IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 11-9900

Consolidated Case Nos. 11-9581, 11-9585, 11-9586, 11-9587, 11-9588, 11-9589, 11-9590, 11-9591, 11-9592, 11-9594, 11-9595, 11-9596, 11-9597, 12-9500, 12-9510, 12-9511, 12-9513, 12-9514, 12-9517, 12-9520, 12-9521, 12-9522, 12-9523, 12-9524, 12-9528, 12-9530, 12-9531, 12-9532, 12-9533, 12-9534, 12-9575

IN RE: FCC 11-161

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

PETITION FOR REHEARING EN BANC OF ALLBAND COMMUNICATIONS COOPERATIVE AS TO ISSUES RAISED IN ADDITIONAL UNIVERSAL SERVICE FUND ISSUES BRIEFS

Allband Communications Cooperative

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Dated: July 7, 2014

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 10th Circuit Rule 26.1, Petitioner Allband Communications Cooperative (Allband) discloses that the following listed persons, associations of persons firms, partnerships, corporations (including parent corporations) or other entities (i) have a financial interest in the subject matter in controversy or in a party to the proceeding, or (ii) have a non-financial interest in that subject matter or in a party that could be substantially affected by the outcome of this proceeding:

1. Petitioner Allband is incorporated as a non-profit corporation in the State of Michigan, organized as a consumer cooperative under Chapter 11 of Michigan's Non-Profit Corporation Act, 1982 PA 162. Allband's principal place of business comprises portions of four counties in Northeast Michigan. Allband's business address is 7251 Cemetery Road, Curran, MI 48728. Allband is owned by its customers as a member-owned cooperative.

2. Petitioner Allband wholly owns a separate subsidiary, Allband Multimedia LLC, which was formed as a limited liability company under Michigan law for the purpose of providing certain advanced broadband communication services. The address of Allband Multimedia LLC is 7251 Cemetery Road, Curran, MI 48728.

3. If additional parties become known during the course of this case, Petitioner Allband will amend this disclosure to bring such additional names to the attention of the Court.

4. To the Petitioner's knowledge, and from Petitioner Allband's perspective or interests, there is no other publicly owned corporation, affiliate, or party that has a financial interest in the outcome of this litigation.

Respectfully submitted,

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RULE 35(B) STATEMENT

Pursuant to F. R. App. P. 35(b), counsel for Petitioner/Appellant Allband Communications Cooperative (Allband) states that En Banc Rehearing is warranted because this appeal involves a questions of exceptional importance. Allband is a communications cooperative owned by its customers that was created pursuant to (and after) passage by Congress of the 1996 Amendments to the FCC Act, and subsequent state and federal regulatory orders applicable to Allband, upon which all of its plant investment was designed, constructed, and became operational with federal loans granted by the Rural Utility Service of the U.S. Department of Agriculture (RUS). The FCC Order herein, if not reversed as applied to Allband, and absent any discretionary action by the FCC, will result in the financial destruction of Allband and of its RUS loans, and cessation of the vital communications services provided in portions of four counties in Michigan that were unserved and unassigned areas prior to Allband's creation.

En Banc Rehearing is also warranted because the panel's decision overlooked a major issue raised by Allband, buttressed by the U.S. Supreme Court decision in *United States v Winstar Corp*, 518 U.S. 839 (1996), and other authority cited by Allband, that the United States and its agencies may not retroactively reverse statutory or agency orders or regulations upon which entities have relied to their detriment.

The panel's decision also erroneously rejects Allband's claims that the FCC Order, as applied to Allband, is also unconstitutional under substantive and procedural Due Process principles, is contrary to the plain language, purposes, objectives, and intent of Congress under the 1996 Amendments to the FCC Act, and is arbitrary and capricious under the Administrative Procedures Act.

STATEMENT OF FACTS

A. ALLBAND'S FORMATION BASED UPON THE 1996 AMENDMENTS TO THE ACT

Due to adoption of the 1996 Amendments to the Federal Communications Act, 47 U.S.C. § 151, *et al*, and the Universal Service Fund (USF), and regulatory approvals of the Federal Communications Commission (FCC) and the Michigan Public Service Commission (MPSC), and loan approvals by the RUS, and investment of funds and resources locally, Allband now serves sizeable portions of four counties in northeast Michigan that never had telecommunications service before the advent of Allband.

In 2000, due to refusals to serve the area by established incumbent carriers, the local affected residents began researching the formation of a communications cooperative based upon the adoption of the 1996 Act and the USF. This research effort was assisted by a grant provided by Michigan State University.

On November 3, 2003, Allband filed its Articles of Incorporation.

On July 29, 2004, Allband filed a loan application with the RUS.

On December 2, 2004, the MPSC in Case U-14200 granted Allband a permanent license to provide service in the then-unserved/unassigned geographical area.

On August 11, 2005, the FCC granted Allband's waiver of certain FCC's rules to allow Allband to be treated as an Incumbent Local Exchange Carrier (ILEC) for NECA (National Exchange Carriers Association) pooling and USF purposes.[1] The FCC's 2005 Order recognized that Allband's provision of services to the unserved/unassigned areas would be costly on a per-line basis, but would be consistent with the 1996 Act. The FCC's 2005 Order, paragraph 19, specifically concluded that "[b]ased on the record… these waivers are in the public interest because they will facilitate the ability of Allband to serve previously unserved areas."

On August 18, 2005, the RUS granted a loan for $8 Million to fund construction of Allband's network.[2]

On October 19, 2005, Allband started construction.

On November 10, 2005, the MPSC in Case No. U-14659 granted Eligible Telecommunications Carrier (ETC) status to Allband for purposes of Section 214(e) of the 1996 federal Act.

On November 30, 2006, Allband activated its first member customer.

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[1] FCC Order *In the Matter of Allband Communications Cooperative Petition for Waiver of Sections 69.2(hh) and 69.601 of the Commission's Rules in WC Docket No. 05-174*, released August 11, 2005 (Allband Order).

[2] USDA Rural Development Loan (RUS) Borrower MI-570-A.

In December 2006, based upon FCC waivers, Allband, as an ILEC, began receiving USF Interim Common Line Support and Local Switching Support, which allowed Allband to minimize administrative expenses and maintain reasonable access rates.

In January 2008, Allband began receiving USF High Cost Loop Support to support a substantial portion of the ongoing high cost of its network facilities and service while maintaining reasonable local exchange rates.

Allband's advanced fiber-to-the-home infrastructure provides services such as traditional telephone service, free calling features, long distance, broadband, high-speed internet, and other advanced services. Allband as an ILEC also undertakes important public interest duties to provide emergency connections including 911 services in an area that lacked traditional telephones and cellular service.

Allband requires the previously established and expected "sufficient and predictable" USF revenues to (a) maintain affordable customer rates and services that are comparable to those provided in urban areas, (b) provide and maintain quality service, and (c) to meet its RUS debt obligations associated with its plant investment and network.

Imposition of the Order's per-line caps to Allband would have a catastrophic and immediate impact upon Allband. The federal USF revenues comprise a significant percentage of Allband's total revenues. The Order's $3,000 per-line annual cap would reduce Allband's regulated revenues by 55 percent, and would immediately render Allband unable to provide service and to meet its loan obligations to the RUS.

B. THE FCC'S RULEMAKING ORDER

In 2010, the FCC issued its Notice of Proposed Rulemaking (NPRM) proposing in part changes to the USF, and providing for the filing of comments. The NPRM (paragraph 10) stated the Commission's objectives to: "modernize USF and ICC for Broadband", further USF "fiscal responsibility", reduce waste and inefficiency, require "accountability" from companies receiving support, and to "transition to market-driven and incentive-based policies that encourage technologies and services." The Commission's NPRM (paragraph 80) also proposed "four specific priorities for the federal universal service high-cost program" - to "preserve and advance voice service" . . . "to ensure universal deployment of modern networks capable of supporting necessary broadband applications as well as voice service" . . to "ensure that rates for broadband service are reasonably comparable in all regions of the nation" . . . and . . ."to limit the contribution burden on households."

On April 18, 2011, Allband submitted formal comments in the NPRM consistent with its later agency and Court positions and requesting that any rules, such as the per-line USF cap, be given **prospective** (or grandfathered), not retroactive, application to existing plant investment and debt obligations.

At odds with the NPRM's statement of objectives, the FCC on November 18, 2011, issued its voluminous Order, with attachments, that included no mention of Allband's issues, and adopted a uniform $250 per line monthly cap on USF reimbursements, without any exception, except for a complicated waiver process, thereby imposing said caps retroactively to Allband.

C. ALLBAND'S FCC WAIVER, STAY, AND REVIEW PETITIONS

On February 3, 2012, Allband submitted a Petition for Waiver of the FCC order, with substantial information, establishing the adverse effect and irreparable harm that the per-line cap would impose on Allband, and the legal grounds supporting a waiver.

On April 30, 2012, Allband filed with the FCC a Request to Expedite its ruling on Allband's Waiver Petition.

On June 27, 2012, Allband filed with the FCC a Petition for Stay, along with substantial supporting attachments, seeking a stay of the FCC Order.

On July 25, 2012, the FCC issued an Order providing Allband a limited three-year waiver of the per-line caps, finding that Allband was a well-run, lean, and efficient operation.[3]

On August 24, 2012, Allband filed with the FCC an Application for Review of the FCC's July 25, 2012, Waiver Order, which remains pending.

ARGUMENT

A. THE PANEL DECISION IGNORES ALLBAND'S ARGUMENT AND CITED U.S. SUPREME COURT PRECEDENT CONCERNING THE UNLAWFUL RETROACTIVE APPLICATION OF THE FCC ORDER TO ALLBAND

Allband asserted to the panel that the Order effects an unlawful and unreasonable regulatory reversal analogous to that rejected by the United States Supreme Court in *United States v Winstar Corporation*, 518 U.S. 839 (1996). Yet the panel ignored this primary Allband argument and *Winstar* precedent.

In *Winstar*, the Federal Home Loan Board promulgated rules to encourage investors in good standing to take over ailing banking thrifts by counting goodwill as an asset, with a premise the rules would not change. However, Congress subsequently forbid such thrifts from using goodwill credits for required reserves -- a retroactive reversal of policy that rendered the Appellant (*Winstar*) insolvent.

[3] *In the Matter of Allband Communications Cooperative Petition for Waiver of Certain High-Cost Universal Service Rules*, FCC Communications Commission, WC Docket No. 10-90, Order Adopted and Released July 25, 2012.

The Court in *Winstar* ruled such Congressional action constituted a breach of contract permitting awards of damages to Winstar and other thrifts that had contracted with the FHLB to take over ailing thrifts, and that suffered damages or harm from Congress' regulatory change.

The outcome in *Winstar* is in concert with the Restatement of Contracts and the Restatement (Second) of Contracts, as applied by the U.S. Supreme Court in a subsequent case. If the "Government … did break … an important contractual promise thereby 'substantially impair[ing] the value of the contract' to the companies … than … the Government must give the companies their money back." *Mobil Oil Exploration v U.S.*, 530 U.S. 604; 120 S. Ct. 2423 (2000).

This Circuit may have anticipated *Winstar* when it ruled: "[I]f within … [a] legislative mandate Congress provides the agency with discretion in enforcement because of Congress' awareness that prior agreements would be abrogated by an abrupt change in the law, the agency may properly be held in breach of any agreements which could have been honored by the exercise of the discretion afforded them by Congress." *Resolution Trust Corp. v. Federal Savings and Loan Ins. Corp.*, 25 F.3d 1493, 1501 (C.A. 10 (N.M.) 1994).

Similar to *Winstar*, Allband entered into loan contracts with the RUS, in reliance upon the premise that Commission regulatory rules and orders governing Allband and the USF under the 1996 Act would not be retroactively changed, particularly where all parties knew that the ongoing USF revenues constituted an absolute prerequisite to repay the loan. Allband also proceeded to construct a modern versatile network, and to operate same, consistent with this reliance.

Allband, supported by *Winstar*, *Resolution Trust Corp. and Mobil, supra*. asserts its contracts with RUS need not contain promises to refrain from regulatory change in order to establish a breach of contract action against the federal government. Similar to *Winstar*, Allband also asserts that, based upon contract, estoppel and fairness considerations, the FCC should have refrained from reversing or disregarding its previous regulatory orders and decisions, and should not have applied its Order retroactively to Allband.[4] The FCC had a clear, less intrusive option, to apply its per-line caps to investments and loans incurred on a prospective (post-Order) basis, which alternative would have been fully consistent with the stated goals and objectives of the NPRM and Order.

[4] The U.S. Supreme Court has reiterated the presumption against retroactive legislation in other cases (e.g. *Landgraf v USI Film Products, et al*, 511 U.S. 244, 265 (1994); *Bowen v Georgetown University Hospital*, 488 U.S. 204 (1988)). The Constitution also includes several provisions that prohibit or otherwise restrict retroactive law-making and agency action (e.g. the Ex Post Facto Clause (Art. I, § 9, c1. 3); the Contracts Clause (Art. I, § 10. cl. 1); the Bills of Attainder Clauses (Art. I, § 9, c1. 3, and § 10, c1. 1); and the Due Process and Takings Clauses of the Fifth Amendment.

B. THE PANEL DECISION IGNORES ALLBAND'S ARGUMENTS THAT THE FCC ORDER AS APPLIED TO ALLBAND VIOLATES CONSTITUTIONAL DUE PROCESS PRINCIPLES, BOTH AS A CONFISCATORY TAKING AND AS AN UNNOTICED AND UNFORESEEN RETROACTIVE REVERSAL OF AGENCY USF DECISIONS AND PROGRAMS

The panel decision in Part IV(B)(4) erroneously states that Allband's Due Process argument (that the Order imposes a retroactive reversal of Commission orders and USF program commitments upon which Allband relied) cites to a single case, *Federal Communications Commission, et al. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012), and that the panel's… "own independent review of that case persuades us it is inapposite."[5]

The panel misconstrues Allband's Due Process claims. Allband's portion of the November 6, 2012 Consolidated Additional Universal Service Fund Issues Principal Brief (pp 33-34, 38) asserted:

> The *Order* is also unconstitutional as applied to Allband under the Fifth Amendment Due Process clause, as it would effect a confiscation of Allband's (and its customer-members' property), and will financially destroy commitments made by Allband to its employees, vendors, and entities providing credit and loans. The *Order* limits USF reimbursements relied upon by Allband to undertake long-term capital investments capital investments and service obligations, and to cover expenses and to repay RUS loans. By ignoring these circumstances, the Commission as a ratemaking agency has acted contrary to the venerable precedent of the United States Supreme Court in *Bluefield Waterworks & Improvement Co. v. Public Service Comm'n of West Virginia*, 262 U.S. 679, 692-693; 42

[5] The separate issue concerning the FCC's benchmarking rules are now moot as the FCC dispensed with these rules in a June 2014 Order.

> S. Ct. 675 (1923), requiring regulatory action to provide a return… "to assure confidence in the financial soundness of the utility and… to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties…" The Order is likewise contrary to *Federal Power Commission v. Hope Natural Gas Company*, 320 US 591 (1944), wherein the Court held that the "return… should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."

Allband's Brief also cited additional authority, including *Pennsylvania Coal Co v. Mahon*, 260 U.S. 393, 415 (1922); *Stone v. Farmers' Loan and Trust Co*, 116 U.S. 307, 331 (1886); *see also, Covington & Lexington Tpk. Rd. Co. v. Sandford*, 164 U.S. 578, 597 (1896); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

The panel decision (p 135) admits later that Allband cited the *Bluefield Waterworks* case (ignoring the rest), but then states, without regulatory agency or judicial precedent, that:

> In the instant case, in contrast, Allband is not a public utility, and, in any event, the Order is not reasonably comparable to a rate-setting order issued by a state utility commission. Moreover, as the FCC notes in its response brief, any takings-type claim is not yet ripe because the FCC has exempted Allband for a period of three years from the USF reforms outlined in the Order, and has also afforded Allband the opportunity to seek an additional waiver at the end of that time period.

The panel cites no facts or legal basis for concluding that Allband is <u>not</u> a public utility. Allband is comprehensively regulated by the MPSC, the FCC (and by the RUS and NECA). As an ILEC and ETC, Allband is subject to enhanced duties, obligations and oversight as compared to non-ILEC carriers or information providers. Allband must provide emergency 911 and certain mandatory services in its service area.

The panel without explanation or authority also suggests that the Order is "not reasonably comparable to a rate-setting Order issued by a state utility commission." Yet, Allband is subject to state rate and tariff regulation. Also, the retroactive reduction of the per-line USF reimbursement as applied to Allband constitutes a form of rate decision by the FCC, as it has a direct nexus to Allband's rates. In other words, the per-line caps, if imposed, would force Allband either to raise its per-line rates astronomically high so as to cause massive customer defection, a result contrary to universal service and the Congressional mandate that Allband's rates be comparable to rates in urban areas.

The panel's reference to a "public utility" also appears distractive. Due Process principles apply universally, not just to public utilities.

The panel's reference to the FCC's waiver process is also misguided. The required filings to seek a waiver comprise a very expensive process, which detracts greatly from Allband's resources to provide service. Also, there is no requirement or guarantee that the FCC will grant another waiver. This is why the U.S. Supreme Court's precedent in *Fox Television* has analogous relevance here. The Court in *Fox* found that the existence of a waiver does <u>not</u> satisfy the need for adequate notice of long term regulation ("…due process protection… does not leave [regulated] parties… at the mercy of *noblesse oblige*"). *Fox* holds that clarity in regulation and notice of changed interpretation is essential to Fifth Amendment Due Process protections. The *Fox* Court also found that "reputational injury" provided further reason for granting relief from the FCC Order, a harm that also exists here with Allband.

Even more than in *Fox*, Allband could never have foreseen when it relied upon the 1996 Act, the USF program, and ensuing state and federal approval orders, that its entire efforts and investment would soon be subject to a retroactive regulatory change that would defeat Allband. No notice of a retroactive regulatory reversal occurred either.

The panel's decision (p 134) also erroneously suggests that the NPRM notice and opportunity to comment satisfies Due Process concerns. The hollow act of providing notice and comment in the FCC's NPRM in 2010-2011 is <u>not</u> the substantive due process notice justifying a reversal of the previous regulatory approvals upon which Allband relied in good faith to its detriment.

The panel decision (pp 136-137) states that Allband failed to flesh out its estoppel claims (another concept supporting Allband's Due Process arguments).[6]

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[6] The panel decision also criticizes the lack of briefing on Allband's issues without fairly acknowledging that the consolidated process mandated by the Court severely limited Allband's briefing arguments to very few words.

The panel ignores Allband's assertions in the June 12, 2013 brief (pp 17-18), replying directly to the FCC's Brief, that:

> Allband readily meets the cited criteria for estoppel under the cases cited, *Tsosie v. U.S.*, 452 F.3d 1161, 1166 (10th Cir. 2006), and *Wade Pediatrics v. Dept of Health and Human Services*, 567 F.3d 1202, 1203 (10th Cir. 2009). Through Allband's active participation in the rulemaking process, and Allband's numerous filings over several years, the FCC clearly knew of Allband's (and RUS's) reliance on the USF revenues to secure the RUS loans. Allband (and the RUS) also could never have foreseen the *Order* or its unreasonable result. By its *Order*, the FCC has undertaken "affirmative misconduct" by unnecessarily and punitively targeting Allband, instead of fashioning an order (or issuing a waiver order) to avoid unlawful adverse impacts upon Allband.

The Order comprises a form of "invitational error." Allband was induced to undertake substantial commitments based upon the 1996 Act, prior FCC Orders, RUS loan approvals, and promised USF revenues, followed by the 2011 Order's action to punish Allband for relying on the regulatory scheme by a post-hoc retroactive reduction of the promised funds needed to support the investment already incurred under the promised structure. This constitutes an egregious violation of both substantive and procedural Due Process principles.

C. THE PANEL DECISION IGNORES ALLBAND'S ARGUMENTS THAT THE FCC ORDER IS CONTRARY TO THE GOALS, OBJECTIVES AND PURPOSES OF CONGRESS AS INCORPORATED IN THE 1996 AMENDMENTS

The Commission's application of the per-line cap to Allband violates of the plain language, and the goals, objectives, and purposes of the 1996 Act.[7] The 1996 Act governs the FCC's jurisdiction, authority, and discretion, and establishes specific mandates (e.g., Section 254(b)'s policies "for the preservation and advancement of universal service;" Section 254(b)(1)'s mandate that "Quality services should be available at just, reasonable, and affordable rates;" Section 254(b)(2)'s mandate that "Access to advanced telecommunications and information services should be provided in all regions of the Nation"). Section 254(b)(3) also provides:

> (C) ACCESS IN RURAL AND HIGH COST AREAS.-- Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

Section 254(b)(5) requires that "There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal

[7] Statutes must be interpreted in accordance with the goals, objectives, and intent of Congress. *Schneidewind v ANR Pipeline Company*, 485 U.S. 293; 108 S. Ct. 1145 (1988).

service." Section 254(d) provides for contributions by carriers “to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.” Section 254(e) provides that universal service support to ETC providers “should be explicit and sufficient to achieve the purposes of this section.” Section 254(g) provides in part that certain rates charged by providers “to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas.” Section 254(h)(1)(A) provides for similar rate comparability. Section 254(i) provides that “The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.”

Allband has met these statutory goals, objectives and mandates of the 1996 Act. Allband has also placed full reliance on various orders or directives of the FCC, the MPSC, and the RUS, among other agencies.

In contrast, the per-line USF cap applied to Allband violates the plain language, and the goals, objectives, and intent of Congress as stated above. The Order has been applied retroactively to Allband, thereby ignoring the continued USF funds necessary to support already incurred investment and RUS-approved loans. Allband’s past investment is presently promoting and advancing universal service objectives. The Order disregards the reality that the FCC’s reforms and policies could be fully achieved without destroying Allband and its taxpayer funded RUS loans[8]

The panel's decision notes Allband's reference to these statutory arguments, but then does not address them. This is despite the FCC Order's failure to explain how the across-the-board ("one size fits all") per-line caps comport with the Congressional mandates noted earlier.

D. THE PANEL DECISION IGNORES THE ARBITRARY AND CAPRICIOUS NATURE OF THE FCC ORDER

The FCC Order is also arbitrary and capricious, in violation of the Administrative Procedures Act, 5 U.S.C. § 706(2)(A), in part for the reasons articulated by the dissenting opinion.

The dissenting opinion properly dissents from Part IV(A)(2) of the panel's decision and correctly finds that "the FCC failed to supply a rational basis for its conclusion that an annual budget of $4.5 billion would suffice with the new requirements for broadband capability" (p 163).[9]

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[8] The destruction of Allband and its loans has virtually no impact upon the USF and the surcharges collected nationwide to fund the USF. The amount of Allband's receipts from the ratepayer supported USF, much of which goes to paying the taxpayer-supplied RUS loans, is infinitesimal compared to the total annual USF budget.

[9] Allband's April 18, 2011 Comments in the NPRM (p 24) advocated that "the Universal Service Fund needs to be increased to bridge the urban/rural divide, and not reduced or made subject to uneconomic short-term requirements."

The FCC Order is also arbitrary and capricious by failing to assert or have any rational basis for determining and mandating an across-the-board $250 per line per month cap for USF reimbursement. The does not consider differences in costs or circumstances of carriers. The cap appears to favor large long-time incumbent carriers with dense secure urban markets, to the disadvantage of small rural entities, particularly new entities like Allband owning new, advanced, undepreciated networks. The cap serves to target the latter, and fails to recognize these differentiating factors.

The Order also fails to recognize that, unlike many other carriers, Allband as an ILEC and ETC is assigned public service responsibilities not assigned to other carriers.

The FCC Order is arbitrary and capricious in retroactively reversing its previous orders, and those of the MPSC and the RUS, upon which Allband and its customer/members, and the public itself, relied in committing to the financial obligations of Allband's RUS loans, and in expending the resources to provide network services in the unserved areas now served by Allband. The Order failed to provide adequate rational reasoning for this regulatory reversal applied to Allband, contrary to the standards of *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

CONCLUSION AND RELIEF

For the reasons stated, Allband requests this Honorable Court to reverse the FCC Order as applied to Allband, and to provide such additional and consistent relief as the Court deems lawful and reasonable.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH CONSISTENCY, TYPE-VOLUME, TYPEFACE, TYPE STYLE, PRIVACY REDACTION AND VIRUS SCAN REQUIREMENTS

I, Don L. Keskey, hereby certify that:

1. The hard copies to be submitted to the Court within two business days are exact copies of the version submitted electronically.

2. This brief complies with the volume limitations in Fed. R. App. P. 40(b) and the Order Governing Rehearing Procedures, and the Court's January 15, 2014 Order, because it contains 4,165 words (including footnotes) as calculated by the Microsoft Word "Word Count" utility.

3. This filing 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, 14 point Times New Roman font.

4. No privacy redactions were required in this document.

5. A virus scan of the PDF version of the attached documents, which are being submitted in this case via the Court's EM/ECF filing system, has been performed. The documents have been scanned with AVG Anti-virus software

from servers at our service provider, Madeira Data Center, which were last updated July 2, 2014 at 5:15 a.m., and according to the program, the file is free of viruses.

Respectfully submitted,

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ATTACHMENT 1

TO

PETITION FOR REHEARING EN BANC OF ALLBAND COMMUNICATIONS COOPERATIVE AS TO ISSUES RAISED IN ADDITIONAL UNIVERSAL SERVICE FUND ISSUES BRIEFS

July 7, 2014

FILED
United States Court of Appeals
Tenth Circuit

May 23, 2014

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

IN RE: FCC 11-161	No. 11-9900
DIRECT COMMUNICATIONS CEDAR VALLEY, LLC, a Utah limited liability company; TOTAH COMMUNICATIONS, INC., an Oklahoma corporation; H & B COMMUNICATIONS, INC., a Kansas Corporation; MOUNDRIDGE TELEPHONE COMPANY, a Kansas corporation; PIONEER TELEPHONE ASSOCIATION, INC., a Kansas corporation; TWIN VALLEY TELEPHONE, INC., a Kansas corporation; PINE TELEPHONE COMPANY, INC., an Oklahoma corporation; PENNSYLVANIA PUBLIC UTILITY COMMISSION; CHOCTAW TELEPHONE COMPANY; CORE COMMUNICATIONS, INC.; NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES; NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION d/b/a NTCA-THE RURAL BROADBAND ASSOCIATION; CELLULAR SOUTH, INC.; AT&T INC.; HALO WIRELESS, INC.; THE VOICE ON THE NET COALITION, INC.; PUBLIC UTILITIES COMMISSION OF OHIO; TW TELECOM INC.; VERMONT PUBLIC SERVICE BOARD; TRANSCOM ENHANCED SERVICES, INC.; THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS; CENTURYLINK, INC.; GILA RIVER	Consolidated Case Nos.: 11-9581, 11-9585, 11-9586, 11-9587, 11-9588, 11-9589, 11-9590, 11-9591, 11-9592, 11-9594, 11-9595, 11-9596, 11-9597, 12-9500, 12-9510, 12-9511, 12-9513, 12-9514, 12-9517, 12-9520, 12-9521, 12-9522, 12-9523, 12-9524, 12-9528, 12-9530, 12-9531, 12-9532, 12-9533, 12-9534, 12-9575

INDIAN COMMUNITY; GILA RIVER TELECOMMUNICATIONS, INC.; ALLBAND COMMUNICATIONS COOPERATIVE; NORTH COUNTY COMMUNICATIONS CORPORATION; UNITED STATES CELLULAR CORPORATION; PR WIRELESS, INC.; DOCOMO PACIFIC, INC.; NEX-TECH WIRELESS, LLC; CELLULAR NETWORK PARTNERSHIP, A LIMITED PARTNERSHIP; U.S. TELEPACIFIC CORP.; CONSOLIDATED COMMUNICATIONS HOLDINGS, INC.; NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS; RURAL TELEPHONE SERVICE COMPANY, INC.; ADAK EAGLE ENTERPRISES LLC; ADAMS TELEPHONE COOPERATIVE; ALENCO COMMUNICATIONS, INC.; ARLINGTON TELEPHONE COMPANY; BAY SPRINGS TELEPHONE COMPANY, INC.; BIG BEND TELEPHONE COMPANY, INC.; THE BLAIR TELEPHONE COMPANY; BLOUNTSVILLE TELEPHONE LLC; BLUE VALLEY TELE-COMMUNICATIONS, INC.; BLUFFTON TELEPHONE COMPANY, INC.; BPM, INC., d/b/a Noxapater Telephone Company; BRANTLEY TELEPHONE COMPANY, INC.; BRAZORIA TELEPHONE COMPANY; BRINDLEE MOUNTAIN TELEPHONE LLC; BRUCE TELEPHONE COMPANY, INC.; BUGGS ISLAND TELEPHONE COOPERATIVE; CAMERON TELEPHONE COMPANY, LLC; CHARITON VALLEY TELEPHONE CORPORATION; CHEQUAMEGON COMMUNICATIONS

