service," the *Cellco* Court noted that "mobile-data providers are statutorily immune, perhaps twice over, from treatment as common carriers." *Id.* On the other hand, the wireless companies that provide mobile-data and mobile-voice services "must comply with Title II's common carrier requirements only in furnishing voice service." *Id.* Thus, the court held that the FCC "may invoke both its Title II and its Title III authority to regulate mobile-voice services, but may not rely on Title II to regulate mobile data." *Id.*

Under the bifurcated regulatory scheme, ETCs employing dual-use facilities can receive USF support only to the extent that the facilities are used in furnishing voice service on a common carrier basis. However, the FCC cannot use its Title II authority to provide USF support to dual-use facilities as a bootstrap to regulate the information services provided over those facilities. Br. at 2, 10.

[33] *See* 47 U.S.C. § 332(c)(2).

V. THE USF RULES EFFECT THE UNAUTHORIZED REGULATION OF AN INFORMATION SERVICE UNDER TITLE II

The FCC engaged in bootstrapping its authority, when it imposed the condition on ETC-support recipients that they "offer broadband service … that meets certain basic performance requirements and to report regularly on associated performance measures." FCC Br. at 23 (quoting *Order* ¶ 86 (JA at 422)). The FCC's imposition of "performance requirements" on the ETC-recipients constitutes the unauthorized regulation of broadband service under Title II. *See* Br. at 20-22. Implicitly conceding that point, the FCC flatly denies that it is regulating broadband service. *See* FCC Br. at 6.

The word "regulate" is defined as "to control or direct by a rule,"[34] while "regulation" means "a law, rule, or order prescribed by authority, esp[ecially] to regulate conduct."[35] By its *Order*, the FCC clearly prescribed rules that "control or direct" the conduct of ETCs in the provision of broadband service. For example, the FCC promulgated rules which: (1) establish "broadband performance

[34] *Random House,* at 1624.

[35] *Id.*

metrics," focusing on "speed, latency, and capacity as three core characteristics," *Order* ¶ 90 (JA at 423);[36] (2) set broadband buildout obligations, *Order* ¶ 103 (JA at 428);[37] (3) required "reasonably comparable rates for broadband service," *id.* ¶ 113 (JA at 435); and (4) imposed broadband testing and reporting obligations. *Id.* ¶ 109 (JA at 432).[38]

The FCC contends that the requirement that ETCs provide broadband service "is *conditional* – carriers only have to provide broadband if they voluntarily seek federal subsidies." FCC Br. at 5. Citing *WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262 (10th Cir. 2007), the FCC claims that this Court held that "such conditions do not amount to 'regulation,' much less common carrier regulation." *Id.* at 22. However, the Court actually found that the wireless carrier in *WWC Holding* could not claim that it was "being subjected to the full panoply of wireline regulations," because the ETC conditions at issue were "merely a subset of those regulations." 488

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[36] *See* 47 C.F.R. §§ 54.312(b)(4), 54.313(b)(2), (e)(1)-(3), (f)(1)(i), (g), 54.1006(a), (b).

[37] *See id.* §§ 54.202(a)(1)(ii), 54.312(b)(2)-(4), 54.313(a)(1), (b)-(e), (f)(1), 54.1006(a), (b).

[38] *See id.* § 54.313(a)(11).

F.3d at 1274. Thus, the Court recognized that conditions imposed on ETC designations constitute regulations.

FCC-imposed conditions are regulations even if they are "voluntarily assume[d]." FCC Br. at 22. The FCC's penchant for issuing conditional approvals has been characterized as "regulation by condition," which results in "one of the most significant bodies of 'regulation' on [its] books."[39] Such conditions may be voluntarily assumed, but the willful failure to comply with them is just as unlawful as a failure to comply with an FCC rule.[40] Indeed, the FCC plans to impose sanctions, including forfeitures,[41] if ETCs "fail to fulfill their public interest obligations." *Order* ¶ 618 (JA at 590).

We did not argue that the "requirement" that ETCs provide broadband service, which the FCC admits is an information service,[42] is a "common carrier requirement." FCC Br. at 5. Nor did

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[39] Peter W. Huber, Michael K. Kellogg & John Thorne, *Federal Telecommunications Law* § 7.3.4, at 610 (2d ed. 1999).

[40] *Compare* 47 U.S.C. § 503(b)(1)(A) *with id.* § 503(b)(1)(B). *See also SBC Communications Inc. v. FCC*, 373 F.3d 140, 147-52 (D.C. Cir. 2004) (upholding a $6 million forfeiture levied by the FCC for a carrier's violation of a merger condition).

[41] *See Order* ¶ 617 & n.1010 (JA at 589-90).