COOPERATIVE, INC.; CHICKAMAUGA TELEPHONE CORPORATION; CHICKASAW TELEPHONE COMPANY; CHIPPEWA COUNTY TELEPHONE COMPANY; CITIZENS TELEPHONE COMPANY; CLEAR LAKE INDEPENDENT TELEPHONE COMPANY; COMSOUTH TELECOMMUNICATIONS, INC.; COPPER VALLEY TELEPHONE COOPERATIVE; CORDOVA TELEPHONE COOPERATIVE; CROCKETT TELEPHONE COMPANY, INC.; DARIEN TELEPHONE COMPANY; DEERFIELD FARMERS' TELEPHONE COMPANY; DELTA TELEPHONE COMPANY, INC.; EAST ASCENSION TELEPHONE COMPANY, LLC; EASTERN NEBRASKA TELEPHONE COMPANY; EASTEX TELEPHONE COOP., INC.; EGYPTIAN TELEPHONE COOPERATIVE ASSOCIATION; ELIZABETH TELEPHONE COMPANY, LLC; ELLIJAY TELEPHONE COMPANY; FARMERS TELEPHONE COOPERATIVE, INC.; FLATROCK TELEPHONE COOP., INC.; FRANKLIN TELEPHONE COMPANY, INC.; FULTON TELEPHONE COMPANY, INC.; GLENWOOD TELEPHONE COMPANY; GRANBY TELEPHONE LLC; HART TELEPHONE COMPANY; HIAWATHA TELEPHONE COMPANY; HOLWAY TELEPHONE COMPANY; HOME TELEPHONE COMPANY (ST. JACOB, ILL.); HOME TELEPHONE COMPANY (MONCKS CORNER, SC); HOPPER TELECOMMUNICATIONS LLC; HORRY TELEPHONE COOPERATIVE, INC.; INTERIOR

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TELEPHONE COMPANY; KAPLAN TELEPHONE COMPANY, INC.; KLM TELEPHONE COMPANY; CITY OF KETCHIKAN, ALASKA, d/b/a KPU Telecommunications; LACKAWAXEN TELECOMMUNICATIONS SERVICES, INC.; LAFOURCHE TELEPHONE COMPANY, LLC; LA HARPE TELEPHONE COMPANY, INC.; LAKESIDE TELEPHONE COMPANY; LINCOLNVILLE TELEPHONE COMPANY; LORETTO TELEPHONE COMPANY, INC.; MADISON TELEPHONE COMPANY; MATANUSKA TELEPHONE ASSOCIATION, INC.; MCDONOUGH TELEPHONE COOPERATIVE; MGW TELEPHONE COMPANY, INC.; MID CENTURY COOPERATIVE.; MIDWAY TELEPHONE COMPANY; MID-MAINE TELECOM LLC; MOUND BAYOU TELEPHONE & COMMUNICATIONS, INC.; MOUNDVILLE TELEPHONE COMPANY, INC.; MUKLUK TELEPHONE COMPANY, INC.; NATIONAL TELEPHONE OF ALABAMA, INC.; ONTONAGON COUNTY TELEPHONE COMPANY; OTELCO MID-MISSOURI LLC; OTELCO TELEPHONE LLC; PANHANDLE TELEPHONE COOPERATIVE, INC.; PEMBROKE TELEPHONE COMPANY, INC.; PEOPLES TELEPHONE CO.; PEOPLES TELEPHONE COMPANY; PIEDMONT RURAL TELEPHONE COOPERATIVE, INC.; PINE BELT TELEPHONE COMPANY, INC.; PINE TREE TELEPHONE LLC; PIONEER TELEPHONE COOPERATIVE, INC.; POKA LAMBRO TELEPHONE

COOPERATIVE, INC.; PUBLIC SERVICE TELEPHONE COMPANY; RINGGOLD TELEPHONE COMPANY; ROANOKE TELEPHONE COMPANY, INC.; ROCK COUNTY TELEPHONE COMPANY; SACO RIVER TELEPHONE LLC; SANDHILL TELEPHONE COOPERATIVE, INC.; SHOREHAM TELEPHONE LLC; THE SISKIYOU TELEPHONE COMPANY; SLEDGE TELEPHONE COMPANY; SOUTH CANAAN TELEPHONE COMPANY; SOUTH CENTRAL TELEPHONE ASSOCIATION; STAR TELEPHONE COMPANY, INC.; STAYTON COOPERATIVE TELEPHONE COMPANY; THE NORTH-EASTERN PENNSYLVANIA TELEPHONE COMPANY; TIDEWATER TELECOM, INC.; TOHONO O'ODHAM UTILITY AUTHORITY; UNITEL, INC.; WAR TELEPHONE LLC; WEST CAROLINA RURAL TELEPHONE COOPERATIVE, INC.; WEST TENNESSEE TELEPHONE COMPANY, INC.; WEST WISCONSIN TELCOM COOPERATIVE, INC.; WIGGINS TELEPHONE ASSOCIATION; WINNEBAGO COOPERATIVE TELECOM ASSOCIATION; YUKON TELEPHONE CO., INC.; ARIZONA CORPORATION COMMISSION; WINDSTREAM CORPORATION; WINDSTREAM COMMUNICATIONS, INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF

AMERICA,

Respondents,

and

SPRINT NEXTEL CORPORATION; LEVEL 3 COMMUNICATIONS, LLC; CENTURYLINK, INC.; CONNECTICUT PUBLIC UTILITIES REGULATORY AUTHORITY; INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE; WESTERN TELECOMMUNICATIONS ALLIANCE; NATIONAL EXCHANGE CARRIER ASSOCIATION, INC.; ARLINGTON TELEPHONE COMPANY; THE BLAIR TELEPHONE COMPANY; CAMBRIDGE TELEPHONE COMPANY; CLARKS TELECOMMUNICATIONS CO.; CONSOLIDATED TELEPHONE COMPANY; CONSOLIDATED TELCO, INC.; CONSOLIDATED TELECOM, INC.; THE CURTIS TELEPHONE COMPANY; EASTERN NEBRASKA TELEPHONE COMPANY; GREAT PLAINS COMMUNICATIONS, INC.; K. & M. TELEPHONE COMPANY, INC.; NEBRASKA CENTRAL TELEPHONE COMPANY; NORTHEAST NEBRASKA TELEPHONE COMPANY; ROCK COUNTY TELEPHONE COMPANY; THREE RIVER TELCO; RCA - The Competitive Carriers Association; RURAL TELECOMMUNICATIONS GROUP, INC.; T-MOBILE USA, INC., CENTRAL TEXAS TELEPHONE COOPERATIVE, INC.; VENTURE COMMUNICATIONS COOPERATIVE, INC.; ALPINE COMMUNICATIONS, LC; EMERY TELCOM; PEÑASCO VALLEY

TELEPHONE COOPERATIVE, INC.; SMART CITY TELECOM; SMITHVILLE COMMUNICATIONS, INC.; SOUTH SLOPE COOPERATIVE TELEPHONE CO., INC.; SPRING GROVE COMMUNICATIONS; STAR TELEPHONE COMPANY; 3 RIVERS TELEPHONE COOPERATIVE, INC.; WALNUT TELEPHONE COMPANY, INC.; WEST RIVER COOPERATIVE TELEPHONE COMPANY, INC.; RONAN TELEPHONE COMPANY; HOT SPRINGS TELEPHONE COMPANY; HYPERCUBE TELECOM, LLC; VIRGINIA STATE CORPORATION COMMISSION OF THE STATE OF KANSAS; MONTANA PUBLIC SERVICE COMMISSION; VERIZON WIRELESS; VERIZON; AT&T INC.; COX COMMUNICATIONS, INC.; NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION d/b/a NTCA-THE RURAL BROADBAND ASSOCIATION; INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE; NATIONAL EXCHANGE CARRIER ASSOCIATION, INC. (NECA), COMCAST CORPORATION; VONAGE HOLDINGS CORPORATION; RURAL TELECOMMUNICATIONS GROUP, INC.; NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION; CENTRAL TEXAS TELEPHONE COOPERATIVE, INC.; VENTURE COMMUNICATIONS COOPERATIVE, INC.; ALPINE COMMUNICATIONS, LC; EMERY TELCOM; PEÑASCO VALLEY TELEPHONE COOPERATIVE, INC.; SMART CITY TELECOM; SMITHVILLE

COMMUNICATIONS, INC.; SOUTH SLOPE COOPERATIVE TELEPHONE CO., INC.; SPRING GROVE COMMUNICATIONS; STAR TELEPHONE COMPANY; 3 RIVERS TELEPHONE COOPERATIVE, INC.; WALNUT TELEPHONE COMPANY, INC.; WEST RIVER COOPERATIVE TELEPHONE COMPANY, INC.; RONAN TELEPHONE COMPANY; HOT SPRINGS TELEPHONE COMPANY; HYPERCUBE TELECOM, LLC,

Intervenors.

STATE MEMBERS OF THE FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE,

Amicus Curiae.

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION (FCC Nos. 11-161, 12-47)

Argued for Petitioners:

James Bradford Ramsay, National Association of Regulatory Utility Commissioners, Washington, D.C., Russell Blau, Bingham McCutchen LLP, Washington, D.C., Robert Allen Long, Jr., Covington & Burling, Washington, D.C., Michael B. Wallace, Wise Carter Child & Caraway, Jackson, Mississippi, Pratik A. Shah, Akin Gump Strauss Hauer & Feld LLP, Washigton, D.C, Russell Lukas, Lukas, Nace, Gutierrez & Sachs, LLP, McLean, Virginia, Joseph K. Witmer, Pennsylvania Public Utility Commission, Harrisburg, Pennsylvania, Christopher F. Van de Verg, Annapolis, Maryland, Lucas M. Walker, Molo Lamken, Washington, D.C., Don L. Keskey, Public Law Resource Center PLLC, Lansing, Michigan, Harvey Reiter, Stinson Leonard Street LLP, Washington, David Bergmann, Columbus, Ohio, E. Ashton Johnston, Communications Law Counsel, P.C., Washington, D.C., Heather M. Zachary, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C., and W. Scott McCollough, McCollough Henry, Austin, Texas.

Argued for Respondents:

Richard K. Welch, James M. Carr, and Maureen Katherine Flood, Federal Communications Commission, Washington, D.C.

Argued for Respondents-Intervenors:

Scott H. Angstreich, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, D.C., Howard J. Symons, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., and Samuel L. Feder, Jenner & Block LLP, Washington, D.C.

Appearances for Petitioners:

David R. Irvine, Salt Lake City, Utah, and Alan L. Smith, Salt Lake City, Utah, for Direct Communications Cedar Valley, LLC, Totah Communications, Inc., H&B Communications, Inc., The Moundridge Telephone Company, Pioneer Telephone Association, Inc., Twin Valley Telephone, Inc., and Pine Telephone Company, Inc.

Bohdan R. Pankiw, Kathryn G. Sophy, Shaun A. Sparks, and Joseph K. Witmer, Pennsylvania Public Utility Commission, Harrisburg, Pennsylvania, for Pennsylvania Public Utility Commission.

Benjamin H. Dickens, Jr. and Mary J. Sisak, Blooston, Mordkofsky, Dickens, Duffy & Prendergrast, LLP, and Craig S. Johnson, Johnson & Sporleder, Jefferson City, Missouri, for Choctaw Telephone Company.

James Christopher Falvey and Charles Anthony Zdebski, Eckert Seamens Cherin & Mellott, Washington, D.C., for Core Communications, Inc.

David Bergmann, Columbus, Ohio, Paula Marie Carmody, Maryland's Office of People's Counsel, Baltimore, Maryland, and Christopher J. White, New Jersey Division of Rate Counsel, Office of the Public Advocate, Newark, New Jersey, for National Association of State Utility Consumer Advocates.

Russell Blau and Tamar Elizabeth Finn, Bingham McCutchen LLP, Washington, D.C., for National Telecommunications Cooperative Association d/b/a NTCA-The Rural

Broadband Association, U.S. TelePacific Corp., and Western Telecommunications Alliance.

Rebecca Hawkins and Michael B. Wallace, Wise Carter Child & Caraway, Jackson, Mississippi, David LaFuria and Russell Lukas, Lukas, Nace, Gutierrez & Sachs, LLP, McLean, Virginia, for Cellular South Inc.

Daniel T. Deacon, Kelly P. Dunbar, Jonathan E. Nuechterlein, and Heather M. Zachary, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C., and Christopher M. Heimann and Gary L. Phillips, AT&T Services, Inc., Washington, D.C., for AT&T Inc.

W. Scott McCollough, McCollough Henry, Austin, Texas, Walter Harriman Sargent, II, Walter H. Sargent, a professional corporation, Colorado Springs, Colorado, and Steven H. Thomas, McGuire, Craddock & Strother, P.C., Dallas, Texas, for Halo Wireless, Inc.

Jennifer P. Bagg and E. Ashton Johnston, Communications Law Counsel, P.C., and Donna M. Lampert, Lampert, O'Connor & Johnston, P.C., Washington, D.C., and Glenn Richards, Pillsbury Winthrop Shaw Pittman, Washington, D.C., for The Voice on the Net Coalition, Inc.

John Holland Jones, Office of the Ohio Attorney General, Columbus, Ohio, for Public Utilities Commission of Ohio.

Thomas Jones, David Paul Murray, and Nirali Patel, Willkie, Farr & Gallagher LLP, Washington, D.C., for tw telecom inc.

Bridget Asay, Office of the Attorney General for the State of Vermont, Montpelier, Vermont, for Vermont Public Service Board.

W. Scott McCollough, McCollough Henry, Austin, Texas, Walter Harriman Sargent, II, Walter H. Sargent, a professional corporation, Colorado Springs, Colorado, and Steven H. Thomas, McGuire, Craddock & Strother, P.C., Dallas, Texas, for Transcom Enhanced Services, Inc.

Robert A. Fox, Kansas Corporation Commission Topeka, Kansas, for The State Corporation Commission of the State of Kansas.

Yaron Dori, Robert Allen Long, Jr., Gerard J. Waldron, Mark Mosier, and Michael Beder, Covington & Burling, Washington, D.C., for CenturyLink, Inc.

John Boles Capehart, Akin Gump Strauss Hauer & Feld, Dallas, Texas, Sean Conway, Patricia Ann Millett, and James Edward Tysse, Akin Gump Strauss Hauer & Feld, Washington, D.C., and Michael C. Small, Akin Gump Strauss Hauer & Feld, Washington, D.C., for Gila River Indian Community and Gila River Telecommunications, Inc.

Don L. Keskey, Lansing Michigan, forAllband Communications Cooperative.

Roger Dale Dixon, Jr., Law Offices of Dale Dixon, Carlsbad, California, for North County Communications Corporation.

David LaFuria and Russell Lukas, Lukas, Nace, Gutierrez & Sachs, LLP, McLean, Virginia, for United States Cellular Corporation.

David LaFuria, Todd Bradley Lantor, and Russell Lukas, Lukas, Nace, Gutierrez & Sachs, LLP, McLean, Virginia, for Petitioners PR Wireless, Inc. and Docomo Pacific, Inc., Todd Bradley Lantor, and Russell Lukas, Lukas, Nace, Gutierrez & Sachs, LLP, McLean, Virginia, for Petitioners Nex-Tech Wireless, LLC, and Cellular Network Partnership, A Limited Partnership.

Russell Blau, Bingham McCutchen LLP, Washington, D.C., for Consolidated Communications Holdings, Inc.

James Bradford Ramsay and Holly R. Smith, National Association of Regulatory Utility Commissioners, Washington, D.C., for National Association of Regulatory Utility Commissioners.

David Cosson, Washington, D.C., H. Russell Frisby, Jr., Dennis Lane, and Harvey Reiter, Stinson Leonard Street LLP, Washington, D.C., for Rural Independent Competitive Alliance, Rural Telephone Service Company, Inc., Adak Eagle Enterprises LLC, Adams Telephone Cooperative, Alenco Communications, Inc., Arlington Telephone Company, Bay Springs Telephone Company, Big Bend Telephone Company, The Blair Telephone Company, Blountsville Telephone LLC, Blue Valley Tele-communications, Inc., Bluffton Telephone Company, Inc., BPM, Inc., Brantley Telephone Company, Inc., Brazoria Telephone Company, Brindlee Mountain Telephone LLC, Bruce Telephone Company, Inc., Buggs Island Telephone Cooperative, Cameron Telephone Company, LLC, Chariton Valley Telephone Corporation, Chequamegon Communications Cooperative, Inc., Chickamauga Telephone Corporation, Chicksaw Telephone Company, Chippewa County Telephone Company, Clear Lake Independent Telephone Company, Comsouth Telecommunications, Inc., Copper Valley Telephone Cooperative, Cordova Telephone Cooperative, Crockett Telephone Company, Inc., Darien Telephone Company, Deerfield

Famers' Telephone Company, Delta Telephone Company, Inc., East Ascention Telephone Company, LLC, Eastern Nebraska Telephone Company, Eastex Telephone Coop., Inc., Egyptian Telephone Cooperative Association, Elizabeth Telephone Company, LLC, Ellijay Telephone Company, Farmers Telephone Cooperative, Inc., Flatrock Telephone Coop., Inc., Franklin Telephone Company, Inc., Fulton Telephone Company, Inc., Glenwood Telephone Company, Granby Telephone Company LLC, Hart Telephone Company, Hiawatha Telephone Company, Holway Telephone Company, Home Telephone Company (St. Jacob Illinois), Home Telephone Company (Moncks Corner, South Carolina), Hopper Telecommunications LLC., Horry Telephone Cooperative, Inc., Interior Telephone Company, Kaplan Telephone Company, Inc., KLM Telephone Company, City of Ketchikan, Alaska, Lackawaxen Telecommunications Services, Inc., Lafourche Telephone Company, LLC, La Harpe Telephone Company, Inc., Lakeside Telephone Company, Lincolnville Telephone Company, Loretto Telephone Company, Inc., Madison Telephone Company, Matanuska Telephone Association, Inc., McDonough Telephone Coop., MGW Telephone Company, Inc., Mid Century Cooperative, Midway Telephone Company, Mid-Maine Telecom, LLC, Mound Bayou Telephone & Communications, Inc., Mondville Telephone Company, Inc., Mukluk Telephone Company, Inc., National Telephone of Alabama, Inc., Ontonagon County Telephone Company, Otelco Mid-Missouri LLC, Otelco Telephone LLC, Panhandle Telephone Cooperative, Inc., Pembroke Telephone Company, Inc., People's Telephone Company, Peoples Telephone Company, Piedmont Rural Telephone Cooperative, Inc., Pine Belt Telephone Company, Inc., Pine Tree Telephone LLC, Pioneer Telephone Cooperative, Inc., Poka Lambro Telephone Cooperative, Inc., Public Service Telephone Company, Ringgold Telephone Company, Roanoke Telephone Company, Inc., Rock County Telephone Company, Saco River Telephone LLC, Sandhill Telephone Cooperative, Inc., Shoreham Telephone LLC, The Siskiyou Telephone Company, Sledge Telephone Company, South Canaan Telephone Company, South Central Telephone Association, Star Telephone Company, Inc., Stayton Cooperative Telephone Company, The North-Eastern Pennsylvania Telephone Company, Tidewater Telecom, Inc., Tohono O'Odham Utility Authority, Unitel, Inc., War Telephone LLC, West Carolina Rural Telephone Cooperative, Inc., West Tennessee Telephone Company, Inc., West Wisconsin Telecom Cooperative, Inc., Wiggins Telephone Association, Winnebago Cooperative Telecom Association, Yukon Telephone Co., Inc.

Maureen A. Scott, Wesley Van Cleve, and Janet F. Wagner, Arizona Corporation Commission, Legal Division, Phoenix, Arizona, for Arizona Corporation Commission.

Jeffrey A. Lamken and Lucas M. Walker, Molo Lamken, Washington, D.C., for Windstream Communications, Inc., and Windstream Corporation.

Appearances for Respondents:

Laurence Nicholas Bourne, James M. Carr, Maureen Katherine Flood, Jacob Matthew Lewis, Joel Marcus, Matthew J. Dunne, and Richard K. Welch, Federal Communications Commission, Washington, D.C., for the Federal Communications Commission.

Robert Nicholson and Robert J. Wiggers, United States Department of Justice, Washington, D.C., for United States of America.

Appearances for Intervenors:

Thomas J. Moorman, Woods & Aitken LLP, Washington, D.C. and Paul M. Schudel, Woods & Aitken LLP, Lincoln, Nebraska, for Arlington Telephone Company, The Blair Telephone Company. Cambridge Telephone Company, Clarks Telecommunications Co., Consolidated Telco, Inc., Consolidated Telephone Company, Inc., Consolidated Telecom, Inc., The Curtis Telephone Company, Eastern Nebraska Telephone Company, Great Plains Communications, Inc., K. & M. Telephone Company, Inc., Nebraska Central Telephone Company, Northeast Nebraska Telephone Company, Rock County Telephone Company and Three River Telco.

Yaron Dori, Robert Allen Long, Jr., Gerard J. Waldron, Mark Mosier, and Michael Beder, Covington & Burling, Washington, D.C., for CenturyLink, Inc.

Gerard J. Duffy, Benjamin H. Dickens, Jr., Robert M. Jackson, and Mary J. Sisak, Blooston, Mordkofsky, Dickens, Duffy & Prendergrast, LLP, Washington, D.C., for 3 Rivers Telephone Cooperative, Inc. , Venture Communications Cooperative, Inc., Alpine Communications, LC, Emery Telcom, Peñasco Valley Telephone Cooperative, Inc., Smart City Telecom, Smithville Communications, Inc., South Slope Cooperative Telephone Co., Inc., Spring Grove Communications, Star Telephone Company, Walnut Telephone Company, and West River Cooperative Telephone Company, Inc.

Ivan C. Evilsizer, Evilsizer Law Office, Helena, Montana, for Ronan Telephone Company and Hot Springs Telephone Company.

Helen E. Disenhaus and Ashton Johnston, Lampert, O'Connor & Johnston, P.C., Washington, D.C., for Hypercube Telecom, LLC.

Raymond L. Doggett, Jr., Virginia State Corporation Commission, Richmond, Virginia, for Virginia State Corporation Commission.

Dennis Lopach, Montana Public Service Commission, Helena, Montana, for Montana Public Service Commission.

Christopher M. Heimann and Gary L. Phillips, AT&T Services, Inc., Washington, D.C., and Daniel T. Deacon, Kelly P. Dunbar, Jonathan E. Nuechterlein, and Heather M. Zachary, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C., for AT&T Inc.

J.G. Harrington and David E. Mills, Cooley, LLP, Washington, D.C., for Cox Communications, Inc.

Scott H. Angstreich, Joshua D. Branson, Brendan J. Crimmins, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, D.C., and Michael E. Glover and Christopher M. Miller, Arlington, Virginia, for Verizon and Verizon Wireless.

Russell Blau, Bingham McCutchen LLP, Washington, D.C., for National Telecommunications Cooperative Association, d/b/a NTCA-The Rural Broadband Association.

Clare Kindall, Office of the Attorney General Energy Department, New Britain, Connecticut, for Connecticut Public Utilities Regulatory Authority.

Samuel L. Feder and Luke C. Platzer, Jenner & Block LLP, Washington, D.C., for Comcast Corporation.

Christopher J. Wright, Wiltshire & Grannis, LLP, Washington, D.C., for Level 3 Communications, LLC, Vonage Holdings Corp., and Sprint Nextel Corporation.

Rick C. Chessen, Neal M. Goldberg, Jennifer McKee, and Steven F. Morris, National Cable & Telecommunications Association, Washington, D.C., and Ernest C. Cooper, Robert G. Kidwell, and Howard J. Symons, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., Washington, D.C., for National Cable & Telecommunications Association.

Genevieve Morelli, The Independent Telephone & Telecommunications Alliance, Washington, D.C., for Independent Telephone & Telecommunications Alliance.

Gerard J. Duffy, Blooston, Mordkofsky, Dickens, Duffy & Prendergrast, LLP, Washington, D.C., for Western Telecommunications Alliance.

Gregory Jon Vogt, Law Offices of Gregory J. Vogt, PLLC, Alexandria, Virginia, and Richard A. Askoff, Sr., National Exchange Carrier Association, Inc., Whippany, New Jersey for National Exchange Carrier Association.

Craig Edward Gilmore, L. Charles Keller, and David H. Solomon, Wilkinson, Barker, Knauer, LLP, Washington, D.C., for T-Mobile USA, Inc.

Caressa Davison Bennet, Kenneth Charles Johnson, Anthony Veach, and Daryl Altey Zakov, Bennet & Bennet, Bethesda, Maryland, for Rural Telecommunications Group, Inc. and Central Telephone Cooperative, Inc.

Appearances for Amicus Curiae:

James Hughes Cawley, Pennsylvania Public Utility Commission, Harrisburg, Pennsylvania, and James Bradford Ramsay, National Association of Regulatory Utility Commissioners, Washington, D.C., for State Members of the Federal-State Joint Board on Universal Service.

Counsel on the briefs:

David Cosson, H. Russell Frisby, Jr., Dennis Lane, Harvey Reiter, Don L. Keskey, Maureen A. Scott, Wesley Van Cleve, Janet F. Wagner, Russell D. Lukas, David A. LaFuria, Todd B. Lantor, Rebecca Hawkins, Michael B. Wallace, Yaron Dori, Robert Allen Long, Jr., Gerard J. Waldron, Benjamin H. Dickens, Jr., Mary J. Sisak, Craig S. Johnson, James C. Falvey, Charles A. Zdebski, David R. Irvine, Alan Lange Smith, Patricia A. Millet, James Edward Tysse, Sean T. Conway, John Boles Capehart, Michael C. Small, James Bradford Ramsay, Holly R. Smith, David Bergmann, Paula Marie Carmody, Christopher J. White, Russell Blau, Tamar Finn, Roger Dale Dixon, Jr., Bohdan R. Pankiw, Kathryn G. Sophy, Joseph K. Witmer, Shaun A. Sparks, John H. Jones, Robert A. Fox, Jennifer P. Bagg, E. Ashton Johnston, Donna N. Lampert, Glenn Richards, W. Scott McCollough, Steven H. Thomas, Bridget Asay, David P. Murray, Thomas Jones, and Nirali Patel on the Joint Preliminary Brief.

Don L. Keskey, Maureen A. Scott, Wesley Van Cleave, Janet F. Wagner, Robert Allen Long, Jr., Gerard J. Waldron, Yaron Dori, Mark W. Mosier, Benjamin H. Dickens, Jr., Mary J. Sisak, Craig S. Johnson, Clare E. Kindall, James C. Falvey, Charles A. Zdebski, Patricia A. Millett, James E. Tyesse, Sean Conway, John B. Capehart, Michael C. Small, Robert A. Fox, R. Dale Dixon, Paula M. Carmody, David C. Bergmann, Christopher J. White, Russell Blau, Tamar Finn, Bohdan R. Pankiw, Kathryn G. Sophy, Joseph K. Witmer, Shaun A. Sparks, John H. Jones, Raymond L. Doggett, Jr., David Cosson, H. Russell Frisby, Jr., Dennis Lane and Harvey Reiter, on the Joint Intercarrier Compensation Principal Brief and Reply Brief.

James C. Falvey, Charles A. Zdebski, Russell Blau, Tamar Finn, R. Dale Dickson, Jr., David Cosson, H. Russell Frisby, Jr., Dennis Lane, Harvey Reiter on the Additional Intercarrier Compensation Issues Principal Brief and Reply Brief.

David Cosson, H. Russell Frisby, Jr., Dennis Lane, Harvey Reiter, Don L. Keskey, Maureen A. Scott, Wesley Van Cleve, Janet F. Wagner, Rebecca Hawkins, Michael B. Wallace, Benjamin H. Dickens, Jr., Mary J. Sisak, Craig S. Johnson, David R. Irvine, Alan Lange Smith, Patricia A. Millet, James Edward Tysse, Sean T. Conway, John Boles Capehart, Michael C. Small, James Bradford Ramsay, David Bergmann, Paula Marie Carmody, Christopher J. White, Russell Blau, Tamar Finn, Bohdan R. Pankiw, Kathryn G. Sophy, Joseph K. Witmer, Shaun A. Sparks, Holly Rachel Smith, and Bridget Asay, on the Joint Universal Service Fund Principal Brief and Reply Brief.

David Cosson, H. Russell Frisby, Jr., Harvey Reiter, Don L. Keskey, Maureen A. Scott, Wesley Van Cleve, Janet F. Wagner, James Bradford Ramsay, Russell Blau, Tamar Finn, and Bridget Asay, Elisabeth H. Ross, Robert Allen Long, Jr., Gerard J. Waldron, Yaron Dori, Michael P. Beder, Benjamin H. Dickens, Jr., and Holly Rachel Smith, on the Additional Universal Service Fund Issues Principal Brief.

Russell D. Lukas, David A. LaFuria, and Todd B. Lantor, on the Wireless Carrier Universal Service Fund Principal Brief and Reply Brief.

Christopher M. Heimann, Gary L. Phillips, Peggy Garber, Heather M. Zachary, and Daniel T. Deacon, on the AT&T Inc. Principal Brief and Reply Brief.

E. Ashton Johnston, Jennifer P. Bagg, and Glenn S. Richards, on the Voice on the Net Coalition, Inc. Principal Brief and Reply Brief.

Steven H. Thomas, and W. Scott McCollough, on the Transcom Principal and Reply Briefs.

Michael C. Small, Patricia A. Millett, James E. Tysse, Sean T. Conway, John B. Capehart, on the Tribal Carriers Principal Brief.

Paula M. Carmody, Christopher J. White, and David C. Bergmann, on the National Association of State Utility Consumer Advocates Principal Brief and Reply Brief.

Thomas J. Moorman, Paul M. Schudel, Genevieve Morelli, Gregory J. Vogt, Richard A. Askoff, Ivan C. Evilsizer, Benjamin H. Dickens, Jr., Mary J. Sisak, Robert M. Jackson, Gerard J. Duffy, Russell M. Blau, Tamar E. Finn on Incumbent Local Exchange Carrier Intervenors' Brief and Reply Brief in Support of Petitioners.

Jeffrey A. Lamken and Lucas M. Walker, on the Windstream Principal Brief and Reply Brief.

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James H. Cawley on the Amicus Brief of the State Members of the Federal-State Joint Board on Universal Service in Support of Petitioners.

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Russell M. Blau and Tamar E. Finn, Bingham McCutchen, LLP, Washington, D.C., on the Brief of Intervenor National Telecommunications Cooperative Association in Support of the FCC's Response to the Voice on the Net Coalition, Inc. Brief.

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Before **BRISCOE,** Chief Judge, **HOLMES** and **BACHARACH**, Circuit Judges.

BRISCOE, Chief Judge.

In late 2011, the Federal Communications Commission (FCC or Commission) issued a Report and Order and Further Notice of Proposed Rulemaking (Order) comprehensively reforming and modernizing its universal service and intercarrier compensation systems. Petitioners, each of whom were parties to the FCC's rulemaking proceeding below, filed petitions for judicial review of the FCC's Order. The Judicial Panel on Multidistrict Litigation consolidated the petitions in this court.

In the Joint Universal Service Fund Principal Brief, Additional Universal Service Fund Issues Principal Brief, Wireless Carrier Universal Service Fund Principal Brief, and Tribal Carriers Principal Brief, petitioners assert a host of challenges to the portions of the Order revising how universal service funds are to be allocated to and employed by recipients. After carefully considering those claims, we find them either unpersuasive or barred from judicial review. Consequently, we deny the petitions to the extent they are based upon those claims.

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all of the RLECs' customers in the same study area, unlawful and unsupported by substantial evidence?

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I. *Glossary*

1996 Act	Telecommunications Act of 1996
Act (or 1934 Act)	Communications Act of 1934
APA	Administrative Procedure Act
ARC	Access Recovery Charge
Joint Board	Federal-State Joint Board on Universal Service
CAF	Connect America Fund
CETC	Competitive Eligible Telecommunications Carrier
COLR	Carrier of Last Resort
ETC	Eligible Telecommunications Carrier
FCC (or Commission)	Federal Communications Commission
HCLS	High Cost Loop Support
IAS	Interstate Access Support
ICC	Intercarrier Compensation
ICLS	Interstate Common Line Support
ILEC	Incumbent Local Exchange Carrier
IP	Internet Protocol
JA	Joint Appendix
LEC	Local Exchange Carrier
Mobility Fund	CAF Mobility Fund
NPRM	Notice of Proposed Rulemaking

PSTN	Public Switched Telephone Network
RLEC	Rate-of-Return ILEC
SA	Supplemental Joint Appendix
SNA	Safety Net Additive
USF	Universal Service Fund
VoIP	Voice over Internet Protocol
WCB	FCC’s Wireline Competition Bureau

II. *Background*

A. *Introduction*

For nearly eighty years, the FCC has regulated interstate communications. When it was first created by way of the Communications Act of 1934 (the 1934 Act or the Act), the FCC's regulatory activities were focused on "communication[s] by wire and radio." 47 U.S.C. § 151. The FCC's regulatory oversight subsequently expanded to include telephone service. Most recently, the FCC was charged by Congress with developing a "[N]ational [B]roadband [P]lan," American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(1), 123 Stat. 115, 515, the purpose of which is "to ensure that all people of the [U]nited [S]tates have access to broadband capability and [to] establish benchmarks for meeting that goal," id. § 6001(k)(2), 123 Stat. at 516.

In a statement issued on March 16, 2010, the FCC concluded that Congress's stated goals for the National Broadband Plan could not be achieved unless the FCC "comprehensively reformed" its existing regulatory system for telephone service. JA at 2. On February 9, 2011, the FCC issued a Notice of Proposed Rulemaking (NPRM) "propos[ing] to fundamentally modernize the [FCC]'s Universal Service Fund (USF or Fund) and intercarrier compensation (ICC) system." Id. at 284 (NPRM ¶ 1). After receiving and considering comments in response to the NPRM, the FCC on November 18, 2011 issued a Report and Order and Further Notice of Proposed Rulemaking (Order). The Order, and the reforms it proposes, are the subject of this litigation.

B. *Distinction between telecommunications service providers and information-service providers*

The 1934 Act, as amended by the Telecommunications Act of 1996 (the 1996 Act), "subjects all providers of 'telecommunications servic[e]' to mandatory common-carrier regulation, [47 U.S.C.] § 153(44)." Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 973 (2005). "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used." 47 U.S.C. § 153(46). In turn, "[t]elecommunications" is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). "Telecommunications carrier[s]" are defined as "provider[s] of telecommunications services." 47 U.S.C. § 153(44).

Notably, the 1934 Act, as amended by the 1996 Act, does not regulate information-service providers. "[I]nformation service" is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . ." 47 U.S.C. § 153(20). In March 2002, the FCC formally "concluded that broadband Internet service provided by cable companies is an 'information service' but not a 'telecommunications service' under the [1934] Act, and therefore not subject to mandatory Title II common-carrier regulation." Nat'l Cable, 545 U.S. at 977-78. In June 2005, the Supreme Court held that this "conclusion [wa]s a lawful construction of the [1934] Act under Chevron

U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and the Administrative Procedure Act." Nat'l Cable, 545 U.S. at 974.

C. *The FCC's pre-Order regulatory framework for telephone services*

The pre-Order regulatory system for telephone service, which was developed by the FCC over decades, was revised by the FCC in accordance with the 1996 Act. The 1996 Act, which "fundamentally restructure[d] local telephone markets," AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 370 (1999), "sought to introduce competition to local telephone markets" while simultaneously "preserving universal service." Qwest Corp. v. FCC, 258 F.3d 1191, 1196 (10th Cir. 2001) (Qwest Corp.). "Universal service" was defined in the 1996 Act "[a]s an evolving level of telecommunications services that the [FCC] shall establish periodically under [§ 254 of the 1996 Act], taking into account advances in telecommunications and information technologies and services." 47 U.S.C. § 254(c)(1). In other words, the 1996 Act "anticipate[d] . . . that in the future other types of telecommunications m[ight] become necessary for the nation to remain at the forefront of technological development," and, consequently, it "outlin[ed] a process for the FCC to adjust [the definition of 'universal service'] as new technologies ar[o]se." Wireless World, LLC v. Virgin Islands Pub. Servs. Comm'n, No. Civ. A. 02-0061STT at *7 n.7 (D. Virgin Islands 2008).

The FCC implemented "high-cost universal service support . . . to help ensure that consumers ha[d] access to telecommunications services in areas where the cost of providing such services would otherwise be prohibitively high." JA at 2. This "high-cost [universal service] support [wa]s provided through a complicated patchwork of programs . . . in which the types of support a carrier receive[d] depend[ed] on the size and regulatory classification of the carrier." Id. at 3. More specifically, "[t]he federal high-cost support mechanism include[d] five major components," id.:

> 1) "High-cost loop support [that] provide[d] support for intrastate network costs to rural incumbent local exchange carriers (LECs) in service areas where the cost to provide service exceed[ed] 115 percent of the national average," id.;
>
> 2) "Local switching support [that] provide[d] intrastate support for switching costs for companies that serve[d] 50,000 or fewer access lines," id.;
>
> 3) "High-cost model support [that] provide[d] support for intrastate network costs to non-rural incumbent LECs in states where the cost to provide service in non-rural areas exceed[ed] two standard deviations above the national average cost per line," id.;
>
> 4) "Interstate access support (IAS) [that] provide[d] support for price cap carriers to offset certain reductions in interstate access charges," id.; and
>
> 5) "Interstate common line support (ICLS) [that] provide[d] support to rate-of-return carriers, to the extent that subscriber line charge (SLC) caps d[id] not permit such carriers to recover their interstate common line revenue requirements," id.

This system, often referred to as the intercarrier compensation or ICC system, was "designed for an era of separate long-distance companies[,] . . . high per-minute charges, and [little] competition . . . among telephone companies . . . ." Id. at 396 (Order ¶ 9).

D. *The deficiencies identified by the FCC regarding its pre-Order regulatory framework*

In devising its National Broadband Plan, the FCC noted what it perceived as deficiencies in its pre-Order regulatory framework. To begin with, "only voice [wa]s a supported service" under this framework, and "there [wa]s no requirement to provide broadband service to consumers, nor [wa]s there any mechanism to ensure that support [wa]s targeted toward extending broadband service to unserved areas." Id. at 3. Further, "some of the . . . high-cost programs d[id] not provide support in an economically efficient manner." Id. "In addition, several programs provide[d] support based on an incumbent carrier's embedded costs, whether or not a competitor provide[d], or could provide, service at a lower cost." Id.[1] Thus, "only non-rural high-cost support [wa]s based on forward-looking economic cost, as determined by the [FCC]'s voice telephony cost model."[2] Id. at 4. As a result, "[i]n 2009, the [FCC] disbursed almost $4.3 billion in high-cost support, of which $331 million was calculated on the basis of forward-looking costs." Id. at 6-7.

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[1] The FCC defined "embedded costs" as "the costs that the incumbent LEC incurred in the past and that are recorded in the incumbent LEC's book of accounts." 47 C.F.R. § 51.505(d)(1) (1997). Prior to the 1996 Act, "explicit federal universal service support was based on embedded costs." JA at 3. Despite its intention to abandon embedded cost support following enactment of the 1996 Act, the FCC ultimately allowed it to remain in place "for rural carriers pending more comprehensive reform." Id. at 4.

[2] The FCC's cost model was based upon ten criteria and was intended to "estimate the cost of providing service for all businesses and households within a geographic region." JA at 4-5 (internal quotation marks omitted).

E. *The FCC's National Broadband Plan*

"On March 26, 2010, the [FCC] delivered to Congress [its] National Broadband Plan." Id. at 7. "The National Broadband Plan estimated that 14 million people living in seven million housing units in the United States currently do not have access to terrestrial broadband infrastructure capable of meeting this target, described as 'the broadband availability gap.'" Id. Consequently, the National Broadband Plan "recommend[ed] the creation of a Connect America Fund [(CAF)] to address the broadband availability gap in unserved areas and to provide any ongoing support necessary to sustain service in areas that require public funding, including those areas that already may have broadband." Id. The National Broadband Plan outlined five principles that the CAF should adhere to,[3] and it recommended that the FCC "create a fast-track program in CAF for providers to receive targeted funding for new broadband construction in unserved areas, and create a Mobility Fund to provide one-time support for deployment of 3G networks, to bring all states to a minimum level of 3G (or better) mobile service availability." Id. at 7 (internal quotation marks omitted). "The National Broadband Plan [also] recommend[ed] that the [FCC] direct public investment toward meeting an initial national broadband availability target

[3] The five principles included: (1) providing funding only in geographic areas where there is no private sector business case to provide broadband and high-quality voice-grade service; (2) allowing at most only one subsidized provider of broadband per geographic area; (3) making the eligibility criteria for obtaining broadband support from CAF company- and technology-agnostic so long as the service provided meets the FCC's specifications; (4) identifying ways to drive funding to efficient levels to determine the firms that will receive CAF support and the amount of support they will receive; and (5) making CAF support recipients accountable for its use and subject to enforceable timelines for achieving universal access. JA at 7.

of 4 Mbps of actual download speed and 1 Mbps of actual upload speed." Id. at 7. In addition, the National Broadband Plan recommended that the FCC's "long range goal should be to replace all of the legacy High-Cost programs with a new program that preserves the connectivity that Americans have today and advances universal broadband in the 21st century." Id. (internal quotation marks omitted). In other words, the National Broadband Plan proposed "cap[ping] and cut[ting] the legacy high-cost programs and" shifting the "realize[d] savings . . . to targeted investment in broadband infrastructure." Id. at 9.

F. *The FCC's Notice of Inquiry and Notice of Proposed Rulemaking*

On April 21, 2010, the FCC issued a Notice of Inquiry and Notice of Proposed Rulemaking (Notice of Inquiry). The Notice of Inquiry sought "comment on three discrete groups of issues." Id. at 8. First, the Notice of Inquiry sought "comment on use of a model as a competitively neutral and efficient tool for helping [the FCC] to quantify the minimum amount of universal service support necessary to support networks that provide broadband and voice service, such that the contribution burden that ultimately falls on American consumers is limited." Id. Second, the Notice sought "comment on potential approaches to providing such targeted funding on an accelerated basis in order to extend broadband networks in unserved areas, such as a competitive procurement auction." Id. Third, the Notice sought "comment on specific proposals to cap and cut the legacy high-cost programs [for voice services] and realize savings that c[ould] be shifted to targeted investment in broadband infrastructure." Id. at 8-9.

The FCC subsequently "received over 2,700 comments, reply comments, and ex parte filings totaling over 26,000 pages, including hundreds of financial filings from telephone companies of all sizes, including numerous small carriers that operate in the most rural parts of the nation." Id. at 398 (Order ¶ 12). The FCC "held over 400 meetings with a broad cross-section of industry and consumer advocates." Id. The FCC also "held three open, public workshops, and engaged with other federal, state, Tribal, and local officials throughout the process." Id.

G. *The FCC's Report and Order of November 18, 2011*

On November 18, 2011, the FCC released its 752-page Order. Id. at 390. The Order stated that "[t]he universal service challenge of our time is to ensure that all Americans are served by networks that support high-speed Internet access—in addition to basic voice service—where they live, work, and travel." Id. at 395 (Order ¶ 5). In turn, the Order stated that the "existing universal service and intercarrier compensation systems [we]re based on decades-old assumptions that fail[ed] to reflect today's networks, the evolving nature of communications services, or the current competitive landscape." Id. at 396 (Order ¶ 6). In light of these factors, the Order purported to "comprehensively reform[] and modernize[] the universal service and intercarrier compensation systems to ensure that robust, affordable voice and broadband service, both fixed and mobile, [we]re available to Americans throughout the nation." Id. at 394 (Order ¶ 1).

The Order summarized the key components of the universal service reform the FCC would be implementing. Because the vast majority of Americans "that lack access to residential fixed broadband at or above the [FCC]'s broadband speed benchmark live in areas served by price cap carriers," i.e., "Bell Operating Companies and other large and mid-sized carriers," the FCC stated that it "w[ould] introduce targeted, efficient support for broadband in two phases" for these areas. Id. at 400 (Order ¶ 21). Phase I of this plan, intended "[t]o spur immediate broadband buildout," would freeze "all existing high-cost support to price cap carriers" and make "an additional $300 million in CAF funding . . . available." Id. (Order ¶ 22). "Frozen support w[ould] be immediately subject to the goal of achieving universal availability of voice and broadband, and subject to obligations to build and operate broadband-capable networks in areas unserved by an unsubsidized competitor over time." Id. Phase II of the plan "w[ould] use a combination of a forward-looking broadband cost model and competitive bidding to efficiently support deployment of networks providing both voice and broadband service for five years." Id. (Order ¶ 23).

With respect to rate-of-return carriers, which "serve[d] less than five percent of access lines in the U.S.," but received "total support from the high-cost fund . . . approaching $2 billion annually," the Order imposed substantial reforms. Id. at 401 (Order ¶ 26). In particular, any such carriers "receiving legacy universal service support, or CAF support to offset lost ICC revenues," were required to "offer broadband service meeting initial CAF requirements . . . upon their customers' reasonable requests." Id. The Order noted that, because of "the economic challenges of extending service in the high-cost areas of the country served by rate-of-return carriers, this flexible approach [would] not require rate-of-return companies to extend service to customers absent such a request." Id.

The Order indicated that a CAF Mobility Fund would be created to "promot[e] the universal availability" of "mobile voice and broadband services." Id. at 402 (Order ¶ 28). Phase I of the CAF Mobility Fund would "provide up to $300 million in one-time support to immediately accelerate deployment of networks for mobile voice and broadband services in unserved areas." Id. at 402. This support, the Order indicated, would "be awarded through a nationwide reverse auction." Id. Phase II of the Mobility Fund would "provide up to $500 million per year in ongoing support" in order to "expand and sustain mobile voice and broadband services in communities in which service would be unavailable absent federal support." Id. Included in this $500 million annual budget was "ongoing support for Tribal areas of up to $100 million per year." Id. Phase II also anticipated "eliminat[ing] the identical support rule that determines the amount of support for mobile, as well as wireline, competitive ETCs [(eligible telecommunications carriers)]," id. (Order ¶ 29), and the creation of a "Remote Areas Fund" designed "to ensure that Americans living in the most remote areas in the nation, where the cost of deploying traditional terrestrial broadband networks is extremely high, can obtain affordable access through alternative technology platforms, including satellite and unlicensed wireless services," id. (Order ¶ 30).

The Order also indicated that the FCC was reforming its intercarrier compensation rules, including "adopt[ing] a uniform national bill-and-keep framework as the ultimate end state for all telecommunications traffic exchanged with a LEC." Id. at 403 (Order ¶ 34). "Under bill-and-keep," the Order noted, "carriers look first to their subscribers to cover the costs of the network, then to explicit universal service support where necessary." Id. Relatedly, the Order noted that the FCC was "abandon[ing] the calling-party-network-pays model that dominated ICC regimes of the last century." Id. However, the Order noted, "states will have a key role in determining the scope of each carrier's financial responsibility for purposes of bill-and-keep, and in evaluating interconnection agreements negotiated or arbitrated under the framework in sections 251 and 252 of the Communications Act." Id.

H. *This litigation*

Petitioners, who were parties to the FCC's rulemaking proceeding below, each filed petitions for judicial review of the Order. After the Judicial Panel on Multidistrict Litigation consolidated the petitions in this court, we held oral argument on the petitions on November 19, 2013.

III. *Standards of review*

The issues raised by petitioners in their respective briefs implicate three different standards of review: the Chevron standard, which applies to all of the issues in which petitioners assert that the FCC acted contrary to its statutory authority; the arbitrary and capricious standard, which applies to petitioners' challenges to rules implemented by the FCC in its Order; and the de novo standard of review that applies to the constitutional issues raised by petitioners.

A. *The Chevron standard*

In "review[ing] an agency's construction of [a] statute which it administers," the first question for the court is "whether Congress has directly spoken to the precise question at issue." Chevron, 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter," id., and both the agency and the court "must give effect to the unambiguously expressed intent of Congress," id. at 843. "If, however, . . . the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. This court gives deference to the agency's interpretation so long as that interpretation is not arbitrary, capricious, or manifestly contrary to the statute. Id. at 844.

B. *The arbitrary and capricious standard*

The Administrative Procedure Act (APA) directs us to "hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under the arbitrary and capricious standard, "a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute." Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." Id. "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Id. (internal quotation marks omitted). A reviewing court must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Id. (internal quotation marks omitted).

C. *The de novo standard*

The APA also compels us to "set aside agency action, findings and conclusions found to be . . . contrary to constitutional right." 5 U.S.C. § 706(2)(B). "Because constitutional questions arising in a challenge to agency action under the APA fall expressly within the domain of the courts, we review de novo whether agency action violated a claimant's constitutional rights." Copar Pumice Co. v. Tidwell, 603 F.3d 780, 802 (10th Cir. 2010) (internal quotation marks omitted).

IV. *Universal Service Fund Issues*

In the Joint Universal Service Fund Principal Brief, Additional Universal Service Fund Issues Principal Brief, Wireless Carrier Universal Service Fund Principal Brief, and Tribal Carriers Principal Brief,[4] petitioners assert various challenges to the portions of the

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[4] Petitioners filed twelve sets of briefs in this action: one joint preliminary brief, four briefs addressing universal service fund issues, and seven briefs addressing intercarrier compensation issues. In addition, intervening local exchange carriers filed a brief in support of the petitioners. For ease of reference and citation, we have assigned a number to each of these twelve briefs. The four briefs addressed in this opinion have been assigned the following numbers:

Brief 3 - Joint Universal Service Fund Principal Brief;
Brief 4 - Additional Universal Service Fund Issues Principal Brief;
Brief 5 - Wireless Carrier Universal Service Fund Principal Brief; and
Brief 9 - Tribal Carriers Principal Brief.

Order revising how universal service funds are to be allocated to and employed by recipients. We proceed to address each of those briefs and the issues raised therein.

A. *Joint Universal Service Fund Principal Brief*

1. *Did the FCC's broadband requirement exceed its authority under 47 U.S.C. § 254?*

Petitioners argue that the FCC's "continued classification of broadband Internet access service as an 'information service' is fatal to" the FCC's condition that "USF support recipients . . . provide broadband Internet access to consumers on reasonable request." Pet'r Br. 3 at 11. More specifically, petitioners argue that the FCC, in requiring USF support recipients to provide broadband Internet access to consumers upon reasonable request, exceeded its authority under 47 U.S.C. § 254 in two ways. First, petitioners argue that the Act "expressly dictates that supported services are limited to an 'evolving level of *telecommunications services*.'" Id. (italics in brief). "But the Order," petitioners argue, "unlawfully mandates that carriers provide non-supported information services to receive USF support." Id. at 11-12. Second, petitioners argue that, although the Act expressly provides that USF support is to go exclusively to telecommunications carriers for the purpose of providing "telecommunications services," the Order "unlawfully gives USF support to entities that are not telecommunications carriers to provide non-telecommunications services." Id. at 11.

a) Relevant statutory language

In addressing petitioners' arguments, we begin by quoting at length the statutory language at issue. The primary statute upon which petitioners rely, 47 U.S.C. § 254, provides, in pertinent part, as follows:

> (b) **Universal service principles**. The [Federal-State] Joint Board[, which was created in subsection (a) by the 1996 Act,] and the Commission shall base policies for the preservation and advancement of universal service on the following principles:
>
> > (1) Quality and rates. Quality services should be available at just, reasonable, and affordable rates.
> >
> > (2) Access to advanced services. Access to advanced telecommunications and information services should be provided in all regions of the Nation.
> >
> > (3) Access in rural and high-cost areas. Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.
> >
> > (4) Equitable and nondiscriminatory contributions. All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.
> >
> > (5) Specific and predictable support mechanisms. There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.
> >
> > (6) Access to advanced telecommunications services for schools, health care, and libraries. Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).
> >
> > (7) Additional principles. Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the

protection of the public interest, convenience, and necessity and are consistent with this Act.

(c) **Definition**. (1) In general. Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services—

(A) are essential to education, public health, or public safety;
(B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;
(C) are being deployed in public telecommunications networks by telecommunications carriers; and
(D) are consistent with the public interest, convenience, and necessity.

(2) Alterations and modifications. The Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms.
(3) Special services. In addition to the services included in the definition of universal service under paragraph (1), the Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h).

(d) **Telecommunications carrier contribution**. Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

(e) **Universal service support**. After the date on which Commission regulations implementing this section take effect, only an eligible

> telecommunications carrier designated under section 214(e) [47 U.S.C. § 214(e)] shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, 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.

47 U.S.C. § 254(b), (c), (d), (e).

The terms "telecommunications," "telecommunications carrier," and "telecommunications service," which are used in § 254 and throughout the Act, are defined in the following manner:

> (50) Telecommunications. The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.
>
> (51) Telecommunications carrier. The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 [47 USCS § 226]). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.
>
> * * *
>
> (53) Telecommunications service. The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

47 U.S.C. § 153(50), (51), (53). Notably, "telecommunications service" is treated distinctly under the Act from "information service," which is defined under the Act as "the offering of a capability for generating, acquiring, storing, transforming, processing,

retrieving, utilizing, or making available information via telecommunications . . . ." 47 U.S.C. § 153(24).

b) Is the FCC prohibited from imposing the broadband requirement?

Petitioners argue that § 254 unambiguously bars the FCC from conditioning USF funding on recipients' agreement to provide broadband internet access services. Pet'r Br. 3 at 12. In support, petitioners begin by noting that § 254(c)(1) "explicitly defines 'universal service' as 'an evolving level of *telecommunications services*' the [FCC] is to establish, 'taking into account advances in telecommunications and information technologies and services.'" Id. at 12 (quoting 47 U.S.C. § 254(c)(1); emphasis added in brief). In turn, petitioners note that "'telecommunications services' are common carrier services under Title II of the Act, distinct from 'information services' defined in 47 U.S.C. § 153(24), and the [FCC] has declined to classify [broadband] services such as Voice over Internet Protocol ('VoIP'), as telecommunications services." Id. In particular, petitioners note that the FCC previously determined "that bundled broadband internet access is an 'information service,' not a 'telecommunications service,'" and that this determination "was upheld [by the Supreme Court] as a permissible choice under Chevron." Id. at 14 n. 7 (citing Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., Inc., 545 U.S. 967 (2005)).

Notwithstanding these facts, petitioners argue, the FCC concluded that, because "consumers are increasingly obtaining voice services" not from traditional methods "but through services like VoIP," "its 'authority to promote universal service . . . does not depend on whether VoIP services are telecommunications services or information services.'" Id. at 13 (quoting JA at 412 (Order ¶ 63)). "And," petitioners assert, "based on this conclusion, [the FCC] lumps supported telecommunications services with VoIP to create a new 'voice telephony service' classification and orders USF recipients to provide bundled Internet access, an information service, 'on reasonable request' as a condition of continued USF support." Id. at 13-14 (internal citations omitted).

Petitioners argue "that Section 254(c)(1)'s limits are unambiguous and deny the FCC the authority it claims." Id. at 14. More specifically, petitioners argue that the FCC, "[h]aving declined [previously] to define broadband Internet access or VoIP as telecommunications services, . . . is not then empowered to include them on the list of supported services simply because advancing the availability of broadband is a desirable goal." Id. Petitioners further argue that "[a]ny doubt on this score is dispelled by subsection (3) of Subsection 254(c)." Id. at 15. Section 245(c)(3), petitioners note, authorizes the FCC to "designate additional services for support mechanisms for schools, libraries and health care providers." 47 U.S.C. § 254(c)(3). Petitioners argue that, "[i]nterpreting the term 'additional services,' as the FCC has, to mean services in addition to telecommunications services, leads, inescapably, to the conclusion that Section 254(c)(3) creates a limited 'schools, libraries and hospitals' exception to the requirement that USF be used only to support 'telecommunications services.'" Pet'r Br. 3 at 15. "Under the doctrine of *expressio unius est exclusio alterius* ('the express mention of one thing excludes all others')," petitioners argue, "the inclusion of this authorization in

Section 254(c)(3) to support non-telecommunications services in specified circumstances precludes an interpretation authorizing the FCC to compel use of USF support to provide broadband Internet access, a non-telecommunication service, in others." Id. at 15-16 (italics in original).

The FCC, in its response, does not dispute that it has previously declined to classify broadband services, including VoIP, as "telecommunications services." But it does not view this, or anything else in § 254(c)(1)'s definition of "universal service," as a limitation on its authority to require recipients of USF funds to expend some of those funds to deploy networks capable of providing voice and broadband services. As it noted in the Order, it believes its "authority to promote universal service in this context does not depend on whether interconnected VoIP services are telecommunications services or information services under the . . . Act."[5] JA at 412 (Order ¶ 63). Rather, the FCC contends "that section 254(e) of the Act allow[s] it to . . . 'require carriers receiving federal universal service support to invest in modern broadband-capable networks.'" FCC Br. 3 at 13 (quoting JA at 413-414 (Order ¶ 65)). The FCC explains that Congress, by referring in § 254(e) "to 'facilities' and 'services' as distinct items for which federal universal service funds may be used, . . . granted [the FCC] the flexibility not only to

[5] The FCC concluded that "[i]f interconnected VoIP services are telecommunications services, [its] authority under section 254 to define universal service after 'taking into account advances in telecommunications and information technologies and services' enables [it] to include interconnected VoIP services as a type of voice telephony service entitled to federal universal service support." JA at 412 (Order ¶ 63 n.67).

designate the types of telecommunications services for which support would be provided, but also to encourage the deployment of the types of facilities that will best achieve the principles set forth in section 254(b) and any other universal service principle that the [FCC] may adopt under section 254(b)(7)." JA at 413 (Order ¶ 65).

The FCC further asserts that, under section 254(b), it possesses authority to create inducements, such as linking the receipt of USF funds to the requirement of deploying voice and broadband networks, to ensure that the universal service policies outlined in section 254(b) are achieved. Id.

Thus, the resolution of this issue hinges, in substantial part, on the interpretation of two subsections of § 254: subsection (c)(1) and subsection (e). Addressing these subsections in order, it is beyond dispute that subsection (c)(1) expressly authorizes the FCC to define "periodically" the types of telecommunications services that are encompassed by "universal service" and thus "supported by Federal universal service support mechanisms." Further, there is no question that the FCC, to date, has interpreted the term "telecommunications services" to include only telephone services and not VoIP or other broadband internet services. All that said, however, nothing in the language of subsection (c)(1) serves as an express or implicit limitation on the FCC's authority to determine what a USF recipient may or must do with those funds. More specifically, nothing in subsection (c)(1) expressly or implicitly deprives the FCC of authority to direct that a USF recipient, which necessarily provides some form of "universal service" and has been deemed by a state commission or the FCC to be an eligible telecommunications carrier under 47 U.S.C. § 214(e), use some of its USF funds to provide services or build facilities related to services that fall outside of the FCC's current definition of "universal service." In other words, nothing in the statute limits the FCC's authority to place conditions, such as the broadband requirement, on the use of USF funds.

That leaves § 254(e), the second sentence of which the FCC asserts authorizes it to direct that USF recipients provide broadband Internet access to customers upon reasonable request. The threshold question we must address, under Chevron, is whether Congress in § 254(e) "has directly spoken to the precise question at issue," 467 U.S. at 842, i.e., did Congress in the second sentence of § 254(e) delegate authority to the FCC to identify precisely what a recipient of USF funds must do with those funds, id. at 844.

As noted above, the second sentence of subsection (e) provides that "[an eligible telecommunications] carrier [designated under 47 U.S.C. § 214(e)] that receives [Federal universal service] support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." 47 U.S.C. § 254(e). Quite clearly, this language does not explicitly delegate any authority to the FCC. But the question remains whether this language can reasonably be construed, as the FCC suggests, as an implicit grant of authority to specify what a USF recipient may or must do with the funds?