[42] *See* FCC Br. at 20-21 ("broadband Internet access service has been classified as an information service exempt from common

we argue that the requirement constitutes "common carrier regulation." FCC Br. at 22. We did argue that: (1) the FCC's imposition of "public interest obligations and broadband performance requirements on broadband service providers" constitutes "broadband Title II regulation;"[43] and (2) the FCC was without authority "to impose Title II regulations on broadband service providers."[44] In short, we argued that the FCC is without authority to regulate broadband under Title II.

The FCC's fundamental contention is that § 254(b)(2), (b)(3), and (e) authorized it to require ETCs to provide broadband service – an information service – that meets certain basic performance requirements. *See* FCC Br. at 10-16. Thus, it contends that § 254, a Title II provision, empowered it to impose those requirements on ETCs. Whether called "funding conditions"[45] or "broadband public interest obligation[s],"[46] the broadband performance requirements

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carrier regulation").

[43] Br. at 20, 21.

[44] *Id.* at 23.

[45] FCC Br. at 10.

[46] *Id.* at 22.

are set forth in the FCC's rules and constitute FCC regulations.[47] Their enforcement by the FCC necessarily constitutes the regulation of an information service under Title II.

The FCC did not dispute that only common-carrier services are subject to regulation under Title II, *see* Br. at 20, and that it has classified broadband as an information service that is exempt from such regulation. *See id.* at 14 (citing *National Cable & Telecommunications Ass'n v.Brand X Internet Service,* 545 U.S. 967, 975-77 (2005)). The FCC never explains how a broadband (information) service provider can be the recipient of USF support, when § 214(e)(1) provides that only a common-carrier ETC can be eligible to receive USF support.

The FCC had no answer to our argument that "[b]y specifying that only a common carrier can be an ETC, Congress imposed the requirement that an ETC provide USF-supported telecom services on a common-carrier basis." *Id.* at 16. But it contends that the *Order* does not extend "the gamut of telephone regulations" under Title II to all broadband service providers. FCC Br. at 22-23 (quoting *WWC Holding*, 488 F.3d at 1274). That is exactly right.

[47] *See supra* text accompanying notes 36-38.

The agency imposes regulations of its own design only on the broadband service providers that receive the benefits of USF support under the Title II program. Thus, the FCC grants broadband service providers the *benefits* of USF support that Congress intended for common-carrier ETCs under Title II, but exempts them from the corresponding *obligations* that Congress imposed on common-carrier ETCs. We submit that the FCC flouted its duty to "execute and enforce" the provisions of the Act, 47 U.S.C. § 151, when it restructured its USF program so that the broadband recipients of USF support were not subject to "mandatory common-carrier regulation under Title II." *Brand X*, 545 U.S. at 976.

Because the FCC cannot regulate broadband service pursuant to Title II, the Court must conclude that the FCC was not authorized by § 254 to promulgate rules mandating that broadband service meet FCC-developed "performance requirements."

VI. THE FCC'S ACTIONS ADOPTING ITS USF RULES AND REGULATIONS WERE *ULTRA VIRES*

We have shown that the FCC exceeded its statutory authority when it reformed its USF rules and regulations. Accordingly, the FCC's actions in adopting the USF portion of the *Order* and

promulgating its new USF rules were *ultra vires*. *See City of Arlington*, 133 S. Ct. at 1869. It follows that the FCC's actions must be vacated. *See* Br. at 31-32.

The FCC did not disagree with our view that its USF reform measures were not severable. *See id.* The Court should vacate Sections I through XIII of the *Order* and the amendments to the FCC's Part 54 USF rules listed in Appendix A.

Respectfully submitted,

/s/ Russell D. Lukas

RUSSELL D. LUKAS
DAVID A. LAFURIA
TODD B. LANTOR
LUKAS, NACE, GUTIERREZ & SACHS, LLP
8300 Greensboro Drive
Suite 1200
McLean, Virginia 22102
(703) 584-8678

Counsel for
Cellular Network Partnership, a Limited Partnership
Cellular South, Inc. d/b/a C Spire Wireless
DOCOMO Pacific, Inc.
Nex-Tech Wireless, LLC
PR Wireless, Inc.
United States Cellular Corporation

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1. This brief complies with the type-volume limitation of the Summary of Deadlines for Briefing, because it contains 4,600 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 the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Bookman Old Style font.

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/s/ Russell D. Lukas
Russell D. Lukas

CERTIFICATION OF SERVICE

I, Russell D. Lukas, certify that on this 31st day of July 2013, the foregoing Wireless Carrier Universal Service Fund Reply Brief was filed using the Court's CM/ECF system. I further certify that the brief was served on all parties via the Court's ECF system.

/s/ Russell D. Lukas
Russell D. Lukas