Upon careful examination, we conclude that the FCC's interpretation of § 254(e) is not "arbitrary, capricious, or manifestly contrary to the statute." Chevron, 467 U.S. at 844. Congress clearly intended, by way of the second sentence of § 254(e), to mandate that USF funds be used by recipients "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." And it seems highly unlikely that Congress would leave it to USF recipients to determine what "the support is intended" for. Instead, as the FCC suggests, it is reasonable to conclude that Congress left a gap to be filled by the FCC, i.e., for the FCC to determine and specify precisely how USF funds may or must be used. And, as the FCC explained in the Order, carriers "that benefit from public investment in their networks must be subject to clearly defined obligations associated with the use of such funding." JA at 418 (Order ¶ 74).

The FCC also, in our view, reasonably concluded that Congress's use of the terms "facilities" and "service" in the second sentence of § 254(e) afforded the FCC "the flexibility not only to designate the types of telecommunications services for which support would be provided, but also to encourage the deployment of the types of facilities that will best achieve the principles set forth in section 254(b)." Id. at 412-13 (Order ¶ 64). Indeed, the FCC's interpretation "ensures that the term[s] ['facilities' and services'] carr[y] meaning, as each word in a statute should." Ransom v. FIA Card Servs., N.A., 131 S.Ct. 716, 724 (2011).

To be sure, petitioners argue that the concluding phrase of the second sentence of § 254(e), which reads "for which the support is intended," must be interpreted as a limit on the FCC's authority and effectively requires USF funds to be used, whether for "facilities" or "services," only in relation to "universal service," which, petitioners again note, the FCC has never expressly defined to include broadband or VoIP services. Pet'r

Br. 3 at 22-23. But that is not the only, or even the most sensible, interpretation of the phrase "for which the support is intended." Indeed, petitioners' proposed interpretation relies on the implicit assumption that USF funds were intended solely to support the provision of universal service. Had Congress intended such a result, however, it clearly could have said so in a more precise manner. For example, the concluding phrase could have read "for universal service" (rather than "for which the support is intended"). Because Congress instead chose to utilize broader language, it was certainly reasonable for the FCC to have concluded that the language was intended as an implicit grant of authority to the FCC to flesh out precisely what "facilities" and "services" USF funds should be used for. And the FCC's interpretation, we note, is consistent both with § 254(c)(1)'s express grant of authority to the FCC to periodically redefine "universal service" and § 254(b)'s express charge to the FCC to "base policies for the preservation and advancement of universal services on" a specific set of controlling principles outlined by Congress.

That leads to one final point regarding the FCC's interpretation of the second sentence of § 254(e). The FCC concluded, in pertinent part, that Congress, "[b]y referring [in the second sentence of § 254(e)] to 'facilities' and 'services' as distinct items for which [USF] funds may be used, . . . granted the [FCC] the flexibility not only to designate the types of telecommunications services for which support would be provided, but also to encourage the deployment of types of facilities that will best achieve the principles set forth in section 254(b) and any other universal service principle that the

[FCC] may adopt under section 254(b)(7)." JA at 412 (Order ¶ 64). This interpretation, in our view, is reasonable because it "consider[s] the operation of the statute as a whole." Adoptive Couple v. Baby Girl, 133 S.Ct. 2552, 2573 (2013). Section 254(b) clearly states that the FCC "shall base policies for the preservation and advancement of universal service" on six specific principles outlined by Congress (in subsections (b)(1) through (7)), as well as on "[s]uch other principles as . . . the [FCC] determine[s] are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with th[e] Act." By interpreting the second sentence of § 254(e) as an implicit grant of authority that allows it to decide how USF funds shall be used by recipients, the FCC also acts in a manner consistent with the directive in § 254(b) and allows itself to make funding directives that are consistent with the principles outlined in § 254(b)(1) through (7).

Thus, in sum, we conclude that petitioners are wrong in arguing that § 254 unambiguously bars the FCC from conditioning USF funding on recipients' agreement to provide broadband internet access services.

c) Is the FCC prohibited from providing USF support to entities that do not provide telecommunications services?

Petitioners also assert that the FCC exceeded the authority granted to it under § 254 by "extending USF support to non-ETCs for provision of broadband Internet access, a non-telecommunications service." Pet'r Br. 3 at 1. In support, petitioners note that § 254(e) "provides that only 'eligible telecommunications carriers,' i.e., those telecommunications carriers designated [by the FCC or a state commission] under Section 214, 'shall be eligible to receive specific Federal universal service support.'" Id. at 17 (quoting 47 U.S.C. § 254(e)). "To ensure that USF support is limited to telecommunications carriers providing telecommunications service," petitioners assert, Section 254(e) also provides that "'[a] carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.'" Id. (quoting § 254(e)). In turn, petitioners argue, "[t]he [FCC's] broadband condition is unlawful because it does not limit support to telecommunications carriers or require that USF be used for telecommunications services." Id. "Instead," they argue, "it provides USF support for 'voice telephony service,' which it called 'a technically neutral approach, allowing companies to provision voice service over any platform, including the PSTN and IP networks.'" Id. at 17-18 (internal citation omitted). Thus, petitioners argue, "[w]hile [USF] recipients must provide 'voice telephony service,' they are not required to provide *telecommunications* service subject to common carrier regulations under Title II of the Communications Act." Id. at 18 (emphasis in original; internal citation omitted). "Instead," petitioners argue, "a [USF] recipient may provide voice telephony service as VoIP, which the FCC has declined to classify as a telecommunications service." Id.

The FCC, acting under the express authority granted to it under § 254(c)(1), chose in the Order "to simplify how [it] describe[d]," JA at 411 (Order ¶ 62), the types of telecommunications services that are encompassed by "universal service" and thus "supported by Federal universal service support mechanisms," 47 U.S.C. § 254(c)(1). Prior to the Order, the FCC had defined those services "in functional terms (e.g., voice grade access to the PSTN, access to emergency services)." JA at 411 (Order at ¶ 62). In the Order, the FCC chose instead to employ "a single supported service designated as 'voice telephony service.'" Id. The FCC indicated that its primary justification for adopting this designation was the fact that "consumers are [increasingly] obtaining voice services not through traditional means but instead through interconnected VoIP providers offering service over broadband networks." Id. at 412 (Order ¶ 63). Although petitioners do not expressly challenge the FCC's decision in this regard, they contend that the FCC has used this new, simpler classification to provide funding to what they claim are entities that do not provide telecommunications services.

The fact remains, however, that in order to obtain USF funds, a provider must be designated by the FCC or a state commission as an "eligible telecommunications carrier" under 47 U.S.C. § 214(e). See 47 U.S.C. § 254(e) ("only an eligible telecommunications carrier designated under section 214(e) . . . shall be eligible to receive specific Federal universal service support."). And, under the existing statutory framework, only "common carriers," defined as "any person engaged as a common carrier for hire . . . in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy," 47 U.S.C. § 153(10), are eligible to be designated as "eligible telecommunications carriers," 47 U.S.C. § 214(e). Thus, under the current statutory regime, only ETCs can receive USF funds that could be used for VoIP support.

Consequently, there is no imminent possibility that broadband-only providers will receive USF support under the FCC's Order, since they cannot be designated as "eligible telecommunications carriers." As a result, we agree with the FCC that the petitioners' argument "will not be ripe for judicial review unless and until a state commission (or the FCC) designates . . . an entity" that is not a telecommunications carrier as "an 'eligible telecommunications carrier'" under § 214(e). FCC Br. 3 at 5.

(d) Does Section 706 of the Act, 47 U.S.C. § 1302, serve as an independent grant of authority to the FCC to impose the broadband requirement?

In a related attack on the FCC's broadband requirement, petitioners argue that Section 706 of the Act, 47 U.S.C. § 1302, does not, contrary to the conclusion reached by the FCC in the Order, serve as an independent grant of authority to the FCC.

Section 706 of the 1996 Act, entitled "Advanced telecommunications incentives," provides, in pertinent part, as follows:

> (a) **In general**. The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.
>
> (b) **Inquiry**. The Commission shall, within 30 months after the date of enactment of this Act [enacted Oct. 10, 2008], and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular,

> elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.
>
> * * *
>
> (d) **Definitions**. For purposes of this subsection:
>
> > (1) Advanced telecommunications capability. The term "advanced telecommunications capability" is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

47 U.S.C. § 1302.

In the Order, the FCC interpreted Section 706 as providing it with "independent authority . . . to fund the deployment of broadband networks." JA at 414 (Order ¶ 66). The FCC explained the basis for its decision as follows:

> 66. . . . In section 706, Congress recognized the importance of ubiquitous broadband deployment to Americans' civic, cultural, and economic lives and, thus, instructed the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." Of particular importance, Congress adopted a definition of "advanced telecommunications capability" that is not confined to a particular technology or regulatory classification. Rather, "'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video communications using any technology." Section 706 further requires the Commission to "determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion" and, if the

Commission concludes that it is not, to "*take immediate action* to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." The Commission has found that broadband deployment to all Americans has not been reasonable and timely and observed in its most recent broadband deployment report that "too many Americans remain unable to fully participate in our economy and society because they lack broadband." This finding triggers our duty under section 706(b) to "remov[e] barriers to infrastructure investment" and "promot[e] competition in the telecommunications market" in order to accelerate broadband deployment throughout the Nation.

67. Providing support for broadband networks helps achieve section 706(b)'s objectives. First, the Commission has recognized that one of the most significant barriers to investment in broadband infrastructure is the lack of a "business case for operating a broadband network" in high-cost areas "[i]n the absence of programs that provide additional support." Extending federal support to carriers deploying broadband networks in high-cost areas will thus eliminate a significant barrier to infrastructure investment and accelerate broadband deployment to unserved and underserved areas of the Nation. The deployment of broadband infrastructure to all Americans will in turn make services such as interconnected VoIP service accessible to more Americans.

68. Second, supporting broadband networks helps "promot[e] competition in the telecommunications market," particularly with respect to voice services. As we have long recognized, "interconnected VoIP service 'is increasingly used to replace analog voice service.'" Thus, we previously explained that requiring interconnected VoIP providers to *contribute* to federal universal service support mechanisms promoted competitive neutrality because it "reduces the possibility that carriers with universal service obligations will compete directly with providers without such obligations." Just as "we do not want contribution obligations to shape decisions regarding the technology that interconnected VoIP providers use to offer voice services to customers or to create opportunities for regulatory arbitrage," we do not want to create regulatory distinctions that serve no universal service purpose or that unduly influence the decisions providers will make with respect to how best to offer voice services to consumers. The "telecommunications market" — which includes interconnected VoIP and by statutory definition is broader than just telecommunications services — will be more competitive, and thus will provide greater benefits to

consumers, as a result of our decision to support broadband networks, regardless of regulatory classification.

69. By exercising our authority under section 706 in this manner, we further Congress's objective of "accelerat[ing] deployment" of advanced telecommunications capability "to all Americans." Under our approach, federal support will not turn on whether interconnected VoIP services or the underlying broadband service falls within traditional regulatory classifications under the Communications Act. Rather, our approach focuses on accelerating broadband deployment to unserved and underserved areas, and allows providers to make their own judgments as to how best to structure their service offerings in order to make such deployment a reality.

70. We disagree with commenters who assert that we lack authority under section 706(b) to support broadband networks. While 706(a) imposes a general duty on the Commission to encourage broadband deployment through the use of "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment," section 706(b) is triggered by a specific finding that broadband capability is not being "deployed to all Americans in a reasonable and timely fashion." Upon making that finding (which the Commission has done), section 706(b) requires the Commission to "take immediate action to accelerate" broadband deployment. Given the statutory structure, we read section 706(b) as conferring on the Commission the additional authority, beyond what the Commission possesses under section 706(a) or elsewhere in the Act, to take steps necessary to fulfill Congress's broadband deployment objectives. Indeed, it is hard to see what additional work section 706(b) does if it is not an independent source of authority.

71. We also reject the view that providing support for broadband networks under section 706(b) conflicts with section 254, which defines universal service in terms of telecommunications services. Information services are not excluded from section 254 because of any policy judgment made by Congress. To the contrary, Congress contemplated that the federal universal service program would promote consumer access to both advanced telecommunications and advanced information services "in all regions of the Nation." When Congress enacted the 1996 Act, most consumers accessed the Internet through dial-up connections over the PSTN, and broadband capabilities were provided over tariffed common carrier facilities. Interconnected VoIP services had only a nominal presence

in the marketplace in 1996. It was not until 2002 that the commission first determined that one form of broadband — cable modem service — was a single offering of an information service rather than separate offerings of telecommunications and information services, and only in 2005 did the Commission conclude that wireline broadband service should be governed by the same regulatory classification. Thus, marketplace and technological developments and the Commission's determinations that broadband services may be offered as information services have had the effect of removing such services from the scope of the explicit reference to "universal service" in section 254(c). Likewise, Congress did not exclude interconnected VoIP services from the federal universal service program; indeed, there is no reason to believe it specifically anticipated the development and growth of such services in the years following the enactment of the 1996 Act.

72. The principles upon which the Commission "shall base policies for the preservation and advancement of universal service" make clear that supporting networks used to offer services that are or may be information services for purposes of regulatory classifications is consistent with Congress's overarching policy objectives. For example, section 254(b)(2)'s principle that "[a]ccess to advanced telecommunications and *information services* should be provided in all regions of the Nation" dovetails comfortably with section 706(b)'s policy that "advanced telecommunications capability [be] deployed to all Americans in a reasonable and timely fashion." Our decision to exercise authority under Section 706 does not undermine section 254's universal service principles, but rather ensures their fulfillment. By contrast, limiting federal support based on the regulatory classification of the services offered over broadband networks as telecommunications services would exclude from the universal service program providers who would otherwise be able to deploy broadband infrastructure to consumers. We see no basis in the statute, the legislative history of the 1996 Act, or the record of this proceeding for concluding that such a constricted outcome would promote the Congressional policy objectives underlying sections 254 and 706.

73. Finally, we note the limited extent to which we are relying on section 706(b) in this proceeding. Consistent with our longstanding policy of minimizing regulatory distinctions that serve no universal service purpose, we are not adopting a separate universal service framework under section 706(b). Instead, we are relying on section 706(b) as an alternative basis to section 254 to the extent necessary to ensure that the federal

> universal service program covers services and networks that could be used to offer information services as well as telecommunications services. Carriers seeking federal support must still comply with the same universal service rules and obligations set forth in sections 254 and 214, including the requirement that such providers be designated as eligible to receive support, either from state commissions or, if the provider is beyond the jurisdiction of the state commission, from this Commission. In this way, we ensure that our exercise of section 706(b) authority will advance, rather than detract from, the universal service principles established under section 254 of the Act.

JA at 414-18 (Order ¶¶ 66-73) (internal footnotes omitted).

Petitioners offer a number of arguments in opposition to the FCC's conclusions. First, petitioners assert that the FCC previously concluded, in a 1998 order entitled In re Deployment of Wireline Servs. Offering Advanced Telecomms. Capability, 13 F.C.C.R. 24,012, 24,047, ¶ 77 (1998) (In re Deployment), that Section 706 "does not constitute an independent grant of authority." That prior conclusion, petitioners assert, is still binding and is directly contrary to the conclusion reached by the FCC in the Order at issue.

The problem with petitioners' argument, however, is that the FCC's conclusion in the 1998 order was confined to interpreting Section 706(a). See In re Deployment, 13 F.C.C.R. at 24,046-24,048. The 1998 order made no mention of, let alone attempted to interpret, Section 706(b). And, as outlined above, it is Section 706(b) that the FCC concludes in the Order provides it with independent authority relevant to this case. Thus, petitioner's argument fails.

Petitioners next take issue with the FCC's conclusion, in ¶ 70 of the Order, that "it is hard to see what additional work section 706(b) does if it is not an independent source of authority." According to petitioners, "[s]ubsection (b) . . . is not redundant at all." Pet'r Br. 3 at 25. More specifically, petitioners assert that subsection (a) imposes a general duty on the FCC without mandating any specific action, and that subsection (b), in turn, "mandates 'immediate action' if the FCC reaches a negative determination on 'whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.'" Id. (quoting 47 U.S.C. § 1302(b)). "This language," petitioners argue, "tells the FCC to put the powers it has to 'immediate action' but does not purport to grant any new powers." Id. at 26.

We reject petitioners' arguments. To be sure, both section 706(a) and section 706(b) focus on "the deployment . . . of advanced telecommunications capability to all Americans." Further, both sections make reference, in terms of achieving such deployment, to the removal of "barriers to infrastructure investment." But that is where the similarities end. As noted, section 706(a) is a general directive stating that the FCC "shall encourage the deployment . . . of advanced telecommunications capability to all Americans . . . by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." The FCC has concluded "that section 706(a) gives [it] an affirmative obligation to encourage the deployment of advanced services, relying on [its] authority established elsewhere in the [1996] Act." In re Deployment, 13 F.C.C.R. at 24,046 (¶74). In other words, the FCC has concluded that section 706(a) is "not . . . an independent grant of authority, but rather, . . . a direction to the [FCC] to use the forbearance [and other] authority granted elsewhere in the Act." Id. at 24,047 (¶76).

In contrast, section 706(b) requires the FCC to perform two related tasks. First, the FCC must conduct an annual inquiry to "determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." Second, and most importantly for purposes of this appeal, if the FCC's annual "determination is negative," it is required to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." Unlike section 706(a), section 706(b) does not specify how the FCC is to accomplish this latter task, or otherwise refer to forms of regulatory authority that are afforded to the FCC in other parts of the Act. As the FCC concluded in the Order, section 706(b) thus appears to operate as an independent grant of authority to the FCC "to take steps necessary to fulfill Congress's broadband deployment objectives," and "it is hard to see what additional work section 706(b) does if it is not an independent source of authority." JA at 416 (Order ¶ 70).

Lastly, petitioners argue that section 706(b), even if it does function as an independent source of authority for the FCC, cannot allow the FCC to ignore the limitations that section 254 imposes on the use of USF funds. Pet'r Br. 3 at 27. In support, petitioners repeat their previous argument that "[s]ection 254 expressly limits the availability of USF support to telecommunications carriers and defines 'telecommunications services' as the only services eligible for support." Id. For the reasons we have outlined above, however, that argument is without merit. In other words, section 254 does not limit the use of USF funds to "telecommunications services." Thus, to the extent the FCC relies on section 706(b) as support for its broadband requirement, section 706(b) is not contrary to section 254.

In sum, then, we conclude that the FCC reasonably construed section 706(b) as an additional source of support for its broadband requirement.

2. *Did the FCC act arbitrarily in simultaneously imposing the broadband requirement and reducing USF support?*

Petitioners next complain that the FCC's broadband requirement was "impose[d] . . . in the face of a *net reduction* to USF and related intercarrier compensation revenues for rural carriers." Pet'r Br. 3 at 29 (emphasis in original). They argue, in turn, that "[t]his 'do more with less' directive flies in the face of Congress's interrelated requirements under Section 254(b) that the FCC use USF to keep quality service 'affordable,' that consumers in high cost areas receive services comparable to those available to their urban counterparts at 'reasonably comparable' rates, that USF support mechanisms be 'predictable and sufficient' to preserve and advance universal service, and that telecommunications service providers contribute equitably to achieve that objective." Id. (citing 47 U.S.C. §§ 254(b)(1), (3), (5)). And, they argue, the FCC "made no attempt to measure whether reduced support, coupled with the added costs of the broadband obligation, will allow carriers to meet the universal service objectives of Section 254(b)." Id. at 30.

As previously noted, § 254(b) provides as follows:

> (b) **Universal service principles**. The [Federal-State] Joint Board[, which was created in subsection (a) by the 1996 Act,] and the Commission shall base policies for the preservation and advancement of universal service on the following principles:
>
> > (1) Quality and rates. Quality services should be available at just, reasonable, and affordable rates.
> >
> > (2) Access to advanced services. Access to advanced telecommunications and information services should be provided in all regions of the Nation.
> >
> > (3) Access in rural and high-cost areas. Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.
> >
> > (4) Equitable and nondiscriminatory contributions. All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.
> >
> > (5) Specific and predictable support mechanisms. There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.
> >
> > (6) Access to advanced telecommunications services for schools, health care, and libraries. Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).
> >
> > (7) Additional principles. Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this Act.

47 U.S.C. § 254(b).

This is not the first time we have analyzed § 254(b). In Qwest Corp., we noted that "[t]he plain text of the statute . . . indicates a mandatory duty on the FCC" to "base its universal policies on the principles listed in § 254(b)." 258 F.3d at 1200. "However," we emphasized, "each of the principles in § 254(b) internally is phrased in terms of 'should,'" which "indicates a recommended course of action, but does not itself imply the obligation associated with 'shall.'" Id. Consequently, we held, "the FCC must base its policies on the principles, but any particular principle can be trumped in the appropriate case." Id. In other words, "the FCC may exercise its discretion to balance the principles against one another when they conflict, but may not depart from them altogether to achieve some goal." Id.

a) Does the Order fail to ensure that USF support for rural carriers is sufficient to preserve and advance universal service?

Petitioners argue that the FCC failed to ensure that USF support for rural carriers is "'sufficient' . . . to achieve Congress's goals." Pet'r Br. 3 at 30. "The overarching problem," petitioners assert, "is that the [FCC] improperly limited its analysis to whether, without reform [i.e., a fixed budget], USF support would be *excessive*." Id. at 31 (emphasis in original). As a result, petitioners assert, "[t]he Order leaves unanalyzed whether reduced USF support will be sufficient to preserve and enhance traditional voice services." Id.

The term "sufficient" is mentioned in both § 254(b)(5) ("There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.”) and § 254(e) (“Any such support should be . . . sufficient to achieve the purposes of this section.”). The Fifth Circuit has concluded, however, that “§ 254(b) [simply] identifies a set of principles and does not lay out any specific commands for the FCC,” and that “[e]ven § 254(e), which is framed as a direct, statutory command, is ambiguous as to what constitutes ‘sufficient’ support.” Texas Office of Public Util. Counsel v. FCC, 183 F.3d 393, 425 (5th Cir. 1999). Consequently, the Fifth Circuit concluded, a reviewing court need “not consider the language an expression of Congress’s ‘unambiguous intent’ allowing Chevron step-one review,” and instead need only “review [the FCC’s] interpretation for reasonability under Chevron step-two.” Id. at 425-26. Because we agree with the Fifth Circuit, we need determine in this case only that the FCC’s “sufficiency” analysis was not arbitrary, capricious, or manifestly contrary to the statute.

At the outset, we note that the FCC’s counsel conceded at oral argument that the FCC, in preparing the Order and establishing the amount of USF funding, made no attempt to determine the precise cost for each potential USF recipient to fulfill the broadband requirement. According to the FCC’s counsel, that would have been exceedingly difficult to do, given the fact that there are approximately eight hundred rate-of-return carriers in the United States.[6] Instead, the FCC chose a different strategy for achieving the goal of budgetary "sufficiency."[7]

In setting the overall budget for the Connect America Fund (CAF), the FCC expressed a "commitment to controlling the size of the universal service fund," and, consequently, it "sought comment on setting an overall budget for the CAF such that the sum of the CAF and any existing legacy high-cost support mechanisms . . . in a given year would remain equal to current funding levels." JA at 437 (Order ¶ 121). "[A] broad cross-section of interested stakeholders . . . agreed" with this proposal, "with many urging the [FCC] to set that budget at $4.5 billion per year, the estimated size of the program in fiscal year (FY) 2011." Id. (Order ¶ 122). After considering these comments, the FCC concluded that the "establish[ment] [of] a defined budget for the high-cost component of

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[6] As discussed below, even objectors to the FCC's proposed budget failed to offer the FCC details of their individual circumstances.

[7] The dissent, relying on Qwest Corp., effectively rejects the FCC's strategy and takes it to task for not "estimat[ing] . . . the cost of its new broadband requirements on the industry as a whole." Dissent at 5. But Qwest, though useful for its general analysis of § 254(b), does not provide a relevant point of comparison when it comes to assessing whether the Order in this case achieves the goal of budgetary "sufficiency." That is because Qwest dealt with a cost model employed by the FCC for purposes of determining universal service funding for non-rural telecommunications carriers in areas "where the average cost of providing service exceeded [a] national benchmark defined in terms of the average cost across the nation." 258 F.3d at 1197. Necessarily, a cost model is intended to estimate, with some degree of accuracy, the costs of a product or project. In contrast, the Order at issue in this case never purported, nor was it statutorily required, to estimate the costs of broadband deployment, either per carrier or for the industry as a whole.

We also, in any event, question how the FCC could have "estimate[d] . . . the cost of its new broadband requirements on the industry as a whole" when, as the dissent itself concedes, the FCC "could not have determined the cost of the broadband condition for each carrier seeking relief through the Universal Service Fund." Dissent at 5.

the universal service fund" would "best ensure that [it] ha[d] in place 'specific, predictable, and sufficient' funding mechanisms to ensure [its] universal service objectives." Id. (Order ¶ 123). In reaching this conclusion, the FCC expressed concern that, "were the CAF to significantly raise the end-user cost of services, it could undermine [the FCC's] broader policy objectives to promote broadband and mobile deployment and adoption." Id. at 438 (Order ¶ 124). And, consistent with many of the comments it received, the FCC "establish[ed] an annual funding target, set at the same level as [its] current estimate for the size of the high-cost program for FY 2011, of no more than $4.5 billion."[8] Id. (Order ¶ 125). The FCC found "that amount [was not] excessive given" its decision to "expand the high-cost program in important ways to promote broadband and mobility; facilitate intercarrier compensation reform; and preserve universal voice connectivity." Id. "At the same time," the FCC found that "a higher budget [was not] warranted, given the substantial reforms [it was] adopt[ing] to modernize [its] legacy funding mechanisms to address long-standing inefficiencies and wasteful spending." Id. The FCC also noted that it would need "to evaluate the effect of these reforms before adjusting [its] budget," id., and it specifically stated that it "anticipate[d] . . . revisit[ing] and adjust[ing] accordingly the appropriate size of each of [its] programs by the end of the six-year period, based on market developments," id. at 399 (Order ¶ 18).

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[8] Of this amount, "approximately $4 billion . . . will be divided between areas served by price cap carriers and areas served by rate-of-return carriers, with no more than $1.8 billion available annually for price cap territories . . . and up to $2 billion available annually for rate-of-return territories." JA at 438 (Order ¶ 126).

After establishing this overall budget, the FCC stated that it intended to "step away from distinctions based on whether a company is classified as a rural carrier or a non-rural carrier" and to "establish two pathways for how support is determined—one for companies whose interstate rates are regulated under price caps, and the other for those whose interstate rates are regulated under rate-of-return." Id. at 440 (Order ¶ 129). The FCC then proceeded to allocate portions of the overall CAF budget to these two groups of carriers.

Turning first to price cap carriers, the FCC noted that they serve "[m]ore than 83 percent of the approximately 18 million Americans who lack access to fixed broadband." Id. at 439 (Order ¶ 127). The FCC outlined a two-phase framework for distributing CAF funds to these carriers. "CAF Phase I," the FCC explained, would "freeze support under [its] existing high-cost support mechanisms . . . for price cap carriers and their rate of return affiliates," and would also, in order "to spur the deployment of broadband in unserved areas, . . . allocate up to $300 million in additional support to such carriers." Id. (Order ¶ 128). The distribution of this additional, or "incremental support," the FCC stated, would be "distribute[d] . . . using a simplified forward-looking cost estimate" that was not objected to by any party. Id. at 442 (Order ¶ 133); see id. at 442-43 (Order ¶ 134). The FCC emphasized that this incremental support was not intended to cover the full costs of broadband deployment:

> We acknowledge that our existing cost model, on which our distribution mechanism for CAF Phase I incremental funding is based, calculates the cost of providing voice service rather than broadband service, although we

> are requiring carriers to meet broadband deployment obligations if they accept CAF Phase I incremental funding. We find that using estimates of the cost of deploying voice service, even though we impose broadband deployment obligations, is reasonable in the context of this interim support mechanism. First, this interim mechanism is designed to identify the most expensive wire centers, and the same characteristics that make it expensive to provide voice service to a wire center (e.g., lack of density) make it expensive to provide broadband service to that wire center as well. Using a cost estimation function based on our existing model will help to identify *which* wire centers are likely to be the most expensive to provide broadband service to, even if it does not reliably identify precisely *how expensive* those wire centers will be to serve. Second, and related, our funding threshold is determined by our budget limit of $300 million for CAF Phase I incremental support rather than by a calculation of what amount we expect a carrier to need to serve that area. That is, this interim mechanism is not designed to "fully" fund any particular wire center—it is not designed to fund the difference between (i) the deployment cost associated with the most expensive wire center in which we could reasonably expect a carrier to deploy broadband without any support at all and (ii) the actual estimated deployment cost for a wire center. Instead, the interim mechanism is designed to provide support to carriers that serve areas where we expect that providing broadband service will require universal service support.

Id. at 444 (Order ¶ 137 n.220). In short, the FCC stated, its objective for CAF Phase I was not "to identify the precise cost of deploying broadband to any particular location," but instead "to identify an appropriate standard to spur immediate broadband deployment to as many unserved locations as possible, given [its] budget constraint."[9] Id. at 445

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[9] For purposes of CAF Phase I incremental funding, the FCC found "that a one-time support payment of $775 per unserved location for the purpose of calculating broadband deployment obligations for companies that elect[ed] to receive additional support [wa]s appropriate." JA at 445 (Order ¶ 139). In arriving at this amount, the FCC "considered broadband deployment projects undertaken by a mid-sized price cap carrier under the BIP program," id. (Order ¶ 140), "data from the analysis done as part of the National Broadband Plan," id. (Order ¶ 141), its own "analysis using the ABC plan cost model, which calculate[d] the cost of deploying broadband to unserved locations on a census block basis," id. at 444-45 (Order ¶ 142), and "estimates of the per-location cost of extending broadband to unserved locations" placed in the record by several carriers, id. at

(Order ¶ 139). Relatedly, the FCC noted that it "expect[ed] that carriers w[ould] supplement incremental support with their own investment."[10] Id. at 446 (Order ¶ 144).

The FCC's Order also "adopt[ed] Phase II of the Connect America Fund" for price-cap carriers, which established "a framework for extending broadband to millions of unserved locations over a five-year period, . . . while sustaining existing voice and broadband services." Id. at 452 (Order ¶ 156). "Within the total $4.5 billion annual [CAF] budget, [the FCC] set the total annual CAF budget for areas currently served by price cap carriers at no more than $1.8 billion for a five-year period." Id. (Order ¶ 158). The FCC concluded that this amount "represent[ed] a reasonable balance" of several considerations, including its "universal service mandate to unserved consumers residing in [price cap] communities," and its need "to balance many competing demands for universal service funds." Id. And the FCC "adopt[ed] the following methodology for providing CAF support in price cap areas" during CAF Phase II:

> First, the Commission will model forward-looking costs to estimate the cost of deploying broadband-capable networks in high-cost areas and identify at a granular level the areas where support will be available. Second, using the cost model, the Commission will offer each price cap LEC annual support for a period of five years in exchange for a commitment to offer voice across its service territory within a state and broadband service to supported locations within that service territory, subject to robust public interest obligations and accountability standards. Third, for all territories

445 (Order ¶ 143).

[10] The Order emphasized that price cap carriers were free to decline CAF Phase I incremental support, in which case they would be under no obligation to satisfy the broadband conditions outlined in the Order. JA at 444 (Order ¶ 138); id. at 447 (Order ¶ 144).

> for which price cap LECs decline to make that commitment, the Commission will award ongoing support through a competitive bidding mechanism.

Id. at 454-55 (Order ¶ 166).

The FCC then turned to rate-of-return carriers and, as with price cap carriers, established a new funding framework. To begin with, the FCC allocated "approximately $2 billion per year" to rate-of-return carriers, an amount "approximately equal to current levels." Id. at 465 (Order ¶ 195). In doing so, the FCC expressed its belief "that keeping rate-of-return carriers at approximately current support levels in the aggregate during th[e] transition [to a more incentive-based form of regulation] appropriately balance[d] the competing demands on universal service funding and the desire to sustain service to consumers and provide continued incentives for broadband expansion as [it] improve[d] the efficiency of rate-of-return mechanisms." Id.

Along with setting this annual budget for rate-of-return carriers, the FCC "implement[ed] a number of reforms to eliminate waste and inefficiency and improve incentives for rational investment and operation by rate-of-return LECs." Id. These included: (1) establish[ing] parameters for what actual unseparated loop and common line costs carriers [could] seek recovery for under the federal universal service program," id. (Order ¶ 196); (2) "reduc[ing] . . . high-cost loop support to the extent that a [rural] carrier's local rates [we]re below a specified urban local rate floor," id. at 466 (Order ¶ 197); (3) eliminating safety net additive support received as a result of line loss, id. (Order ¶ 198); (4) eliminating local switching support, id. (Order ¶ 199); (5)

"eliminat[ing] support for rate-of-return companies in any study area that is completely overlapped by an unsubsidized competitor," id. (Order ¶ 200); and (6) "adopt[ing] a rule that support in excess of $250 per line per month will no longer be provided to any carrier," id. (Order ¶ 201).

In a section of the Order entitled "Public Interest Obligations of Rate-of-Return Carriers," the FCC announced its requirement "that [rate-of-return] recipients use their support in a manner consistent with achieving universal availability of voice and broadband." Id. at 467 (Order ¶ 205). But, the FCC emphasized, "rather than establishing a mandatory requirement to deploy broadband-capable facilities to all locations within their service territory, [it would] continue to offer a more flexible approach for these smaller carriers." Id. (Order ¶ 206). In particular, the FCC emphasized that "rate-of-return carriers w[ould] not necessarily be required to build out to and serve the most expensive locations within their service area," id. at 468 (Order ¶ 207), nor would they be subject to "intermediate build-out milestones or increased speed requirements for future years," id. at 467-68 (Order ¶ 206). Thus, the relative cost of providing broadband service to a particular location is a relevant factor in determining whether a customer's request to a rate-of-return carrier for broadband service is reasonable. And, as the FCC's counsel emphasized at oral argument, the Order leaves it to rate-of-return carriers in the first instance to determine whether a customer's request for broadband service is reasonable.

In a separate section discussing the "Connect America Fund in Remote Areas," the Order expressly "exempted the most remote areas, including fewer than 1 percent of all American homes, from the home and business broadband service obligations that otherwise apply to CAF recipients." Id. at 564-65 (Order ¶ 533). The Order also noted that "universal service revenues account for [only] approximately 30 percent of the typical rate-of-return carrier's total revenues," and it concluded that the intercarrier compensation reforms outlined in the Order "w[ould] provide rate-of-return carriers with access to a new explicit recovery mechanism in [the Connect American Fund], offering a source of stable and certain revenues that the [prior] intercarrier system c[ould] no longer provide." Id. at 496-97 (Order ¶ 291).

The Order also, in a section entitled "Impact of these Reforms on Rate-of-Return Carriers and the Communities They Serve," addressed the likely impact of its proposed reforms on rate-of-return carriers and the communities served by those carriers. To begin with, the Order concluded that its intercarrier compensation reforms and set budget would "provide greater certainty and a more predictable flow of revenues [to those carriers] than the status quo." Id. at 495 (Order ¶ 286). The Order in turn opined "that carriers that invest and operate in a prudent manner w[ould] be minimally affected by th[e] Order." Id. at 496 (Order ¶ 289). In support, the Order concluded "that nearly 9 out of 10 rate-of-return carriers w[ould] see reductions in high-cost universal service receipts of less than 20 percent annually, . . . approximately 7 out of 10 w[ould] see reductions of less than 10 percent," and "almost 34 percent w[ould] see an increase in high-cost universal service receipts." Id. (Order ¶ 290).

Lastly, the Order noted that "various parties . . . ha[d] argued that reductions in current support levels would threaten their financial viability, imperiling service to consumers in the areas they serve[d]." Id. at 566 (Order ¶ 539). The FCC determined it could not "evaluate those claims absent detailed information about individualized circumstances," and thus "conclude[d] that they [we]re better handled in the course of a case-by-case review."[11] Id. Consequently, the Order authorizes "any carrier negatively affected by the universal service reforms" adopted in the Order "to file a petition for waiver that clearly demonstrates that good cause exists for exempting the carrier from some or all of those reforms, and that waiver is necessary and in the public interest to ensure that consumers in the area continue to receive voice service." Id.

In sum, the FCC determined that budgetary "sufficiency" for price cap and rate-of-return carriers could be achieved through a combination of measures, including, but not limited to: (1) maintaining current USF funding levels while reducing or eliminating waste and inefficiencies that existed in the prior USF funding scheme; (2) affording

[11] Although the dissent asserts that "[t]he sufficiency of the budget was challenged in the FCC proceedings," it cites to only two objections contained in the record. Dissent at 3. And, as it turns out, only one of those two (from tribal carrier Gila River Telecommunications, Inc.) offered any details of the costs of complying with the broadband requirement (and in that regard, Gila cited only one extreme example, rather than outlining its average or overall costs of broadband deployment). See JA at 4094 ("Costs of deploying fiber-to-the-home have been as high as $12,000 for a single residence.").

carriers the authority to determine which requests for broadband service are reasonable; (3) allowing carriers, when necessary, to use the waiver process; and (4) conducting a budgetary review by the end of six years. And, relatedly, the FCC quite clearly rejected any notion that budgetary "sufficiency" is equivalent to "complete" or "full" funding for carrying out the broadband and other obligations imposed upon carriers who are voluntary recipients of USF funds. In our view, these determinations were not arbitrary, capricious, or manifestly contrary to the directives outlined in § 254. To contrary, the FCC's determinations, particularly when considered in light of the other statutory directives the FCC was charged with achieving, were reasonable and sufficient to survive scrutiny under Chevron step-two analysis.

b) Does the Order fail to ensure service and rate comparability between rural and urban areas?

According to petitioners, the FCC "acknowledges it has not investigated what broadband service or rate levels are offered in either rural or urban areas." Pet'r Br. 3 at 33. Petitioners argue, in turn, that the FCC "cannot possibly confirm that its policies enable rural carriers to provide broadband service 'at rates reasonably comparable to rates charged for similar services in urban areas,' Section 254(b)(3), if it has failed to determine the urban rate and service levels to which rural rates and service are to be compared." Id. at 33-34.

We reject petitioners' arguments, however, because they ignore the FCC's efforts to accurately assess urban rates and satisfy its statutory obligations. In the Order, the

FCC noted that it "ha[d] never compared broadband rates for purposes of section 254(b)(3)." JA at 435 (Order ¶ 113). Consequently, the FCC "directed [its Wireline Competition Bureau and its Wireless Telecommunications Bureau] to develop a specific methodology for defining that reasonable range, taking into account that retail broadband service is not rate regulated and that retail offerings may be defined by price, speed, usage limits, if any, and other elements." Id. The FCC also sought "comment on how specifically to define a reasonable range." Id. Relatedly, the FCC "delegate[d] to the Wireline Competition Bureau and Wireless Telecommunications Bureau the authority to conduct an annual survey of urban broadband rates, if necessary, in order to derive a national range of rates for broadband service." Id. at 435 (Order ¶ 114). "By conducting [its] own survey," the FCC concluded, it "w[ould] be able to tailor the data specifically to [its] need to satisfy [its] statutory obligation." Id.

c) Does the Order's establishment of a budget cap, without widening the contribution base, fail to protect affordability or ensure equitable fund contributions?

Petitioners argue that the Order's imposition of a USF budget cap, "[w]ithout widening the contribution base, . . . will do nothing to ensure affordability." Pet'r Br. 3 at 34. "The problem," according to petitioners, "is that telecommunications voice revenues are declining." Id. As a result, they argue, "[e]ven a fixed budget will have to be recovered from fewer customers, whose individual charges will *go up* (become *less* affordable), unless the contribution base is widened." Id. at 34-35 (emphasis in original). In turn, petitioners argue that, even assuming that the FCC acted within its authority in imposing the broadband mandate, "it is inequitable to exempt telecommunications providers who also offer broadband from being required to contribute to universal service from the revenues they receive for such services, particularly since rural carriers assuming a broadband obligation will incur added costs." Id. at 35. And, they argue, it is not enough for the FCC to "decide at some unspecified future date . . . whether to expand its contribution base." Id.

Two points are clear from the Order and the parties' briefs. First, the Order concluded that the existing contribution framework (which is comprised of assessments paid by interstate telecommunications service providers) was sufficient to satisfy the annual USF budget established in the Order. Second, the FCC chose to address potential changes to the contribution framework in a separate proceeding. More specifically, the FCC in a separate rulemaking docket has sought comment on proposals to reform and modernize how USF contributions are assessed and recovered. See Universal Service Contribution Methodology; A National Broadband Plan for Our Future, 27 FCC Rcd 5357, 5358 (2012).

As the FCC correctly notes in its appellate response brief, 47 U.S.C. § 154(j) affords it the discretion to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." FCC Br. 3 at 68. And we agree with the FCC that its decision to address USF contributions not in the Order, but rather in a separate proceeding, falls well within that discretion.

d) Does the FCC's "regression rule" violate § 254's predictability requirement?

Petitioners next take issue with what they describe as the Order's "regression rule."[12] According to petitioners, the regression rule is inconsistent with § 254(b)(5)'s mandate that "[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." 47 U.S.C. § 254(b)(5). More specifically, petitioners assert that "[t]he Order's regression rule . . . contravenes this mandate in three respects: (1) it delegates authority to devise a rule limiting USF support to its Wireline Competition Bureau ('WCB') in violation of its own rules and then compounds the uncertainty thereby created by (2) leaving the WCB unbounded discretion to devise the rule and subsequently (3) to revise it without abiding by APA notice and comment procedures." Pet'r Br. 3 at 36-37. The end result, petitioners argue, is unpredictability because "a carrier simply cannot know from year to year which investment or expenses will be supported and which will not," and thus will be "at a loss as to how to make business plans for the future." Id. at 38.

The "regression rule" referred to by petitioners, as best we can tell, is part of the FCC's new "benchmarking rule" for limiting the reimbursable capital and operating expenses in the formula used to determine high-cost loop support (HCLS) for rate-of-return carriers. See FCC Br. 3 at 41. The benchmarking rule was adopted by the FCC in the Order to "ensur[e] that companies do not receive more support than necessary to serve

[12] Notably, petitioners fail to identify in their briefs where the so-called "regression rule" is discussed in the Order.

their communities," JA at 468 (Order ¶ 210), and to "create structural incentives for rate-of-return companies to operate more efficiently and make prudent expenditures," id. at 469 (Order ¶ 210). The benchmarking rule is based on the FCC's "proposed . . . regression analyses to estimate appropriate levels of capital expenses and operating expenses for each incumbent rate-of-return study area and limit expenses falling above a benchmark based on this estimate." Id. (Order ¶ 212). "Th[is] methodology," the Order stated, "will generate caps, to be updated annually, for each rate-of-return company." Id. at 470 (Order ¶ 214).

The FCC, in the Order, "delegate[d] authority to the Wireline Competition Bureau to implement a methodology." Id. at 469 (Order ¶ 210). In doing so, the Order "set forth in" an attached Further Notice of Proposed Rulemaking "a specific methodology for capping recovery for capital expenses and operating expenses using quantile regression techniques and publicly available cost, geographic and demographic data." Id. at 470 (Order ¶ 216). The FCC "invite[d] public input . . . on that methodology." Id. at 471 (Order ¶ 471). On April 25, 2012, the Wireline Competition Bureau completed its assigned task and finalized the benchmarking methodology after considering the record compiled in response to the Further Notice of Proposed Rulemaking. FCC Br. 3 at 42.

According to the FCC, the challenges that petitioners now pose to the benchmarking and regression rules were never raised by petitioners during the administrative process. In particular, the FCC asserts, "[p]etitioners did not raise these contentions before the [FCC] in a petition for reconsideration." Id. at 43. Consequently, the FCC asserts, the contentions must be considered waived pursuant to 47 U.S.C. § 405(a).

Section 405(a) authorizes a party to file with the FCC a motion for reconsideration of “an order, decision, report, or action” of the FCC. 47 U.S.C. § 405(a). “[F]iling a petition for reconsideration before the [FCC] is ‘a condition precedent to judicial review . . . where the party seeking such review . . . relies on questions of fact or law upon which the [FCC] . . . has been afforded no opportunity to pass.’” See Globalstar, Inc. v. FCC, 564 F.3d 476, 483 (D.C. Cir. 2009) (quoting § 405(a)). “Thus, even when a petitioner has no reason to raise an argument until the FCC issues an order that makes the issue relevant, the petitioner must file a petition for reconsideration with the [FCC] before it may seek judicial review.” Id. at 484 (internal quotation marks omitted). In short, then, § 405(a) requires that the FCC be given an “opportunity to pass” on an issue before the issue is raised in federal court. Id. at 479. If the FCC has not been given such an opportunity, the issue is deemed waived for purposes of federal court review. Id.

In their reply brief, petitioners assert that “[t]he illegality of [the regression rule]’s delegation was in fact raised in [the] Petition for Reconsideration and Clarification of the National Exchange Carrier Association, Inc., et al.” Pet’r Reply Br. 3 at 20 n.8. A review of the Joint Appendix confirms that the National Exchange Carrier Association (NECA), an entity that is not a petitioner or intervenor in this appeal, did, in fact, move for reconsideration of the FCC’s adoption of the use of annual regression analysis. Petitioners have not identified with specificity, however, which statements in the NECA’s petition for reconsideration they believe related to the arguments they now seek to assert. Having conducted our own review of the NECA's petition for reconsideration, we note that two sentences therein specifically addressed the FCC's "use of a regression analysis." JA at 4087. The first sentence stated: "By firmly adopting the use of regression analysis before giving parties the ability to consider whether this approach truly works or whether other constraints might yield better result, the [FCC] has ventured down a path that could limit cost recovery in unworkable or unlawful ways." Id. The second, and immediately following sentence, stated: "The [FCC] should accordingly reconsider its conclusion to utilize a regression analysis to develop the new caps, and should state instead that it will *examine* a regression analysis approach . . . , subject to adequate notice and comment, *before* it adopts and implements a particular form of investment or operating expense constraint." Id. (emphasis in original). The NECA's petition for reconsideration also, in reference to the FCC's "decision to change the caps each year based upon a refreshed 'run' of the regression analyses," complained that "this dynamic capping does nothing to restore predictability to the high-cost program but instead only exacerbates uncertainty." Id. Lastly, the NECA's petition for reconsideration asserted in a footnote that the FCC's "decision to delegate to the Wireline Competition Bureau the authority to establish regression-based constraints raises serious legal concerns as well."[13] Id. n.22.

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[13] The NECA's petition for reconsideration did not otherwise specify the purported "serious legal concerns." Instead, it simply cited to a "Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et al.* (filed Oct. 21, 2011) at 2." Notably, petitioners in this appeal have not themselves cited to the "Letter from Michael R. Romano," nor have they cited to where in the record this document can be

We conclude that none of these statements in the NECA's petition for reconsideration are sufficiently specific to encompass the petitioners' arguments that the FCC's regression rule "(1) . . . delegates authority to devise a rule limiting USF support to its Wireline Competition Bureau . . . in violation of its own rules and then compounds the uncertainty thereby created by (2) leaving the WCB unbounded discretion to devise the rule and subsequently (3) to revise it without abiding by APA notice and comment procedures." Pet'r Br. 3 at 36-37. Consequently, we deem these arguments waived since the FCC was never given an opportunity pass on them prior to this appeal. See Globalstar, 564 F.3d at 484 (holding that, when a party complains of a technical or procedural mistake, the party must raise the precise claim before the FCC).

We are persuaded, however, that petitioners' general attack on the predictability of the FCC's regression rule was sufficiently raised in the NECA's petition for reconsideration and thus is subject to judicial review. But, that said, we agree with the FCC that there is no merit to this attack. To begin with, the method to be utilized by the WCB in arriving at the annual HCLS disbursement amounts is far from unpredictable. The Order circumscribed the WCB's authority by "set[ting] forth . . . parameters of the methodology that the [WCB must] use to limit payments from HCLS."[14] JA at 471

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found. And our own examination indicates that the October 21, 2011 "Letter from Michael R. Romano" was not included in the Joint Appendix. Consequently, we conclude that the NECA's reference to "serious legal concerns" was simply too vague to have alerted the FCC to the specific concerns now asserted by petitioners.

[14] These parameters "require that companies' costs be compared to those of similarly situated companies," "that statistical techniques should be used to determine

(Order ¶ 217). In turn, the Order requires the WCB "[e]ach year" to "publish in a public notice the updated capped values that will be used." Id. (Order ¶ 218). Together, we believe, these measures are sufficient to satisfy § 254(b)(5)'s predictability requirement. See Alenco Commc'ns, Inc. v. FCC, 201 F.3d 608, 622 (5th Cir. 2000) (concluding that "[t]he methodology governing subsidy disbursements" was predictable because it was "plainly stated and made available to" carriers). Relatedly, we agree with the FCC that nothing in the Act guarantees that HCLS disbursements will be the same from year to year. Nor does the Act guarantee "predictable market outcomes" or "protection from competition." Alenco, 201 F.3d at 622.

3. *Does the FCC's use of auctions to distribute USF violate § 214(e)?*

Petitioners contend that the FCC's use of auctions to distribute USF violates 47 U.S.C. § 214(e). According to petitioners, "Congress," by way of § 214(e), "expressly gave State commissions the job of deciding *who* would receive universal service support and *where* supported services would be advertised and provided by the carrier." Pet'r Br. 3 at 40 (emphasis in original). More specifically, petitioners assert, § 214(e) "provides that only ETCs may receive USF support and that, with narrow exceptions, only states may designate ETCs and their service areas." Id. at 39. And, they assert, "[o]nce an ETC is designated by a state commission to serve a particular service area under Section

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which companies shall be deemed similarly situated," a "non-exhaustive list of variables that may be considered" by the WCB, and a grant of authority to the WCB "to determine whether other variables . . . would improve the regression analysis. JA at 471 (Order ¶ 217).

214(e)(2), it is eligible to receive funding and must offer and advertise the supported services throughout its service area." Id.

Petitioners complain that "[t]he *Order* contravenes this statutory scheme in two respects." Id. (italics in original). "First," petitioners assert, the Order "adopted various competitive bidding mechanisms to distribute USF support, and provided that the [FCC] will define the geographic areas to be auctioned off." Id. at 39-40. "Second," petitioners assert, "the FCC created an entirely new 'conditional designation,' nowhere mentioned in the statute, that will require state commissions to conditionally designate 'ETCs' before auctions to distribute Mobility Fund support are concluded." Id. at 40.

To properly address petitioners' arguments, it is useful to begin with the language of § 214(e). That section, entitled "Provision of universal service," provides, in pertinent part, as follows:

> (1) Eligible telecommunications carriers. A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 [47 USCS § 254] and shall, throughout the service area for which the designation is received—
>
> > (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) [47 USCS § 254(c)], either using its own facilities or a combination of its own facilities and resale of another carrier's services . . . ; and
> > (B) advertise the availability of such services and the charges therefor using media of general distribution.
>
> (2) Designation of eligible telecommunications carriers. A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. * * *

> (3) Designation of eligible telecommunications carriers for unserved areas. If no common carrier will provide the services that are supported by Federal universal support mechanisms under section 254(c) [47 USCS 254(c)] to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services or an area served by a common carrier to which paragraph (6) applies, or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof. * * * * * *
> (6) Common carriers not subject to State commission jurisdiction. In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission, the Commission shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the Commission consistent with applicable Federal and State law. * * *

47 U.S.C. § 214(e).

As the FCC notes in its response brief, its Order "reformed the distribution of high-cost universal service support, [but] left intact the state commissions' authority to designate ETCs and their service areas." FCC Br. 3 at 63. In particular, the Order "decline[d] to adopt the structure of the [existing] competitive ETC rules, which provide[d] support for multiple providers in an area." JA at 506 (Order ¶ 316). In the FCC's view, "that structure . . . led to duplicative investment by multiple competitive ETCs in certain areas at the expense of investment that could be directed elsewhere, including areas that are not currently served." Id. In place of the existing system, the FCC adopted, in pertinent part, "a competitive bidding mechanism" that "award[s] support based on the lowest per-unit bid amounts submitted in a reverse auction, subject to the constraint . . . that there will be no more than one recipient per geographic area, so as to make the limited funds available go as far as possible."[15] Id. at 507 (Order ¶ 321).

Notably, the Order emphasized that "[c]arriers seeking federal support must still comply with the same universal service rules and obligations set forth in sections 254 and 214, including the requirement that such providers be designated as eligible to receive support, either from state commissions or, if the provider is beyond the jurisdiction of the state commission, from th[e] [FCC]." Id. at 418 (Order ¶ 73). In other words, "parties that seek to participate in the auction must be ETCs in the areas for which they will seek support at the deadline for applying to participate in the auction." Id. at 525 (Order ¶ 389). The Order "decline[d] to adopt the alternative of allowing parties to bid for support prior to being designated an ETC." Id. at 526 (Order ¶ 392). Relatedly, the Order recognized that "the states have primary jurisdiction to designate ETCs; the [FCC] designates ETCs where states lack jurisdiction." Id. at 525 (Order ¶ 390 n.662). Lastly, the Order concluded that "nothing in the statute compels that every party eligible for support actually receives it." Id. at 507 (Order ¶ 318).

The key flaw in petitioners' argument, as the FCC correctly notes in its response brief, is that "it conflates eligibility for subsidies with the right to receive subsidies."

[15] For price cap areas, the Order indicated that the FCC would "offer each price cap LEC annual support for a period of five years in exchange for a commitment to offer voice across its service territory, subject to robust public interest obligations and accountability standards." JA at 454 (Order ¶ 166). However, "for all territories for which price cap LECs decline to make that commitment, the [FCC] will award ongoing support through" the reverse auction process. Id.

FCC Br. 3 at 62. To be sure, § 214(e) authorizes state commissions to decide which entities will be designated as ETCs and, relatedly, to determine the service areas served by those ETCs.[16] But nothing in § 214(e) gives authority to the state commissions to allocate USF funds, nor does § 214(e) give a designated ETC the absolute right to receive USF funds. Rather, as the language of § 214(e)(1) makes clear, "[a] common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 [47 USCS § 254]." 47 U.S.C. § 214(e) (emphasis added). Had Congress intended designated ETCs to automatically receive USF funds, it could and should have omitted the phrase "be eligible to" from the language of § 214(e)(1).

4. *Was the FCC's decision to reduce USF support in areas with "artificially low" end user rates unlawful or arbitrary?*

Petitioners contend that the FCC's decision to reduce USF support in areas with "artificially low" end user rates was both unlawful and arbitrary.

The portion of the Order being challenged by petitioners is a section entitled "Reducing High Cost Loop Support for Artificially Low End-User Rates." Therein, the Order "adopt[ed] a rule," applicable "to both rate-of-return carriers and price cap companies," "to limit high-cost support where end-user rates do not meet a specified local

[16] States will continue to define the larger geographic regions for ETC status, and the FCC will use the smaller parts of these regions (through census blocks) to determine the existence and level of financial support. JA at 812-13 (Order ¶¶ 1191-92); see id. at 455 (Order ¶ 167), 459 (Order ¶ 179). Thus, states will continue to define the service areas for ETCs, while the FCC will decide (on a census block basis) the zones within those areas that are eligible for support through competitive bidding.

floor." JA at 476 (Order ¶ 235). In doing so, the Order noted there was "evidence in the record" indicating that "there [were] a number of carriers with local rates that [we]re significantly lower than rates that urban consumers pay." Id. at 477 (Order ¶ 235). "For example," the Order noted, there were "two carriers in Iowa and one carrier in Minnesota [that] offer[ed] local residential rates below $5 per month." Id. The Order concluded that Congress did not "intend[] to create a regime in which universal service subsidizes artificially low local rates in rural areas when it adopted the reasonably comparable principle in section 254(b); rather, [the Order concluded], it [wa]s clear from the overall context and structure of the statute that its purpose [wa]s to ensure that rates in rural areas not be significantly higher than in urban areas." Id. (emphasis in original). Relatedly, the Order concluded:

> It is inappropriate to provide federal high-cost support to subsidize local rates beyond what is necessary to ensure reasonable comparability. Doing so places an undue burden on the Fund and consumers that pay into it. Specifically, we do not believe it is equitable for consumers across the country to subsidize the cost of service for some consumers that pay local service rates that are significantly lower than the national urban average.

Id. at 478 (Order ¶ 237).

The Order stated that the FCC would "phase in [a] rate floor in three steps, beginning with an initial rate floor of $10 for the period July 1, 2012 through June 30, 2013 and $14 for the period July 1, 2013 through June 30, 2014." Id. (Order ¶ 239). "Beginning July 1, 2014," the Order stated, "and in each subsequent calendar year, the rate floor will be established after the Wireline Competition Bureau completes an updated annual survey of voice rates." Id.

Petitioners argue that "the de facto effect of the *Order*" is that the FCC is setting local rates. Pet'r Br. 3 at 41 (italics in original). "And," they argue, "since local rate setting is exclusively the province of state commissions under the Act, 47 U.S.C. § 152(b), the *Order* unlawfully usurps a power reserved to the states." Id. (italics in original). "The perverse result of" this portion of the Order, petitioners argue, is that to avoid depriving local carriers of needed USF support, states must raise some local rates above levels they would have deemed reasonable." Id. at 41-42.

The FCC asserts, however, and we agree, that we are not bound to examine the "practical effect" of an agency order. Cable & Wireless P.L.C. v. FCC, 166 F.3d 1224, 1230 (D.C. Cir. 1999). As the District of Columbia Circuit has noted, "no canon of administrative law requires [a reviewing court] to view the regulatory scope of agency actions in terms of their practical or even foreseeable effects." Id. As the District of Columbia Circuit noted, "[o]therwise, [a reviewing court] would have to conclude, for example, that the Environmental Protection Agency regulates the automobile industry when it requires states and localities to comply with national ambient air quality standards, or that the Department of Commerce regulates foreign manufacturers when it collects tariffs on foreign-made goods." Id. Thus, we summarily reject the petitioners' argument regarding the practical effect of the Order's new rate floors.

In any event, to the extent the Order encourages states to adjust local rates to ensure that they are not excessively low in comparison to urban rates, that appears to be permissible under, and indeed is consistent with, the universal service principles outlined in the Act. As we noted in Qwest Corp., "the FCC may not simply assume that the states will act on their own to preserve and advance universal service." 258 F.3d at 1204. Rather, the FCC "remains obligated to create some inducement . . . for the states to assist in implementing the goals of universal service," i.e., in this case to ensure that rural rates are not artificially low. Id. The portion of the Order at issue appears to serve that purpose by encouraging states to set rural rates that are least comparable to urban rates.

Petitioners also argue that this portion of the Order is arbitrary and capricious in two respects. First, they argue, it "fails to give adequate consideration to . . . comments explaining that the rural and urban basic services at issue may not be comparable." Pet'r Br. 3 at 42. Second, they argue that the Order failed to consider "the fact that rate[s] may have been kept low by state funds, placing *no* burden on the federal USF fund." Id. (emphasis in original).

Addressing these arguments in order, the record on appeal indicates that the Missouri Small Telephone Company Group (MSTCG), in response to the FCC's Notice of Proposed Rulemaking, filed initial comments with the FCC regarding the proposed benchmark rule. The MSTCG stated, in pertinent part: "Because rural calling scopes are smaller, many rural subscribers incur greater long distance charges to place calls to schools, health care facilities, and government offices." JA at 2284. "As a result," the

MSTCG asserted, "the total bills for rural customers (including both local and long distance calling) may be comparable to or higher than the bills of urban customers, and the proposal to establish a nationwide benchmark does not take into account local calling scopes." Id. "Therefore," MSTCG argued, "the FCC may wish to consider establishing a separate rural benchmark." Id.

As far as we can determine, the FCC did not expressly respond to these comments in the Order. In its appellate response brief, the FCC asserts that the MSTCG's comment was "'unsupported by any data' showing that rural customers actually pay as much, or more, for telecommunications services than their urban counterparts by incurring greater long distance charges." FCC Br. 3 at 58 (quoting Vt. Pub. Serv. Bd. v. FCC, 661 F.3d 54, 63 (D.C. Cir. 2011)). "Thus," the FCC argues, "it [wa]s not a significant comment that warranted a response from the agency." Id.

It is well established that "agencies need not respond to every comment." Vt. Pub. Serv. Bd., 661 F.3d at 63. In particular, "[c]omments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern." Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553 (1978) (internal quotation marks omitted). Here, the three sentence-comment offered by MSTCG, though not necessarily frivolous, was entirely speculative. As the FCC now notes, the MSTCG offered virtually no evidence in support of the comment. Instead, the MSTCG merely surmised that there might be a difference between urban and rural areas in what it uniquely deemed "local calling scopes." Given the speculative nature of the comment and the complete lack of supporting evidence, we conclude that the FCC did not act arbitrarily or capriciously in failing to address the comment in the Order.

As for petitioners' argument that the FCC failed to consider "the fact that rate[s] may have been kept low by state funds," this claim was never presented to the FCC. Consequently, the claim is waived. See 47 U.S.C. § 405(a).

5. *Does the Order unlawfully deprive rural carriers of a reasonable opportunity to recover their prudently-incurred costs?*

Petitioners argue that the Order unlawfully deprives rural carriers of a reasonable opportunity to recover their prudently-incurred costs. In support, petitioners assert that "they are required to continue to provide current services and, at considerable additional expense, to provide broadband service as well." Pet'r Br. 3 at 43. "At the same time," they assert, "their ICC revenue streams are being narrowed and their USF support will be capped, reduced or eliminated outright (depending on their regulatory status)." Id. In turn, petitioners argue that "[i]t would be one thing if the [FCC] had tied the reductions in USF support to a determination that the individual carriers had imprudently incurred costs, or that they were recovering the costs of investments not 'used and useful' in delivering regulated services, or that these costs could somehow be recovered from end users without violating the statutory universal service principle calling for rural service rates to be reasonably comparable with those in urban areas." Id. at 44. "But," they assert, "the FCC made none of these findings." Id. at 45. Lastly, petitioners acknowledge that the Order contains a waiver provision, but they argue that that provision applies only in narrow circumstances and does not reflect "[t]he constitutional test," which they assert "is whether the carrier has been afforded a reasonable opportunity to recover its costs." Id.

The FCC asserts, in response, that all of this amounts to an "unsubstantiated takings claim" that "is not ripe." FCC Br. 3 at 39. The FCC notes that the Order made clear that if "any rate-of-return carrier can effectively demonstrate that it needs additional support to avoid constitutionally confiscatory rates, the [FCC] will consider a waiver request for additional support." JA at 498 (Order ¶ 294). The FCC thus argues that "[n]o takings claim is ripe until a party has invoked that process and been denied." FCC Br. 3 at 39.

In their reply brief, petitioners deny asserting a takings claim. Pet'r Reply Br. 3 at 15. Instead, they assert, their argument is that "the *Order* was arbitrary and inconsistent with the statutory requirement of 'sufficient support' because it will not provide them a reasonable opportunity to recover prudently incurred costs." Id. (italics in original). The problem, however, is that these arguments were not clearly framed at all in petitioners' opening brief. Indeed, their opening brief made no mention of the Order being arbitrary (in fact, the discussion did not use the word "arbitrary" at all), nor did they clearly assert that the Order violated a statutory requirement of "sufficient support." Instead, the arguments in petitioners' opening brief made reference to a "constitutional test" for "whether [a] carrier has been afforded a reasonable opportunity to recover its costs," Pet'r

Br. 3 at 45, and also cited to a Supreme Court takings case, id. at 43 (citing Duquesne Light Co. v. Barasch, 488 U.S. 299, 307-08 (1989)). Thus, we would be well within our discretion to invoke our longstanding rule that a party waives issues and arguments raised for the first time in a reply brief.[17] See Reedy v. Werholtz, 660 F.3d 1270, 1274 (10th Cir. 2011).

In any event, however, it is clear to us that the FCC did not act arbitrarily in implementing changes to the USF mechanisms. Notably, the Order includes a section expressly discussing the "Impact of These Reforms on Rate-of-Return Carriers and the Communities They Serve." JA at 495. In that section, the FCC concluded that its "intercarrier compensation reforms" would provide rate-of-return carriers with "greater certainty and a more predictable flow of revenues than the status quo." Id. (Order ¶ 286). The FCC further noted that the Order's "package of universal service reforms [wa]s targeted at eliminating inefficiencies and closing gaps in [the] system, not at making indiscriminate industry-wide reductions." Id. at 496 (Order ¶ 287). Relatedly, the FCC noted that its "reforms w[ould] not affect all carriers in the same manner or in the same magnitude," but it expressed confidence "that carriers that invest and operate in a prudent manner will be minimally affected." Id. (Order ¶ 289). In support, the FCC stated that its "analysis show[ed] that nearly 9 out of 10 rate-of-return carriers w[ould] see reductions in high-cost universal service receipts of less than 20 percent annually, . . . approximately 7

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[17] The FCC has moved to strike these arguments on the grounds that they were not adequately raised in petitioners' opening brief.

out of 10 w[ould] see reductions of less than 10 percent, . . . almost 34 percent . . . w[ould] see no reductions whatsoever, and more than 12 percent . . . w[ould] see an increase in high-cost universal service receipts." Id. (Order ¶ 290). The FCC also "reject[ed] the sweeping argument that the rule changes . . . would unlawfully necessarily affect a taking." Id. at 497 (Order ¶ 293). And it emphasized "that carriers have no vested property interest in USF." Id. More specifically, it noted "there [wa]s no statutory provision or Commission rule that provides companies with a vested right to continued receipt of support at current levels, and we are not aware of any other, independent source of law that gives particular companies an entitlement to ongoing USF support." Id. at 498 (Order ¶ 293). Lastly, the FCC concluded that "carriers ha[d] not shown that elimination of USF support w[ould] result in confiscatory end-user rates." Id. (Order ¶ 294). In reaching this conclusion, the FCC noted that, "[t]o the extent that any rate-of-return carriers can effectively demonstrate that it needs additional support to avoid constitutionally confiscatory rates, the Commission will consider a waiver request for additional support." Id.

Nothing about this analysis is remotely arbitrary or capricious. Rather, we conclude the FCC's analysis is both reasoned and reasonable. Further, the FCC's analysis is entirely consistent with the overarching universal service principles outlined in 47 U.S.C. § 254(b), including the principle that "[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." 47 U.S.C. § 254(b)(5).

6. *Do the FCC's regression and SNA rules have unlawful retroactive effects?*

Petitioners argue that "the FCC's regression and SNA [(Safety Net Additive)] rules," "by limiting recovery of costs lawfully incurred pursuant to federal and state law before the *Order* was adopted," "violate the strong judicial presumption against retroactive rulemaking." Pet'r Br. 3 at 46 (italics in original). According to petitioners, prior to the Order they incurred "capital and operating expenses . . . to comply with the ETC [eligible telecommunications carrier] provisions of Section 214(e) of the Act, Rural Utilities Service ('RUS') loan covenants and/or state Carrier of Last Resort ('COLR') requirements." Id. And, they assert, under the pre-Order regulatory scheme, they were able to receive SNA support to compensate them for those expenses.

The SNA support petitioners refer to is considered to be a "component" of high-cost loop support (HCLS). JA at 401 (Order ¶ 27). HCLS, which was established by the FCC in 1997 during its implementation of the 1996 Act, "provides support for the 'last mile' of connection for rural companies in service areas where the cost to provide this service exceeds 115% of the national average cost per line." Universal Service Administrative Company, High Cost, http://www.usac.org/hc/legacy/incumbent-carriers/step01/hcl.aspx (last visited Dec. 16, 2013). SNA, like HCLS generally, was "available to rural price-cap and rate-of-return carriers and competitive carriers providing service in the areas of these rural companies." Universal Service Administrative Company, http://www.usac.org/hc/legacy/incumbent-carriers/step01/sna.aspx (last visited

Dec. 16, 2013). "SNA support [wa]s support 'above the cap' for carriers that ma[d]e significant investment in rural infrastructure in years in which HCL support [wa]s capped." Id. It "[wa]s intended to provide rural carriers with the appropriate incentives to invest in the network infrastructure serving their communities." Id.

Beginning in early 2010, however, the FCC began notifying carriers "that [it] intended to undertake comprehensive universal service reform in the near term." JA at 485 (Order ¶ 252 n.409). And in the Order, the FCC "conclude[d] the [SNA] [wa]s not designed effectively to encourage additional significant investment in telecommunications plant." Id. at 484 (Order ¶ 250). Instead, the FCC concluded, "[t]he majority of incumbent LECs that currently are receiving the [SNA] qualified in large part due to significant loss of lines, not because of significant increases in investment, which is contrary to the intent of the rule." Id. (Order ¶ 249).

Consequently, the Order "phase[s] out the [SNA] over time." Id. at 401 (Order ¶ 27). In particular, during "CAF Phase I," effective January 1, 2012, the Order "freeze[s] support under [the] existing high-cost support mechanisms," including HCLS and SNA, "for price cap carriers and their rate-of-return affiliates." Id. at 439 (Order ¶ 128). CAF Phase I, the Order stated, "set[s] the stage for a full transition to a system where support in price cap territories is determined based on competitive bidding or the forward-looking costs of a modern multi-purpose network." Id. at 440 (Order ¶ 129). And, as we have already discussed, the Order adopted a new "benchmarking rule" for limiting the reimbursable capital and operating expenses in the formula used to determine high-cost loop support (HCLS) for rate-of-return carriers. FCC Br. 3 at 41. This benchmarking rule was based on the FCC's "proposed . . . regression analyses to estimate appropriate levels of capital expenses and operating expenses for each incumbent rate-of-return study area and limit expenses falling above a benchmark based on this estimate." JA at 469 (Order ¶ 212).

Petitioners now argue that "[t]he [Order's] regression and SNA rules violate the presumption against retroactive rulemaking because each 'takes away or impairs vested rights' or 'attaches new legal consequences to events completed before its enactment.'" Pet'r Br. 3 at 47 (quoting Arkema, Inc. v. EPA, 618 F.3d 1, 16 (D.C. Cir. 2010)). Alternatively, petitioners argue that "even if reasonable and prudent expenditures made pursuant to federal and state law are not deemed to entail a vested right to federal support, they render the regression and SNA rules invalid as arbitrary and capricious under the 'secondary retroactivity' standard . . . because they 'alter[] future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule.'" Id. (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 220 (1988) (Scalia, J., concurring)).

We reject petitioners' arguments. "Retroactive rules 'alter[] the *past* legal consequences of past actions.'" Mobile Relay Assoc. v. FCC, 457 F.3d 1, 11 (D.C. Cir. 2006) (quoting Bowen, 488 U.S. at 219 (Scalia, J., concurring); emphasis in Bowen). "[A]n agency order that alters the future effect, not the past legal consequences of an action, or that upsets expectations based on prior law, is not retroactive." Id. (internal quotation marks omitted). Consequently, the Order in this case, which makes only prospective changes to the reimbursement framework, including the elimination of SNA, is not retroactive. “To conclude otherwise would hamstring not only the FCC in its [telecommunications] management, but also any agency whose decision affects the financial expectations of regulated entities.” Id. As the District of Columbia Circuit noted in Mobile Relay, “[i]t is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes.” Id. “This has never been thought to constitute retroactive lawmaking, and indeed most economic regulation would be unworkable if all laws disrupting prior expectations were deemed suspect.” Id.

“Secondary activity—which occurs if an agency’s rule affects a regulated entity’s investment made in reliance on the regulatory status quo before the rule’s promulgation—will be upheld if it is reasonable, i.e., if it is not arbitrary or capricious.” Id. (internal quotation marks omitted); see Bowen, 488 U.S. at 220 (Scalia, J., concurring)(suggesting that “[a] rule that has unreasonable secondary retroactivity . . . may for that reason be ‘arbitrary’ or capricious’ and thus invalid.”). Our review of the Order in this case persuades us that the FCC’s elimination of the SNA rule and its adoption of the new benchmarking rule was neither arbitrary nor capricious. As outlined above, the FCC considered in detail the rationale for the SNA rule and concluded, for reasons detailed at length in the Order, that a new framework needed to be created and enacted. Because the FCC’s actions in this regard were neither arbitrary nor capricious, that is sufficient to overcome the petitioners' objection grounded on the theory of secondary retroactivity.

7. *Did the FCC disregard evidence that allocating USF to rural price cap carriers by competitive bidding would reduce service quality?*

Petitioners assert that the FCC, "[i]n adopting an auction mechanism" for the allocation of USF to rural price cap carriers, "has arbitrarily either ignored entirely or failed adequately to address arguments and evidence that the auction approach would result in a 'race to the bottom,' where bidders need only meet minimum service standards inadequate to . . . satisfy future customer needs." Pet'r Br. 3 at 49. Although petitioners concede that the Order acknowledged their arguments, they assert that the Order "never *tackled* them," which, they argue, is "a hallmark of arbitrary agency action." Id. at 50 (emphasis in original; citing Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

The FCC responds that "[t]his claim is not ripe for judicial review, because the FCC did not 'adopt[] an auction mechanism' for price cap carriers in the Order," but "[r]ather . . . merely sought comment on how best to design and implement such a mechanism in the attached FNPRM [(Further Notice of Proposed Rulemaking)]." FCC Br. 3 at 54. The FCC in turn argues that it "addressed the 'arguments' that it allegedly 'ignored' by seeking comment on them in that FNPRM." Id. Lastly, the FCC argues that, "[u]ntil [it] adopts an auction mechanism based on the record developed under the outstanding FNPRM, the Court will not be able to determine whether [it] adequately responded to petitioners' arguments that competitive bidding will degrade service and disadvantage small carriers." Id. at 55.

Our review of the Order confirms the FCC's arguments. The Order, in Section XVII, entitled "FURTHER NOTICE OF PROPOSED RULEMAKING," expressly "adopt[ed] a framework for USF reform in areas served by price cap carriers where support will be determined using a combination of a forward-looking broadband cost model and competitive bidding to efficiently support deployment of networks providing both voice and broadband service over the next several years." JA at 812 (Order ¶ 1189). The Order explained this framework:

> In each state, each incumbent price cap carrier will be asked to undertake a state-level commitment to provide affordable broadband to all high-cost locations in its service territory in that state, excluding locations served by an unsubsidized competitor, for a model-determined efficient amount of support. In areas where the incumbent declines to make that commitment, we will use a competitive bidding mechanism to distribute support in a way that maximizes the extent of robust, scalable broadband service and minimizes total cost. This FNPRM addresses proposals for this competitive bidding process, which we refer to here as the CAF auction for price cap areas. The FNPRM proposes program and auction rules, consistent with the goals of the CAF and the [FCC]'s broader objectives for USF reform.

Id. The Order then proceeded to outline, in detail, how the proposed auction process would work and the performance requirements that successful bidders would be required to meet. Notably, the Order sought comment on all of these details.

Although petitioners' opening brief cites to various points in the Order where the FCC purportedly recounted and then briefly responded to arguments in opposition to the proposed auction process, those cited portions deal with the FCC's "discussion of a different auction mechanism for [dispersing Mobility Fund Phase I funds to] wireless carriers." FCC Br. 3 at 54; see JA at 502-04 (Order ¶¶ 306-11).

We therefore conclude that petitioners' challenges to the FCC's proposed auction mechanism for price-cap carriers are not yet ripe for review.

8. *Does eliminating USF support for the highest-cost areas defeat the very purpose of universal service?*

Petitioners complain that the Order delays indefinitely, and thereby effectively eliminates, support for remote, so-called "extremely high-cost areas," and thus defeats the very purpose of universal service. Pet'r Br. 3 at 52.

We begin our analysis of this claim by outlining the Order's treatment of universal funding for "extremely high-cost" service areas. The Order, in pertinent part, "adopt[s] Phase II of the Connect America Fund: a framework for extending broadband to millions of unserved locations over a five-year period, including households, businesses, and community anchor institutions, while sustaining existing voice and broadband services." JA at 452 (Order ¶ 156). The primary focus of CAF Phase II is to provide "increased support to areas served by price cap carriers." Id. (Order ¶ 159). Those areas, the Order noted, accounted for "more than 83 percent of the unserved locations in the nation" in 2010, but only "receive[d] approximately 25 percent of high-cost support." Id. (Order ¶ 158).

"CAF Phase II will have an annual budget of no more than $1.8 billion," which will be distributed "us[ing] a combination of competitive bidding and a new forward-looking model of the cost of constructing modern multi-purpose networks." Id. "Using th[is] [forward-looking] model," the FCC "will estimate the support necessary to serve areas where costs are above a specified benchmark, but below a second 'extremely high-cost' benchmark." Id. The FCC "delegate[d] to the Wireline Competition Bureau the responsibility for setting the extremely high-cost threshold in conjunction with adoption of a final-cost model." Id. at 456 (Order ¶ 169).

Relatedly, the Order created a "Remote Areas Fund" intended "to ensure that the less than one percent of Americans living in remote areas where the cost of deploying traditional terrestrial broadband networks is extremely high can obtain affordable broadband." Id. at 819 (Order ¶ 1224). The Remote Areas Fund, the Order indicated, will receive "$100 million in annual CAF funding to maximize the availability of affordable broadband in such areas." Id. at 455 (Order ¶ 168). In the FNPRM portion of the Order, the FCC "s[ought] comment on how best to utilize" the Remote Areas Fund. Id. The Order proposed that the "universal service goals [could be fulfilled in extremely high-cost areas] by taking advantage of services such as next-generation broadband satellite service or wireless internet service provider (WISP)." Id. The Order also sought "comment on how to structure the Remote Areas Fund." Id. at 820 (Order ¶ 1225). In doing so, the Order proposed several alternative structures, including "a portable consumer subsidy," id., "a competitive bidding process," id. at 820 (Order ¶ 1226), and "a competitive proposal evaluation process," id. (Order ¶ 1227).

As the FCC notes in its response brief, until the Remote Areas Fund distribution rules "are in place, extremely high-cost areas will continue to receive support under existing mechanisms for price cap and rate-of-return carriers." FCC Br. 3 at 64 (citing JA at 442 (Order ¶¶ 133 (freezing support for price-cap carriers), 195 (maintaining support for rate-of-return carriers)).

In light of these undisputed facts, it is readily apparent that the Order neither "indefinitely" delays distribution of the Remote Areas Fund, nor effectively denies USF funding to extremely high-cost areas.[18] Further, any specific challenges that petitioners may seek to assert against the manner in which the Remote Areas Fund is distributed are not yet ripe.

9. *Is the FCC's decision to eliminate high-cost support to RLECs, where an unsubsidized competitor offers voice and broadband to all of the RLECs' customers in the same study area, unlawful and unsupported by substantial evidence?*

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[18] In their reply brief, petitioners offer two new arguments. First, they assert that "the FCC's rule provides that if a census block in a price cap service area exceeds the alternative technology threshold by even one dollar, the area is removed from Phase II support entirely and instead relegated to a separate remote areas fund." Pet'r Reply Br. 3 at 24. Second, and relatedly, they complain that the FCC failed to respond to "[c]ommenters [who] offered an alternative in which the alternative technology threshold would serve as a cap on support instead of an absolute limit." Id. Because we generally "decline to consider arguments not raised in [an appellant's] opening brief," United States v. Ford, 613 F.3d 1263, 1272 n.2 (10th Cir. 2010), we shall grant the FCC's motion to strike these arguments.

Petitioners argue that "[t]he Order's directive that high cost support to RLECs be phased out as unnecessary where unsubsidized competitors offer voice and broadband to all of an RLEC's residential and business customers in the same study area is unlawful and unsupported by substantial evidence." Pet'r Br. 3 at 54. According to petitioners, "unsubsidized competitors have no obligation either to continue providing voice or broadband service to existing customers or to serve new ones once the RLEC's support is eliminated, much less an obligation to provide services comparable in quality and prices to those enjoyed by customers of urban telecommunications carriers." Id. "The *Order*," petitioners argue, "disregards entirely evidence that the moment the rural carrier loses its USF support . . . , consumers are at risk." Id. at 55-56 (italics in original).

At issue here is a section of the Order entitled "Elimination of Support in Areas with 100 Percent Overlap." JA at 493. In the first paragraph of that section, entitled "Background," the FCC explained that "in many areas of the country, universal service provides more support than necessary to achieve [the FCC's] goals by subsidizing a competitor to a voice and broadband provider that is offering service without governmental assistance." Id. (Order ¶ 280; internal quotation marks omitted). In the ensuing paragraphs, entitled "Discussion," the FCC "adopt[ed] a rule to eliminate universal service support where an unsubsidized competitor — or a combination of unsubsidized competitors — offers voice and broadband service throughout an incumbent carrier's study area, and [sought] comment on a process to reduce support where such an unsubsidized competitor offers voice and broadband service to a substantial majority, but not 100 percent of the study area." Id. at 494 (Order ¶ 281). The FCC thus "exclude[d] from the CAF areas that are overlapped by an unsubsidized competitor." Id. The FCC also announced its intent to discontinue its "current levels of high-cost support to rate-of-return companies where there is overlap with one or more unsubsidized competitors." Id. More specifically, the FCC "adopt[ed] a rule to phase out all high-cost support received by incumbent rate-of-return carriers over three years in study areas where an unsubsidized competitor — or a combination of unsubsidized competitors — offers voice and broadband service at" certain specified speeds "for 100 percent of the residential and business locations in the incumbent's study area." Id. 494-95 (Order ¶ 283).

In announcing these rules, the FCC "recognize[d] that there [we]re instances where an unsubsidized competitor offer[ed] broadband and voice service to a significant percentage of the customers in a particular study area (typically where customers are concentrated in a town or other higher density sub-area), but not to the remaining customers in the rest of the study area, and that continued support may be required to enable the availability of supported voice services to those remaining customers." Id. at 494 (Order ¶ 282). "In those cases," the FCC concluded, "there should be a process to determine appropriate support levels." Id. "The FNPRM" thus sought "comment on the methodology and data for determining overlap." Id. at 495 (Order ¶ 284). The Order also "direct[ed] the Wireline Competition Bureau to publish a finalized methodology for determining areas of overlap." Id.

Although petitioners complain that the Order "disregards entirely evidence that the moment the rural carrier loses its USF support (because there is an unsubsidized competitor offering to serve all its customers), consumers are at risk," Pet'r Br. 3 at 55-56, they fail to cite to any such evidence in the record. In any event, the purported "risks" cited by the petitioners appear, at best, speculative, and, at worst, nonexistent. Indeed, as the FCC notes in its response brief, it "made a very different predictive judgment" regarding the effects of its decision: "that an 'unsubsidized competitor' — which, by definition, is a facilities-based provider that is not eligible for support yet serves the incumbent LEC's entire geographic service area — would have an incentive to recover its investment by continuing to serve every possible customer." FCC Br. 3 at 60. We agree with the FCC that this predictive judgment was "entirely reasonable." Id.

Further, as the FCC also points out, both it and the state commissions possess authority under 47 U.S.C. § 214(e)(3) ("Designation of eligible telecommunications carriers for unserved areas") to order one or more carriers "to provide . . . service for [an] unserved community or portion thereof." And any carrier(s) ordered to do so must in turn satisfy the requirements to be designated an ETC under § 214(e)(1). 47 U.S.C. § 214(e)(3). Thus, to the extent that a currently served area would become "unserved," the FCC possesses authority to remedy that situation.

10. *Did the FCC arbitrarily fail to explain how its new definition of supported telecommunications services took into account the four factors it was required to consider under § 254(c)(1)?*

Petitioners next assert that "[s]ection 254(c)(1) of the Act requires the FCC, in consultation with the [Federal-State] Joint Board [on Universal Service], to consider four specific factors in establishing its definition of supported telecommunications services, namely the extent to which such telecommunications services (a) are essential to education, public health, or safety, (b) have been freely purchased by a substantial majority of residential customers, (c) are actually being publicly deployed by telecommunications carriers and (d) are in the public interest."[19] Pet'r Br. 3 at 56. "But," they argue, "with the exception of brief references . . . to the first, third and fourth factors, the *Order* fails to discuss how its new 'voice telephony service' definition takes any of these factors into account." Id. (italics in original). "That failure," they argue, "was arbitrary." Id.

What petitioners ignore or overlook, however, is that the FCC's new "voice telephony service" definition was intended by the FCC merely "to simplify how [it] describe[s] the various supported services that [it] historically has defined in functional terms (e.g., voice grade access to the PSTN, access to emergency services) into a single supported service." JA at 411 (Order ¶ 62). In other words, the FCC was not, in adopting its new "voice telephony service" definition, adding new services that would be

[19] The header to this argument in petitioners' opening brief makes reference to the FCC's "new definition of supported information services." Pet'r Br. 3 at 56. But the FCC clearly did not classify "voice telephony service" as an "information service."

"supported by Federal universal service support mechanisms."[20] 47 U.S.C. § 254(c)(1). Thus, under the wording of the statute, it was unnecessary for the FCC to review in detail, or at all, the four factors listed § 254(c)(1)(A) through (D).

11. *Did the FCC arbitrarily disregard comments that the Order's incremental USF support provisions would duplicate or undermine state-initiated plans for broadband deployment?*

Petitioners argue that, assuming the FCC possesses authority to impose its broadband requirement, the FCC nevertheless failed to consider petitioner's argument "that it was arbitrary and discriminatory to distribute USF support only to carriers in states who [have done] nothing to promote broadband, while carriers in states with extensive broadband development commitments . . . get nothing to upgrade what they have done." Pet'r Br. 3 at 57.

In the Order, the FCC noted that "[c]arriers have been steadily expanding their broadband footprints, funded through a combination of support provided under current mechanisms and other sources, and we expect such deployment will continue." JA at 444 (Order ¶ 137). The FCC in turn stated that it "intend[ed] for CAF Phase I to enable additional deployment beyond what carriers would otherwise undertake absent this reform." Id. In other words, the FCC explained, "CAF Phase I incremental support [wa]s designed to provide an immediate boost to broadband deployment in areas that are

[20] To be sure, the Order recognized interconnected VoIP as a form of "telephony voice service." But, as the Order noted, interconnected VoIP is simply a nontraditional method that consumers are increasingly using to obtain voice services. JA at 412 (Order ¶ 63). Thus, the service at issue (i.e., "voice service") is unchanged; only the delivery method is new.

unserved by any broadband provider." Id. In a related footnote, the FCC stated that its "distribution mechanism for CAF Phase I incremental funding [wa]s . . . designed to identify the most expensive wire centers, and [that] the same characteristics that make it expensive to provide voice service to a wire center . . . make it expensive to provide broadband service to that wire center as well." Id. (Order ¶ 137 n.220). Thus, the FCC's "interim mechanism [wa]s designed to provide support to carriers that serve areas where [the FCC] expects that providing broadband service will require universal service support." Id.

Although it is apparent that petitioners disagree with the policy judgments made by the FCC regarding how to allocate CAF Phase I funds, we conclude that the FCC's decision was neither arbitrary nor capricious. In particular, it is clear from the above-quoted provisions of the Order that the FCC was focused on promoting universal service to the areas most in need, rather than allocating additional funds to areas that were already served by broadband providers.

12. *Did the Order unlawfully make changes not contained in the FCC's proposed rule that could not reasonably have been anticipated by commenters?*

Petitioners argue that "[k]ey provisions in the Order were not part of the proposed rule" and that, "because Petitioners had no reasonable opportunity to comment on these rule changes[,] the Order violated Sections 553(b) and (c) of the APA," i.e., the APA's notice-and-comment requirements. Pet'r Br. 3 at 58. In particular, petitioners point to "the ARC rules," id., the "dual process for ICC revenue recovery for price cap carriers and rate-of-return carriers," id. at 59, and the decision to "give[] price cap carriers an exclusive right of first refusal . . . to receive $300 million in CAF Phase I funding for unserved areas," id.

According to the FCC, however, this issue "was not presented to [it] either before [it] issued the Order or on reconsideration once [it] allegedly acted without notice." FCC Br. 3 at 65. In their reply brief, petitioners do not dispute that they failed to present the issue to the FCC. Instead, they assert that they were not required to present this issue to the FCC because 47 U.S.C. § 405(a) does not apply to claims of lack of APA notice. Pet'r Reply Br. 3 at 28. Alternatively, they argue, "this Court has denied the FCC's request to stay proceedings while reconsideration petitions are pending, . . . and the FCC's history of sitting on pending reconsideration petitions would have made a reconsideration request futile anyway." Id.

As we have previously discussed, 47 U.S.C. § 405(a), which authorizes a party to file with the FCC a motion for reconsideration of "an order, decision, report, or action" of the FCC, essentially requires, in part, that the FCC be given an "opportunity to pass" on an issue before the issue is raised in federal court. See Globalstar, 564 F.3d at 479. The District of Columbia Circuit has "strictly construed § 405(a), holding that [it] generally lack[s] jurisdiction to review arguments that have not first been presented to the [FCC]." Id. at 483 (internal quotation marks omitted; brackets added). "Thus," it has held, "even when a petitioner has no reason to raise an argument until the FCC issues an order that makes the issue relevant, the petitioner must file a petition for reconsideration with the

[FCC] before it may seek judicial review." Id. (internal quotation marks omitted; brackets added). Notably, the District of Columbia Circuit has adhered to this strict construction rule even in instances "[w]hen . . . a party complains of only a technical or procedural mistake, such as an obvious violation of a specific APA requirement." Id. at 484 (internal quotation marks omitted). In other words, even in cases involving only a purported technical or procedural mistake, the District of Columbia Circuit "ha[s] insisted that a party raise the precise claim before the [FCC]." Id. The court has explained that "such rigid adherence to § 405(a) is necessary with respect to claims of procedural error in order to give the agency the opportunity to consider the claim in the first instance and to correct any error in the rulemaking process prior to judicial review." Id.

Although we are not bound by the District of Columbia Circuit's decision in Globalstar, we find its reasoning to be both sound and persuasive and we thus adopt it in this case. In doing so, we note that petitioners have failed to cite to a single case in which another circuit has interpreted § 405(a) differently. Further, petitioners have made no attempt to refute the District of Columbia Circuit's reasoning for adopting a strict construction of § 405(a). Consequently, we conclude that petitioners have waived their inadequate notice and comment claim by failing to present it at any time to the FCC.

That leaves only petitioners' arguments that it would have been futile for them to file a petition for reconsideration because (a) this court refused the FCC's request to stay these proceedings while petitions for reconsideration were pending, and (b) the FCC has a history of "sitting on pending reconsideration petitioners." Pet'r Reply Br. 3 at 28. These arguments, however, are unsupported by the record. To begin with, a review of the docket sheet in this case fails to confirm that the FCC filed a motion to stay these proceedings. Indeed, the only motion for stay was filed by one of the petitioners (the National Telecommunications Cooperative Association) seeking to delay implementation of the Order. Notably, the FCC opposed that motion and this court ultimately denied it. As for petitioners' assertion that the FCC has a "history of sitting on pending reconsideration petitions," they cite to nothing in the record or elsewhere that would confirm that assertion. Thus, both of petitioners' assertions are baseless.

B. *Additional Universal Service Fund Issues Principal Brief*

We now proceed to address the issues raised by petitioners in Brief 4, entitled "Additional Universal Service Fund Issues Principal Brief."

1. *The FCC's decision to limit USF support for broadband deployment to price-cap ILECs*

Petitioners argue that the FCC's decision to "deny[] any USF support to competitive carriers for broadband and reserving it exclusively to price cap ILECs was arbitrary in two respects." Pet'r Br. 4 at 7. "First," they argue, "the FCC failed to explain how a USF policy reserving USF support for incumbents and excluding competitive rural carriers from USF support could be reconciled with the Act's directive that local telecom markets be open to competition." Id. In petitioners' view, "making CAF II support accessible only to the largest LECs will serve only to preserve and advance their dominance in the local telecom market." Id. (internal quotation marks omitted).

"Second," petitioners argue, "the FCC departed without reasoned explanation from its own USF competitive neutrality principle that 'universal support mechanisms and rules neither unfairly advantage or disadvantage one provider over another.'" Id. at 8 (quoting Universal Service Order, 12 F.C.C.R. 8776, ¶¶ 46-48 (1997)). According to petitioners, the FCC "could not logically claim that admittedly disparate treatment is acceptable as long as it is not 'unfair' without addressing how it could possibly be fair to exclude CETCs from USF support entirely and still preserve competitive neutrality." Id.

a) The relevant portions of the Order

The Order "create[d] the Connect America Fund [(CAF)], which will ultimately replace all existing high-cost support mechanisms." JA at 400 (Order ¶ 20). The Order summarized the CAF in the following manner:

> The CAF will help make broadband available to homes, businesses, and community anchor institutions in areas that do not, or would not otherwise, have broadband, including mobile voice and broadband networks in areas that do not, or would not otherwise, have mobile service, and broadband in the most remote areas of the nation. The CAF will also help facilitate our ICC reforms. The CAF will rely on incentive-based, market-driven policies, including competitive bidding, to distribute universal service funds as efficiently and effectively as possible.

Id.

Because "[m]ore than 83 percent of the approximately 18 million Americans that lack access to residential fixed broadband at or above the [FCC]'s broadband speed benchmark live in areas served by price cap carriers—Bell Operating Companies and other large and mid-sized carriers," the Order stated that "the CAF will introduce targeted, efficient support for broadband in two phases." Id. (Order ¶ 21). Phase I, intended "[t]o spur immediate broadband buildout, . . . will provide additional funding for price cap carriers to extend robust, scalable broadband to hundreds of thousands of unserved Americans in early 2012." Id. (Order ¶ 22). "To enable this [Phase I] deployment, all existing legacy high-cost support to price cap carriers will be frozen and an additional $300 million in CAF funding will be made available." Id. Phase II of the process "will use a combination of a forward-looking broadband cost model," to be developed by the FCC's Wireline Competition Bureau, "and competitive bidding to efficiently support deployment of networks providing both voice and broadband service for five years." Id. (Order ¶ 23). Phase II "of the CAF will distribute a total of up to $1.8 billion annually in support for areas with no unsubsidized broadband competitor." Id. at 401 (Order ¶ 25). More specifically, "[i]n determining areas eligible for support, [the FCC] will . . . exclude areas where an unsubsidized competitor offers broadband service that meets the broadband performance requirements" outlined in the Order. Id. at 456 (Order ¶ 170). In areas that are not served by an unsubsidized competitor, "[e]ach incumbent carrier will . . . be given an opportunity to accept, for each state it serves, the public interest obligations associated with all the eligible census blocks in its territory, in exchange for the total [cost] model-derived annual [CAF Phase II] support associated with those census blocks, for a period of five years." Id. (Order ¶ 171). "If the incumbent accepts the state-level broadband commitment, it . . . shall be the presumptive recipient of the model-derived support amount for the five-year CAF Phase II period."

Id. After that five-year CAF Phase II period, however, the FCC anticipates distributing all support through a competitive bidding process. Id. at 459 (Order ¶ 178); FCC Br. 4 at 4.

The Order also "transition[s] existing competitive ETC support to the CAF . . . over a five-year period beginning July 1, 2012." JA at 557 (Order ¶ 513). In doing so, the Order found "that a five-year transition w[ould] be sufficient for competitive ETCs that are currently receiving high-cost support to adjust and make necessary operational changes to ensure that service is maintained during the transition." Id. at 558 (Order ¶ 513). The Order outlined a "phase-down" framework in which "[c]ompetitive ETC support" would first "be frozen at the 2011 baseline" level, and then reduced in each of the ensuing five years until the competitive ETCs received no support at all. Id. at 559 (Order ¶ 519).

b) Relevant statutory provisions

Sections 214(e)(1) and (2) of the Act, which address the "provision of universal service," provide as follows:

> (1) Eligible telecommunications carriers. A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 [47 USCS § 254] and shall, throughout the service area for which the designation is received—
>
> > (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) [47 USCS 254(c)], either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

> (B) advertise the availability of such services and the charges therefor using media of general distribution.
>
> (2) Designation of eligible telecommunications carriers. A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

47 U.S.C. §§ 214(e)(1), (2).

Section 254(e), entitled "Universal service support," provides as follows:

> After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) [47 USCS § 214(e)] shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of the facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

47 U.S.C. § 254(e).

c) Arguments and analysis

Petitioners argue that "[t]he Act requires both that only designated ETCs may receive universal service support, 47 U.S.C. §§ 214(e)(1) and 254(e), and that additional qualified carriers shall be designated ETCs in the areas of non-rural carriers[,] 47 U.S.C. § 214(e)(2)." Pet'r Br. 4 at 9. "These provisions," petitioners argue, "reflect the dual nature of the FCC's obligations under the Act, namely that it must see to it that both universal service and local competition are realized." Id. at 9-10 (internal quotation marks and italics omitted). But, they argue, the FCC "has rendered meaningless the competition-promoting aspect of its dual statutory obligations" by "determining . . . that only price cap carriers (the great majority of which are non-rural), but not their competitors, are eligible for additional USF support over the next five years – while their competitors' existing support is phased out during that same time period." Id. at 10.

We conclude, however, that the FCC reasonably interpreted § 214(e)(2) as not requiring it to offer USF support to all ETCs in a particular area. The Order itself notes, and we agree, that "nothing in the statute compels that every party eligible for support actually receives it." JA at 507 (Order ¶ 318). Rather, both §§ 214(e) and 254(e) clearly speak only in terms of "eligibility" for USF support. Further, as the Order reasonably noted, "the statute's goal is to expand availability of service to users," id., "not to subsidize competition through universal service in areas that are challenging for even one provider to serve," id. (Order ¶ 319).

To be sure, the FCC, acting pursuant to 47 U.S.C. § 254(b)(7), adopted and generally attempts to adhere to a principle of "competitive neutrality." That principle holds that "universal service support mechanisms . . . should not unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another." Id. at 458 (Order ¶ 176; internal quotation marks omitted). But that is only one of the seven statutory principles outlined in 47 U.S.C. § 254(b)(1)-(7)

that are intended to guide the FCC "in drafting policies to preserve and advance universal service," including the distribution of USF support. Qwest Comm'n Int'l, Inc. v. FCC, 398 F.3d 1222, 1234 (10th Cir. 2005) (Qwest Comm'n). As we have noted, the "FCC may exercise its discretion to balance the principles against one another when they conflict," and "any particular principle can be trumped in the appropriate case." Id. (internal quotation marks omitted). The only caveat is that the FCC "may not depart from [the principles] altogether to achieve some other goal." Id. (internal quotation marks omitted).

Here, the FCC's Order concluded that, for price cap areas that are not served by an unsubsidized competitor,[21] "adhering to strict competitive neutrality at the expense of state-level commitment process would unreasonably frustrate achievement of the universal service principles of ubiquitous and comparable broadband services and promoting broadband deployment," and would also "unduly elevate the interests of competing providers over those of unserved and under-served consumers . . . as well as . . . consumers and telecommunications providers who make payments to support the Universal Service Fund." JA at 459 (Order ¶ 178). In making that decision, the FCC found that in price-cap areas that lack an unsubsidized competitor, the incumbent LEC is likely to be the only provider with wireline facilities that are already deployed. The FCC also found that incumbent LECs, in contrast to competitive LECs, "generally continue to

[21] As previously noted, the Order eliminates all USF support in price-cap areas that are served by an unsubsidized competitor.

have carrier of last resort [“COLR”] obligations for voice services,” id. at 457-58 (Order ¶ 175), and therefore must maintain networks capable of “ensur[ing] service to consumers who request it” throughout their designated service area, id. at 458-59 (Order ¶ 177 n.290). “[C]ompetitive LECs,” the FCC found, “typically have not built out their networks subject to COLR obligations” and, as a result, typically serve much smaller geographic areas. Id. at 692-93 (Order ¶ 864). As the FCC explains in its response brief, it essentially “predicted that it could get more ‘bang for its buck’ by providing subsidies to incumbent LECs to upgrade their extensive existing facilities than by providing subsidies to competitive ETCs . . . to deploy entirely new facilities.” FCC Br. 4 at 9.

Notably, the interim USF arrangement adopted by the Order for price-cap carriers is not wholly dissimilar from the pre-Order balance of USF funding. According to the FCC, “wireline competitive ETCs . . . received only $23 million of high-cost universal service support annually prior to the Order.” FCC Br. 4 at 10. “By contrast, price cap carriers received more than $1 billion annually.” Id. (citing Order ¶¶ 7, 158, 501, 503 n.834). “That differential,” the FCC argues, “underscores the fact that competitive ETCs serve very few lines relative to the price cap carriers.” Id.

Finally, it is true, as petitioners suggest, “that by far the largest amount—both in absolute and percentage terms—of areas unserved by broadband are in the service areas of the price cap companies.” Pet’r Br. 4 at 14. But the inference that petitioners draw from that fact, i.e., that price cap carriers “have previously ignored” large portions of their service areas, id. at 12, is not entirely accurate. In the Order, the FCC found that the price cap areas only "receive[d] approximately 25 percent of high-cost support" under the pre-Order USF funding framework. JA at 452 (Order ¶ 158). The FCC thus inferred, and it appears reasonably so, that the coverage gaps in price cap areas were a product of inadequate funding, rather than price-cap carrier mismanagement or inattention.

We thus conclude that the FCC reasonably exercised its discretion in adopting this USF funding framework for price-cap areas, particularly since the framework applies only during the interim period marked by CAF Phase II. See generally Rural Cellular Ass'n v. FCC, 588 F.3d 1095, 1105 (D.C. Cir. 2009) ("The 'arbitrary and capricious' standard is particularly deferential in matters implicating predictive judgments and interim regulations."); id. at 1106 (holding that "the FCC should be given 'substantial deference' when acting to impose interim regulations").

2. *Did the FCC violate the mandatory referral duty imposed by 47 U.S.C. § 410(c)?*

Petitioners next assert that the FCC violated the mandatory referral duty imposed by 47 U.S.C. § 410(c) when it (a) "directly adopted new separations rules with new formal separations methodologies," Pet'r Br. 4 at 4, and (b) "made decisions that had as much effect on separations as direct changes to the rules themselves, such as by ordering the reduction of intrastate access rates (and thereby revenues) and replacing them in part with a new interstate charge, without also adjusting the allocation of the underlying costs between jurisdictions," id. at 4-5.

a) Jurisdictional separations under the Act

The 1934 Act "establishe[d], among other things, a system of dual state and federal regulation over telephone service." La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 360 (1986). "In broad terms, the [1934] Act grant[ed] to the FCC the authority to regulate 'interstate and foreign commerce in wire and radio communication,' 47 U.S.C. § 151, while expressly denying [the FCC] 'jurisdiction with respect to . . . intrastate communication service,' 47 U.S.C. § 152(b)." Id. "[T]he realities of technology and economics," however, "belie . . . a clean parceling of responsibility" between the FCC and the states. Id. Thus, "[t]he determination of whether any particular service or facility is 'interstate' or 'intrastate' is not always a straightforward matter; any particular facility or service often provides some combination of the two." Puerto Rico Tel. Co. v. T-Mobile Puerto Rico LLC, 678 F.3d 49, 64 (1st Cir. 2012).

"Addressing this issue, the Act establishes a process designed to resolve what is known as jurisdictional separations matters, by which process it may be determined what portion of an asset is employed to produce or deliver interstate as opposed to intrastate service." Id. (internal quotation marks omitted; citing 47 U.S.C. §§ 221(c), 410(c)). To begin with, Section 221(c) of the Act authorizes the FCC to "classify the property" of any "carriers engaged in wire telephone communication" in order to "determine what property of said carrier shall be considered as used in interstate or foreign telephone toll service." 47 U.S.C. § 221(c). In turn, § 410(c) of the Act, 47 U.S.C. § 410(c), "creates a 'Federal–State Joint Board,' and provides that '[t]he Commission shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations . . . to a Federal–State Joint Board.'" Puerto Rico Tel., 678 F.3d at 64 (quoting 47 U.S.C. § 410(c)). Although the Board is composed of "three Commissioners of the Commission and . . . four State commissioners," the State commissioners are allowed only to participate in deliberations and may not vote. 47 U.S.C. § 410(c). The Board "is charged with 'prepar[ing] a recommended decision for prompt review and action by the Commission.'" Puerto Rico Tel., 678 F.3d at 64 (quoting § 410(c)).

"[T]he separations process literally separates costs such as taxes and operating expenses between interstate and intrastate service," and thereby "facilitates the creation or recognition of distinct spheres of regulation." Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 375 (1986). According to the FCC's web site, "[t]he primary purpose of separations is to determine whether a local exchange carrier (LEC)'s cost of providing regulated services are to be recovered through its rates for intrastate services or through its rates for interstate services." Jurisdictional Separations, FCC Encyclopedia, http://www.fcc.gov/encyclopedia/jurisdictional-separations (last visited Dec. 16, 2013); see State Corp. Comm'n of State of Kan. v. FCC, 787 F.2d 1421, 1423 (10th Cir. 1986) ("The process of 'jurisdictional separations' determines how . . . costs are allocated for ratemaking purposes."). "The first step in the current separations process requires carriers to apportion regulated costs among categories of plant and expenses." Jurisdictional Separations, FCC Encyclopedia, supra. "In the second step of the current separations process, the costs in each category are apportioned between intrastate and interstate jurisdictions." Id. "Once costs are separated between the jurisdictions, carriers can then apportion their interstate regulated costs among their interexchange services and their intrastate costs among intrastate services." Id. Historically, one of the primary purposes of the separations process has been to prevent incumbent LECs from recovering the same costs in both the interstate and intrastate jurisdictions.

b) The jurisdictional separations process is currently frozen

In 2001, the FCC, acting pursuant to the recommendation of the Federal-State Joint Board on Jurisdictional Separations, froze the jurisdictional separations process. Although the freeze was intended originally to last only five years, it has since been extended and remains currently in effect (until June 30, 2014). JA at 729 (Order ¶ 932) ("The jurisdictional process, which has been frozen for some time, is currently the subject of a referral to the Separations Joint Board."). In its most recent order extending the freeze, the FCC noted that the freeze remained appropriate to afford "Joint Board members" the "significant time and effort" it will take "to educate themselves about the impacts of . . . reforms" to intercarrier compensation and universal service "on separations." FCC Report and Order, FCC 12-49 at ¶13, p.5 (May 8, 2012).

The FCC has expressly noted the freezing of the jurisdictional separations process in its regulations. 47 C.F.R. § 36.3. And, notably, the Order stated that "[t]he jurisdictional separations process . . . is currently the subject of a referral to the Separations Joint Board." JA at 729 (Order ¶ 932).

c) Did the Order effectively impact or change jurisdictional separations?

Petitioners point to "a number of key changes" that the Order purportedly made "to separations rules and policies" and that in turn necessitated referral to the Joint Board. Pet'r Br. 4 at 17. To begin with, petitioners assert, the Order "made numerous and substantial changes directly to [the FCC's] Part 36 rules,"[22] including "limit[ing] the portion of nationwide loop cost expense that certain carriers could allocate to the interstate jurisdiction," "curtail[ing] carriers' ability to receive 'Safety net additive support' for new Telecommunications Plant in Service," "limit[ing] the amount of Corporate Operations Expenses carriers could allocate to the interstate jurisdiction," and "giving [FCC] staff[, i.e., the Wireline Competition Bureau,] discretion to publish a schedule each year establishing new limits on unseparated loop cost allocated to the interstate jurisdiction." Id. Further, petitioners argue that the Order's "changes to [the] universal service rules affected [the FCC's] separations rules, thereby [again] requiring referral" to the Joint Board. Id. at 20. In particular, they note that the Order "capped the level of High Cost Loop ('HCL') Fund limit the support carriers would receive for various expenses, including capital and operating expenses," id., and "reduced HCL support for carriers whose intrastate end user local rates were below a local rate floor," id. at 20-21. These changes, petitioners assert, "essentially reassigned to the intrastate jurisdiction for possible recovery from other sources" "[c]osts that were [originally] assigned to the interstate jurisdiction for recovery from the Universal Service Fund." Id.

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[22] The "Part 36 rules" referred to by petitioners are the jurisdictional separations procedures outlined by the FCC in 47 C.F.R. Part 36.

at 21. Petitioners also assert that the Order, "[t]hrough its intercarrier compensation reform, . . . reduced and eliminated certain intrastate access charges over a transition period." Id. at 22. "For many carriers," petitioners assert, "the intrastate access revenues can represent a substantial portion of their existing intrastate revenues." Id. "The [Order] also," petitioners assert, "allowed carriers to charge a new interstate-approved rate, the Access Recovery Charge, and receive some limited support from the Connect America Fund as a partial and limited means of addressing substantial lost revenue." Id. But, petitioners argue, "[t]he FCC failed to reclassify carrier access costs between jurisdictions as a corollary to these actions," thus leaving the states with these costs "in their intrastate allocations for ratemaking." Id. at 23.

The FCC argues, in response, that there "was no . . . jurisdictional separation here: the Order did not reallocate costs for any type of telecommunications plant or any operating expense between the federal and the state jurisdictions." FCC Br. 4 at 13 (italics omitted). Addressing the specific points raised by petitioners, the FCC asserts as follows:

> • the only changes the Order made to Part 36 were to Subpart F thereof, which "contains universal service rules governing high-cost loop support ('HCLS') for rate-of-return carriers," id., and those changes, which "simply adjusted the amount of universal service *funding* that is prospectively available for HCLS," id. at 14 (emphasis in original), "have nothing to do with jurisdictional separations," id.;
>
> • the amended rules eliminating Safety Net Additive Support and imposing new limits on recoverable corporate operations expenses, capital expenses, and operating expenses . . . merely prohibit carriers from obtaining universal service *subsidies* to cover certain costs already allocated to the

federal jurisdiction" and thus "did not change the jurisdictional allocation of costs," id.;

• the reductions in "universal service support and intercarrier compensation revenues" implemented by the Order do not constitute "formal changes to the allocation of costs" that would "require consultation with the Joint Board," id. at 15;

• "petitioners' assertion that states have been 'left' with the responsibility to recover certain carrier access costs overlooks the Order's explicit holding that 'states will not be required to bear the burden of establishing and funding state recovery mechanisms for intrastate access reductions,'" id. at 16 (quoting Order ¶ 795); and

• "the Order established a federal recovery mechanism to 'provide carriers with recovery for reductions to eligible interstate and intrastate [intercarrier compensation] revenue.'" id. (quoting Order ¶ 795), "[a]nd the backstop Total Cost and Earnings Review process permits a carrier to make a comprehensive cost showing to the FCC that additional recovery is needed to avoid a taking," id. at 17.

Although § 410(c) does not expressly indicate who determines whether a particular FCC proceeding concerns "the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations," the only reasonable conclusion that can be drawn from the statute is that Congress afforded the FCC the authority and discretion to make that determination (subject, of course, to judicial review). See Crockett Tel. Co. v. FCC, 963 F.2d 1564, 1570 (D.C. Cir. 1992) (holding that "[n]o procedural requirements are triggered [under § 410(c)] absent the Commission's discretionary choice to adopt a new formal separation guideline."). And, consequently, under the Administrative Procedure Act, the FCC's determination as to whether a particular proceeding involved "jurisdictional separation" issues could be held unlawful and set aside only it if was found by a court to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

In this case, we are not persuaded that the FCC, in determining that the Order did not involve jurisdictional separations issues, has violated that deferential standard. Quite clearly, the purpose of the FNPRM and the Order was not "to adopt a new formal separation guideline" or methodology. Crockett, 963 F.2d at 1570. Rather, as the Order itself notes, the purpose was to "comprehensively reform[] and modernize[] the universal service and intercarrier compensation systems to ensure that robust, affordable voice and broadband service . . . [we]re available to Americans throughout the nation." JA at 394 (Order ¶ 1). Relatedly, the Order makes no changes to the FCC's "formal separation guideline[s]." Crockett, 963 F.2d at 1570; see Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523, 556 (D.C. Cir. 1992) (holding that FCC order deciding "that federal support for universal service should be applied to satisfy the interstate revenue requirement" did not involve a jurisdictional separations issue that required referral to the joint board; "the FCC was not allocating jointly used plant, nor was it changing the proportions for allocating jointly used plant to interstate and intrastate jurisdictions."). Consequently, we conclude that the FCC did not violate § 410(c) in adopting the Order.

3. *Did the FCC irrationally refuse to modify service obligations for carriers to whom it denied USF support?*

Petitioners argue that, even assuming it was proper for the FCC to eliminate USF support for all carriers serving any territory that is also served by an unsubsidized competitor, the FCC nevertheless erred "by refusing to relieve Eligible Telecommunications Carriers (ETCs) of their ongoing duty to serve all comers without USF support." Pet'r Br. 4 at 24. According to petitioners, the "statutory structure" of 47 U.S.C. § 214(e) "leaves no room for doubt that Congress intended eligibility for support and the duty to serve to be two sides of the same coin." Id. at 26.

a) The requirements imposed by § 214(e)

As noted by petitioners, § 214(e)(1) of the Act imposes certain requirements on ETCs:

> (1) Eligible telecommunications carriers. A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 [47 USCS § 254] and shall, throughout the service area for which the designation is received—
>
> > (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) [47 USCS § 254(c)], either using its own facilities or a combination of its own facilities and resale of another carrier's services . . . ; and
> > (B) advertise the availability of such services and the charges therefor using media of general distribution.

47 U.S.C. § 214(e)(1).

b) Relevant portions of the Order

In the Order, the FCC found that "USF support should be directed to areas where providers would not deploy and maintain network facilities absent a USF subsidy, and not in areas where unsubsidized facilities-based providers already are competing for customers." JA at 494 (Order ¶ 281; internal quotation marks omitted). In turn, the FCC, in a portion of the Order entitled "Elimination of Support in Areas with 100 Percent

Overlap," id. at 493, outlined certain changes to the USF funding system. In the first paragraph of that section, entitled "Background," the FCC explained that "in many areas of the country, universal service provides more support than necessary to achieve [the FCC's] goals by subsidizing a competitor to a voice and broadband provider that is offering service without governmental assistance." Id. (Order ¶ 280; internal quotation marks omitted). In the ensuing paragraphs, entitled "Discussion," the FCC "adopt[ed] a rule to eliminate universal service support where an unsubsidized competitor — or a combination of unsubsidized competitors — offers voice and broadband service throughout an incumbent carrier's study area, and [sought] comment on a process to reduce support where such an unsubsidized competitor offers voice and broadband service to a substantial majority, but not 100 percent of the study area." Id. at 494 (Order ¶ 281). The FCC thus "exclude[d] from the CAF areas that are overlapped by an unsubsidized competitor." Id. The FCC also announced its intent to discontinue its "current levels of high-cost support to rate-of-return companies where there is overlap with one or more unsubsidized competitors." Id. More specifically, the FCC "adopt[ed] a rule to phase out all high-cost support received by incumbent rate-of-return carriers over three years in study areas where an unsubsidized competitor — or a combination of unsubsidized competitors — offers voice and broadband service at" certain specified speeds "for 100 percent of the residential and business locations in the incumbent's study area."[23] Id. at 494-95 (Order ¶ 283).

In announcing these rules, the FCC "recognize[d] that there [we]re instances where an unsubsidized competitor offer[ed] broadband and voice service to a significant percentage of the customers in a particular study area (typically where customers are concentrated in a town or other higher density sub-area), but not to the remaining customers in the rest of the study area, and that continued support may be required to enable the availability of supported voice services to those remaining customers." Id. at 494 (Order ¶ 282). "In those cases," the FCC concluded, "there should be a process to determine appropriate support levels." Id. "The FNPRM" thus sought "comment on the methodology and data for determining overlap." Id. at 495 (Order ¶ 284). And the Order "direct[ed] the Wireline Competition Bureau to publish a finalized methodology for determining areas of overlap." Id.

The Order also recognized the possibility that ETCs might be required to provide service in areas where they no longer receive support, or receive reduced support. As a result, in the attached FNPRM, the FCC sought comment on whether the reductions in USF support "should be accompanied by relaxation of those carriers' section 214(e)(1) voice service obligations in some cases." Id. at 790 (Order ¶ 1095); see id. at 791 (Order ¶ 1096). Although petitioners contend "[i]t was arbitrary, capricious, unreasonable and

[23] Likewise, in areas served by price cap carriers, a new rule eliminates high-cost support in a census block only where an unsubsidized competitor already serves that census block. JA at 456 (Order ¶¶ 170-71).

contrary to law for the [FCC] to maintain the [214(e)] service obligations while eliminating support," Pet'r Br. 4 at 27, they make no attempt to explain precisely how it was arbitrary or capricious. And a reading of the Order refutes that assertion; clearly, the FCC is taking a reasoned approach to the situation by seeking comment regarding the possible relaxation of service obligations. As for their assertion that the FCC is acting "contrary to law," petitioners argue simply that "Congress clearly intended the[] obligations and benefits [outlined in § 214(e)] to be complementary." Id. But that argument rests on the faulty assumption that being designated an ETC under § 214(e) entitles a carrier to USF funds. As we have explained, ETC designation simply makes a carrier eligible for USF. Nothing in the language of § 214(e) entitles an ETC to USF funding.

Finally, as the FCC notes in its response, once it finalizes its rules following comment and further order, ETCs will "have avenues to seek relief should their continuing section 214(e)(1) obligations prove too onerous." FCC Br. 4 at 21. In particular, the Order expressly authorizes "any carrier negatively affected by the universal service reforms . . . to file a petition for waiver that clearly demonstrates that good cause exists for exempting the carrier from some or all of those reforms, and that waiver is necessary and in the public interest to ensure that consumers in the area continue to receive voice service." JA at 566 (Order ¶ 539). To be sure, the Order cautions that the FCC will "subject such requests to a rigorous, thorough and searching review comparable to a total company earnings review," and will "take into account not only all revenues derived from network facilities that are supported by universal service but also revenues derived from unregulated and unsupported services as well." Id. at 567 (Order ¶ 540). But the Order states that "[w]aiver w[ill] be warranted where an ETC can demonstrate that, without additional universal service funding, its support would not be sufficient to achieve the purposes of [section 254 of the Act]." Id. (internal quotation marks omitted; brackets in original).

c) The FCC's notice of supplemental authority

On November 5, 2013, the FCC filed with this court a Rule 28(j) letter advising that on October 31, 2013, the FCC's Wireline Competition Bureau (WCB) released an order that allows ETCs to challenge a price-cap ILEC's exclusive right to high-cost support. Connect America Fund, Report and Order, WC Docket 10-90 (rel. Oct. 31, 2013) (WCB Order). More specifically, the WCB Order states, in pertinent part, as follows:

> The Commission directed the [WCB] to exclude areas with unsubsidized competitors from Phase II funding. The codified rule states that an unsubsidized competitor is one that "does not receive high-cost support." The Commission's intent in adopting this rule was to preclude support to areas where voice and broadband is available without burdening the federal support mechanisms. We will presume that any recipient of high-cost support at the time the challenge process is conducted does not meet the literal terms of the definition, but will entertain challenges to that presumption from any competitive eligible telecommunications carrier that otherwise meets or exceeds the performance obligations established herein and whose high-cost support is scheduled to be eliminated during the five-year term of Phase II. This will provide an opportunity for the Commission to consider whether to waive application of the "unsubsidized" element of the unsubsidized competitor definition in situations that would result in

> Phase II support being used to overbuild an existing broadband-capable network.

WCB Order ¶ 41, p.18.

We agree with the FCC that this portion of the WCB Order further serves to undercut petitioners' argument that the Order violates the FCC's principle of competitive neutrality. Specifically, "[a] competitive ETC that successfully utilizes the challenge process will not be forced to compete against an ILEC whose service in the same areas is subsidized by federal universal service funding." FCC Rule 28(j) Letter at 2.

4. *Is the Order, as applied to Allband and similarly-situated small rural carriers, unconstitutional under due process principles and as a bill of attainder, and/or does it violate the Act, principles of estoppel and contract law?*

The fourth and final issue of Brief 4 is devoted exclusively to issues raised by Allband Communications Cooperative (Allband).

a) Background information regarding Allband

Allband is a communications cooperative created in 2003 to offer communications services to residents in four rural contiguous counties in northern Michigan. In 2005, the FCC approved Allband as an ILEC. Allband, in turn, obtained $8 million in loans from the USDA Rural Utility Service (RUS), premised upon receipt of USF revenues as security. With those loan proceeds, Allband constructed an advanced communications network and began offering partial service in late 2005. By 2010, Allband had completed its network and was offering services to the residents in its rural exchange area.

According to petitioners, "[t]he annual USF funds provided to Allband comprise the bulk of the revenues necessary to make payments on Allband's RUS loans." Pet'r Br. 4 at 30.

Shortly after the Order at issue was released, Allband, acting pursuant to the authority granted to it in the Order, filed a petition for waiver of both the $250 per-line cap and the benchmarking rule adopted in the Order. FCC Br. 4 at 24. The FCC's Wireline Competition Bureau (WCB) considered the petition and found "good cause to grant [Allband] a waiver of [the $250 per-line cap] for three years." Id. (internal quotation marks omitted). The WCB advised Allband, however, that it was expected "to actively pursue any and all cost-cutting and revenue generating measures in order to reduce its dependency on federal high-cost USF support." Id. (internal quotation marks omitted). The WCB also expressly noted Allband's willingness to work with RUS to restructure its loan terms. But the WCB did not grant Allband the unlimited waiver Allband had requested. Instead, the WCB concluded it would reassess Allband's financial condition to determine whether a waiver remained necessary in the future.

Allband sought full Commission review of the WCB's Order and has asked the FCC to waive both the $250 per-line cap and the regression rule until 2026, when Allband will have repaid its loan from RUS. Allband's petition remains pending before the FCC.

b) The issues raised by Allband in this appeal

Allband argues that the Order violates its constitutional rights in several respects. Pet'r Br. 4 at 31. In support, Allband begins by asserting that it "fully meets all of the provisions and purposes of the 1996 Act, such as the USF provisions of Section 254(b)."

Id. In turn, Allband argues that the Order "contravenes the provisions[] and . . . goals and objectives of Congress under Section 254(b)(5) and 254(d) of the Act, requiring 'specific, predictable and sufficient . . . mechanisms to preserve and advance universal service'; and under Section 254(e) which requires that universal service support provided to ETC Providers 'should be explicit and sufficient to achieve the purposes of this section.'" Id. (quoting statutes). Continuing, Allband argues that the Order "imposes a drastic reduction in the per-line USF funding support to be provided some small rural companies such as Allband, and also established a 'benchmark regression rule' which purports to impose limitations on capital and operations costs reimbursable from the USF." Id. at 32. Allband argues that this benchmark regression rule "is . . . hopelessly vague, unascertainable, uncertain, and arbitrary as applied to small companies such as Allband." Id.

Ultimately, Allband argues that the Order, as applied to it, is "unconstitutional under the Due Process clause because (i) it imposes a retroactive reversal of Commission orders and USF program commitments upon which Allband (and the RUS) have relied in establishing Allband and in incurring capital costs, . . . and (ii) because the expense reimbursement limitations under the ever-changeable 'benchmark regression rule,' on a going-forward basis, are hopelessly vague and unascertainable." Id. "The Order thus fails," Allband argues, "to meet the holdings and reasoning stated in Federal Communications Commission, et al. v. Fox Television Stations, Inc., 132 S.Ct. 2307 (2012)." Pet'r Br. 4 at 32-33 (italics in original omitted).

We readily reject Allband's due process claim. To begin with, it is questionable whether Allband has supported the due process claim with sufficient reasoned argument. At best, Allband mentions the term "due process" and cites to a single case in support, i.e., Fox Television, without explaining its relevance. In any event, our own independent review of that case persuades us it is inapposite. At issue in Fox Television was whether the FCC had violated the due process rights of two television networks by failing to give them fair notice that, in contrast to a prior FCC policy, a fleeting expletive or a fleeting shot of nudity could be actionably indecent. In addressing this issue, the Supreme Court noted that "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." 132 S.Ct. at 2317. In turn, the Court held that "[t]his requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment." Id. In the case at hand, there is no basis for us to conclude that the FCC failed to give petitioners, including Allband, adequate notice of its intent or planned regulations. Indeed, the FCC issued a NPRM and allowed petitioners to file comments thereto. Thus, in short, there is no lack of fair notice in this case. Relatedly, it is unclear precisely what "process" Allband is claiming it was deprived of. Notably, Allband was given notice and an opportunity to comment, like all other carriers, and was also allowed to file a petition for waiver from certain of the Order's new USF rules. And, as noted, the FCC has granted Allband temporary relief from certain of those rules.

Allband also argues that the Order is "unconstitutional as applied to Allband under the Fifth Amendment Due Process clause" because it "would effect a confiscation of Allband's (and its customer-members' property), and will financially destroy commitments made by Allband to its employees, vendors, and entities providing credit and loans." Pet'r Br. 4 at 33. The only cases that Allband cites in support of its claim, however, are distinguishable. For example, in Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n of W. Va., 262 U.S. 679, 690 (1923), the Supreme Court held that public utility rates established by a state commission that "are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment." In the instant case, in contrast, Allband is not a public utility, and, in any event, the Order is not reasonably comparable to a rate-setting order issued by a state utility commission. Moreover, as the FCC notes in its response brief, any takings-type claim is not yet ripe because the FCC has exempted Allband for a period of three years from the USF reforms outlined in the Order, and has also afforded Allband the opportunity to seek an additional waiver at the end of that time period.

Allband next argues that the Order "constitutes an unconstitutional Bill of Attainder." Pet'r Br. 4 at 34. That is because, Allband argues, the "benchmark regression rule" adopted in the Order "threatens to reduce reimbursement funding from the USF, crippling Allband and a small class of rural carriers which relied on the 1996 Act's USF." Id.

Allband's argument, however, is clearly baseless. According to the Supreme Court, "the Bill of Attainder Clause was intended . . . as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply-trial by legislature." United States v. Brown, 381 U.S. 437, 442 (1965). Thus, "[a] bill of attainder is a legislative act which inflicts punishment without a judicial trial." United States v. Lovett, 328 U.S. 303, 315 (1946) (internal quotation marks omitted). In this case, there has been no legislative act, let alone one that punishes Allband without a judicial trial.[24] Consequently, Allband has failed to establish the existence of an unconstitutional Bill of Attainder.

In addition to these constitutional arguments, Allband also asserts several other non-constitutional claims. To begin with, Allband argues that the Order "is irrational to the extreme" and "should be reversed as applied to Allband based upon estoppel principles." Pet'r Br. 4 at 35. Notably, however, Allband fails to flesh out this estoppel claim by citing any case law or outlining the essential elements of an estoppel claim. Consequently, the claim is inadequately briefed. In any event, as the FCC notes in its response brief, it never represented to Allband that USF funding would remain constant

[24] Presumably, Allband would have us treat the Order as a legislative act. Even if we were to do so, there clearly has been no "punishment" of Allband that would render the Order an unconstitutional bill of attainder.

for the duration of Allband's loan with RUS, or, for that matter, any other set length of time. Thus, there is no basis for an estoppel claim.

Relatedly, Allband argues that the Order "arbitrarily failed to consider Allband's assertions that the USF funding should not be reduced as applied to already invested capital and expenses incurred in reliance on the USF, and at most, should apply only to prospective investment incurred after the Order." Id. at 36 (italics omitted). And, Allband further argues, the Order "will cause a prompt default by Allband of its RUS loan contracts and obligations," and "wholly ignores that the pre-Order USF revenue stream was relied upon by both Allband and the RUS to pay back the RUS loans." Id. at 37. As we have noted, however, the FCC, in its pre-Order USF funding system, never promised Allband or any other carriers that they would continue to receive USF funding indefinitely. And, in any event, the FCC has effectively considered Allband's unique situation by granting Allband's petition for waiver and authorizing Allband to seek an additional waiver at the end of three years.

Allband next argues that the Order is "arbitrary because it fails to recognize that the destructive impacts upon Allband (or similar rural small carriers) are wholly unnecessary to achieve the stated goals or objectives of the Order." Pet'r Br. 4 at 35 (italics omitted). In support, Allband argues that there is "no evidence of waste or insufficiency attributable to [it]." Id. at 36. But, notwithstanding the fact that Allband may operate efficiently (and Allband cites to no evidence in the record on this point), the Order found that there were systemic inefficiencies in the existing USF funding system that required a complete alteration of that system. Notably, Allband does not dispute the Order's findings on that point. Further, the purported "destructive effects" on Allband have clearly been mitigated, at least in the short term, by the FCC's grant of Allband's petition for waiver. Consequently, there is no merit to this claim.

Lastly, Allband argues that the Order is "unlawful and beyond the jurisdiction of the FCC because it intrudes much too far into the economic market place" and "serves to pick 'winners and losers' among companies." Id. at 37. Allband, however, fails to cite to a single case or statute in support of its claim. Consequently, we deem the claim inadequately briefed and thus waived. See Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 679 (10th Cir. 1998).

C. *Wireless Carrier Universal Service Fund Principal Brief*

1. *Does the FCC lack authority to redirect USF support to broadband or to regulate broadband?*

In the first issue of Brief 5, petitioners assert that the FCC lacks statutory authority to redirect USF support to broadband or to regulate broadband. The specific arguments offered by petitioners in support are, in large part, identical to those raised in the first issue of Brief 3. We therefore reject those arguments for the reasons we have outlined above. Petitioners in Brief 5 have also asserted that the Order's broadband condition is contrary to three additional provisions of the Act. We thus turn to address that argument.

a) Does the Order violate Congressional intent as expressed in 47 U.S.C. §§ 153(51), 214(e)(1) and 254?

Petitioners argue that the Order's broadband condition violates Congressional intent as expressed in 47 U.S.C. §§ 153(51), 214(e)(1) and 254. Section 153(51) defines the term "Telecommunications carrier" to mean:

> [A]ny provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 [47 USCS §226]). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

47 U.S.C. § 153(51).

The terms "common carrier," "telecommunications," and "telecommunications service," all of which are used in the above-quoted definition, are themselves defined as follows:

> (11) Common carrier. The term "common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.
> * * *
> (50) Telecommunications. The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.
> * * *
> (53) Telecommunications service. The term "telecommunications service" means the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used.

47 U.S.C. §§ 153(11), (50), (53).

Title II of the Act imposes certain specific requirements on "common carriers" in their provision of "telecommunications services." Because telephone service is quite clearly a "telecommunications service," entities that provide telephone service are treated and regulated as common carriers under Title II. Broadband internet service, however, has been treated differently by the FCC. In 2002, the FCC determined that cable broadband service was not a "telecommunications service" subject to regulation under Title II, but rather was an "information service" subject only to the FCC's ancillary authority under Title I of the Act.

All of which leads to petitioners' argument that § 153(51)'s definition of "telecommunications carrier" "clearly prohibits the FCC from treating telecom carriers as common carriers under Title II when they are engaged in providing an information service." Pet'r Br. 5 at 14. In other words, petitioners argue, the statement in § 153(51) that "[a] telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services," "places a statutory limitation on the FCC's jurisdiction to regulate." Id. at 13.

Relatedly, petitioners argue that when 47 U.S.C. §§ 153(51), 214(e)(1) and 254 are considered together, the only conclusion that can be drawn is "that a common-carrier ETC shall be eligible to receive USF support only to the extent it is engaged in providing telecom services on a common-carrier basis." Pet'r Br. 5 at 17. And in turn, petitioners argue that Congress, "[b]y specifying [in 47 U.S.C. § 214(e)(1)] that only a common carrier can be an ETC [(eligible telecommunications carrier)], . . . imposed the requirement that an ETC provide USF-supported telecom services on a common-carrier basis." Id. at 16. In short, petitioners argue, the wording of the relevant statutes clearly indicates that (a) USF funding may only be given to ETCs providing telecommunications services, and (b) ETCs that receive USF funding may use that funding only for the provision of telecommunications services. Consequently, they argue, the FCC lacked statutory authority (which they refer to in their brief as "jurisdiction") to require ETCs to offer broadband service upon reasonable request.

We conclude, however, that the FCC has the better of the argument. As the FCC notes in its response brief, petitioners' arguments "fail to acknowledge that carriers use the same facilities to provide both telecommunications and information services [i.e., broadband]." FCC Br. 5 at 16-17. Indeed, the FCC asserts, at the present time "more than 800 incumbent LECs voluntarily offer broadband subject to common carrier regulation under Title II of the Act." Id. at 21. Consequently, petitioners' reading of the Act "would prohibit universal service support for any dual-use facilities — despite the fact that hundreds of carriers, including petitioners, expended support on such facilities under the FCC's prior 'no barriers' policy." Id. at 17-18 (citing Order ¶¶ 64-65, 308).

Petitioners' suggested reading of the Act also ignores 47 U.S.C. § 254(b), which, as we have already discussed, outlines a set of "Universal service principles" that the FCC must follow in establishing "policies for the preservation and advancement of universal service." Notably, these principles include providing "[a]ccess to advanced telecommunications and information services . . . in all regions of the Nation," 47 U.S.C. § 254(b)(2), and ensuring that "[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, . . . have access to telecommunications and information services," 47 U.S.C. § 254(b)(3).

Thus, considering the Act as a whole, and in context of the realities of existing technology, we agree with the FCC that it was entirely reasonable for it to conclude that, "[s]o long as a provider offers some service on a common carrier basis, it may be eligible for universal service support as an ETC under sections 214(e) and 254(e), even if it offers other services - including 'information services' like broadband Internet access- on a non-common carrier basis." FCC Br. 5 at 19.

Finally, it is clear that the Order does not regulate broadband internet service or providers. Rather, it merely imposes broadband-related conditions on those ETCs that voluntarily seek to participate in the USF funding scheme. As the FCC notes, a provider of telecommunications services is not required to seek USF funding. But if it does so, it clearly can be subjected to certain conditions that the FCC may choose to attach to the funding. As the FCC notes, "[a] funding condition, like the broadband public interest obligation, is unlike common carrier regulation because providers voluntarily assume the condition in exchange for support and 'retain[] the ability to opt out of [the condition] entirely by declining . . . federal universal service subsidies.'" Id. at 22 (quoting WWC Holding Co. v. Sopkin, 488 F.3d 1262, 1274 (10th Cir. 2007)).

2. *Must the USF portions of the Order be vacated?*

Petitioners argue, relatedly, that the USF portions of the Order must be vacated. Pet'r Br. 5 at 31. But that argument is dependent upon a ruling in petitioners' favor on their claim that the Order's broadband condition is contrary to statutory authority. Because we have rejected this latter claim, there is no basis for vacating the USF portions of the Order.

3. *Did the FCC act arbitrarily and capriciously in reserving CAF II support for ILECs?*

Petitioners next argue that, even if the FCC possessed statutory authority to impose the broadband condition, it acted arbitrarily and capriciously in "mak[ing] its CAF II support program the virtual preserve of the big ILEC price-cap carriers." Pet'r Br. 5 at 33. This issue is identical to the first issue raised in Brief 4 ("Additional Universal Service Fund Issues Principal Brief") that we rejected above.

4. *Did the FCC act arbitrarily and capriciously in repealing the identical support rule and adopting a single-winner reverse auction?*

Petitioners challenge the FCC's decision to "[a]bandon[] its practice of providing USF support to multiple CETCs in an area" and instead "disburse Mobility I support to only one CETC per area," i.e., "the winning bidder in a reverse auction." Id. at 36.

a) The Order's plan for disbursement of the Mobility Fund

"In 2008, the [FCC] concluded that rapid growth in support to competitive ETCs as a result of the identical support rule threatened the sustainability of the universal service fund." JA at 499 (Order ¶ 296). The FCC also found at that time "that providing the same per-line support amount to competitive ETCs had the consequence of encouraging wireless competitive ETCs to supplement or duplicate existing services while offering little incentive to maintain or expand investment in unserved or underserved areas." Id. Accordingly, "the [FCC] adopted an interim state-by-state cap on high-cost universal support for competitive ETCs, . . . pending comprehensive high-cost universal service reform." Id.

In the Order, the FCC "establish[ed] the Mobility Fund," id. at 500 (Order ¶ 299), to "secure funding for mobility directly, rather than as a side-effect of the competitive ETC system, while rationalizing how universal service funding is provided to ensure that it is cost-effective and targeted to areas that require public funding to receive the benefits of mobility," id. at 499-500 (Order ¶ 298). "The first phase of the Mobility Fund will provide one-time support through a reverse auction, with a total budget of $300 million, and will provide the [FCC] with experience in running reverse auctions for universal service support." Id. at 500 (Order ¶ 299). "The second phase of the Mobility Fund will provide ongoing support for mobile service . . . with an annual budget of $500 million." Id. "This dedicated support for mobile service supplements the other competitive bidding mechanisms under the Connect America Fund." Id.

According to the FCC's response brief, it "completed the Mobility Fund Phase I Auction" on September 27, 2012. FCC Br. 5 at 32. "Based on this auction, thirty-three winning bidders became eligible to receive a total of $299,998,632 in one-time universal service support to provide third-generation or better mobile voice and broadband services covering up to 83,494 road miles in 795 biddable geographic areas located in thirty-one states and one territory." Id.

b) Petitioners' specific challenges to the Mobility Fund disbursement plan

In attacking the Order's Mobility Fund Phase I plan, petitioners begin by arguing that "the FCC ignored its prior policy choice of ensuring competitively-neutral funding." Pet'r Br. 5 at 37. But as the FCC correctly notes, the Order expressly discussed and ultimately "eliminate[d] the [pre-existing] identical support rule." JA at 554 (Order ¶ 502). The "identical support rule," the Order noted, "provide[d] competitive ETCs the same per-line amount of high-cost universal service support as the incumbent local exchange carrier serving the same area." Id. at 552 (Order ¶ 498). The Order further noted that the "rule's primary role ha[d] been to support mobile services, [even though] the [FCC] did not identify that purpose when it adopted the rule." Id. For example, the Order noted, "the largest competitive ETC recipient by holding company in 2010 was AT&T, which received $289 million," and in 2011, "about $611 million went to one of the four national wireless providers." Id. at 553 (Order ¶ 501). The Order concluded that the "rule fail[ed] to efficiently target support where it [wa]s needed," and thus "ha[d] not functioned as intended."[25] Id. at 554 (Order ¶ 502). Thus, rather than "ignoring" the pre-existing identical support rule as suggested by petitioners, the Order expressly reviewed and rejected it.

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[25] The Order explains in much greater detail the inefficiencies that resulted from the identical support rule. JA at 555 (Order ¶¶ 502-506).

Petitioners next argue that "[t]he FCC did not explain how its goal [of providing appropriate levels of support for the efficient deployment of mobile services] was based on any of the § 254(b) principles insofar as broadband services are ineligible for USF support." Pet'r Br. 5 at 37. According to petitioners, "[t]he FCC was obliged to provide a detailed explanation of how its 'balancing calculus' of the statutory principles led it to replace the rule with the Mobility I auction." Id. at 38.

This argument is flawed in several respects. To begin with, the Mobility Fund Phase I auction was not intended to replace the identical support rule. Rather, this auction was intended to "swiftly extend[] current generation wireless coverage in areas where it is cost effective to do so with one-time support." JA at 505 (Order ¶ 314). Further, the Order directly addressed and rejected the argument that broadband services are ineligible for USF support:

> 307. As an initial matter, it is wholly apparent that mobile wireless providers offer "voice telephony services" and thus offer services for which federal universal support is available. Furthermore, wireless providers have long been designated as ETCs eligible to receive universal service support.
> * * *
>
> 308. . . . [W]e reject the argument that we may not support mobile networks that offer services other than the services designated for support under section 254. As we have already explained, under our longstanding "no barriers" policy, we allow carriers receiving high-cost support "to invest in infrastructure capable of providing access to advanced services" as well as supported voice services. Moreover, section 254(e)'s reference to "facilities" and "services" as distinct items for which federal universal service funds may be used demonstrates that the federal interest in universal service extends not only to supported services but also the nature of the facilities over which they are offered. Specifically, we have an interest in promoting the deployment of the types of facilities that will best achieve the

> principles set forth in section 254(b) (and any other universal service principles that the Commission may adopt under section 254(b)(7)), including the principle that universal service program [sic] be designed to bring advanced telecommunications and information services to all Americans, at rates and terms that are comparable to the rates and terms enjoyed in urban areas. Those interests are equally strong in the wireless arena. We thus conclude that USF support may be provided to networks, including 3G and 4G wireless services networks, that are capable of providing additional services beyond supported voice services.
>
> 309. . . . [T]he Mobility Fund will be used to support the provision of "voice telephony service" and the underlying mobile network. That the network will also be used to provide information services to consumers does not make the network ineligible to receive support; to the contrary, such use directly advances the policy goals set forth in section 254(b), our new universal service principle recommended by the Joint Board, as well as section 706.

JA at 502-03 (Order ¶¶ 307-309; internal footnotes omitted). Finally, as the above-quoted language makes clear, the FCC expressly considered the principles outlined in § 254(b) and concluded that the Mobility Fund Phase I auction was consistent with and served to promote those principles. Nothing about the FCC's analysis on this point strikes us as arbitrary or capricious.

Lastly, petitioners argue that "[b]y virtue of the FCC's decision 'not to subsidize competition,' and its adoption of a single-winner Mobility I auction, States were deprived of their § 214(e)(2) authority to designate more than one CETC in a given area." Pet'r Br. 5 at 39. That is, petitioners argue, "[b]y unilaterally deciding that it would define the areas throughout which CETCs would provide USF-supported services based on census blocks, the FCC preempted the primary jurisdiction of the States to establish such areas."

Id. at 39-40. Petitioners argue that "§ 214(e)(2) conferred on the States the authority 'to designate more than one . . . ETC in a given area' and to 'determine whether that is in the public interest.'" Id. at 40. "That conferral of authority," petitioners assert, "necessarily deprived the FCC of authority to limit Mobility I support to one CETC in any FCC-designated, census block-based service area." Id.

Contrary to petitioners' arguments, nothing in the Order deprives states of their statutory authority to designate ETCs. Indeed, only designated ETCs may participate in the Mobility Fund Phase I auction. JA at 524 (Order ¶ 386) ("to be eligible for Mobility Fund support, entities must (1) be designated as a wireless ETC pursuant to section 214(e) of the Communications Act, by the state public utilities commission"). Ultimately, petitioners' arguments rest on the faulty assumption that ETC designation by a State entitles an entity to USF funding. As we have discussed elsewhere in this opinion, ETC designation by a State simply makes an entity eligible for, but not entitled to, USF funding. Consequently, the rules adopted by the Order for distributing Mobility Fund Phase I funds are not contrary to § 214(e), nor do they deprive the states of their designation authority under that statute.

5. *Did the FCC act arbitrarily and capriciously in setting the Mobility II budget at $500 million?*

Petitioners also argue that the FCC acted arbitrarily and capriciously in setting the Mobility Fund Phase II annual budget at $500 million, particularly when "compared to a $4 billion annual budget for ILECs." Pet'r Br. 5 at 42. Although petitioners concede that the FCC concluded in its Order that "the Mobility II budget would 'be sufficient to sustain and expand the availability of mobile broadband,'" they argue that the Order "failed to supply a nexus between any record findings and [that] conclusion." Id. (quoting Order ¶ 495). In particular, petitioners complain that (a) "[t]he FCC did not cite to any record representation by Verizon, Sprint, AT&T or T-Mobile that [they] would maintain current coverage if [their] USF support is phased out," id. at 43, (b) "[t]he FCC made no findings supporting its conclusions that $579 million was sufficient support for regional and small wireless CETCs in 2010 and that $500 million in annual support would be sufficient for them in the future," id., and (c) "no findings supported the FCC's conclusion that providing 800 percent more USF funding to large ILECs than to wireless CETCs would constitute competitively-neutral funding," id. at 43-44.

Addressing these three complaints in turn, the FCC concluded in the Order that it was "reasonable to assume that the four national [wireless] carriers will maintain at least their existing coverage footprints even if the [USF] support they receive today [i.e., pre-Order] is phased out." JA at 551 (Order ¶ 495). Contrary to petitioners' suggestion, the FCC made this prediction based upon the record evidence that was compiled in response to the Further Notice of Proposed Rulemaking. In particular, the FCC noted that "[u]nder 2008 commitments to phase down their competitive ETC support, Verizon Wireless and Sprint have already given up significant amounts of the support they received under the identical support rule, and there is nothing in the record showing that either carrier is reducing coverage or shutting down towers" as a result of this reduction in USF support.

Id. Further, the FCC noted that there was no evidence "in the record . . . suggest[ing] AT&T or T-Mobile would reduce coverage or shut down towers in the absence of ETC support." Id. In light of this analysis, we are not persuaded that the FCC's predictive judgment that the four major wireless carriers would continue their existing coverage even in the absence of USF support was arbitrary or capricious.

The same can be said for petitioners' complaint that the FCC failed to support its conclusion that an annual $500 million budget was sufficient for regional and small wireless carriers. In the Order, the FCC found that "[i]n 2010, $579 million flowed to regional and small carriers, i.e., carriers other than the four nationwide providers." Id. In support of that finding, the FCC cited to its "2010 Disbursement Analysis." Id. (Order ¶ 495 n.821). Notably, petitioners make no attempt to discredit that report. In turn, the FCC found in the Order that "[o]f this $579 million, we know in many instances that this support is being provided to multiple wireless carriers in the same geographic area." Id. (Order ¶ 495). In support of that finding, the FCC cited to its "Response to United States House of Representatives Committee on Energy and Commerce, Universal Service Fund Data Request of June 22, 2011, Request 7: Study Areas with the Most Eligible Telecommunications Carriers (Table 1: Study Areas with the Most Eligible Telecommunications Carriers in 2010)." Id. (Order ¶ 495 n.822). Again, petitioners make no attempt to discredit this source of evidence. Lastly, the FCC "note[d] that the State Members of the Federal State Joint Board on Universal Service have proposed that the Commission establish a dedicated Mobility Fund that would provide $50 million in the first year, $100 million in the second year, and then increase by $100 million each year until support reaches $500 million annually." Id. at 551-52 (Order ¶ 495). Considering this recommendation together with its factual findings, the FCC opined "that [its] $500 million budget w[ould] be sufficient to sustain and expand the availability of mobile broadband." Id. at 552 (Order ¶ 495). Nothing about this predictive judgment was arbitrary or capricious.

Finally, and again contrary to petitioners' assertions, the FCC expressly justified its decision to provide substantially less USF funding to wireless carriers than to other types of carriers, including large ILECs. To begin with, the FCC noted that "[a]lthough the budget for fixed services exceeds the budget for mobile services, . . . today significantly more Americans have access to 3G mobile coverage than have access to residential broadband via fixed wireless, DSL, cable, or fiber." Id. at 551 (Order ¶ 494). In turn, the FCC predicted "that as 4G mobile service is rolled out, this disparity will persist — private investment will enable the availability of 4G mobile service to a larger number of Americans than will have access to fixed broadband with speeds of at least 4 Mbps downstream and 1 Mbps upstream." Id. In support of this finding and prediction, the FCC cited to the "15th Annual Mobile Wireless Competition Report, 26 FCC Rcd at 9736-41, paras. 109-116 and Table 11." Id. (Order ¶ 494 n.820). Petitioners have made no attempt to challenge this source of information. Thus, in sum, we conclude the FCC acted neither arbitrarily nor capriciously in deciding to provide substantially more USF funding to "fixed services" than to wireless services.

6. *Did the FCC fail to respond to comments calling for a separate mobility fund for insular areas?*

In the final issue of Brief 5, petitioners complain that the FCC did not respond to comments calling for a separate mobility fund for insular areas. According to petitioners, "[t]he FCC received comments from wireless CETCs in insular areas urging it to establish a separate insular component of the Mobility Fund." Pet'r Br. 5 at 46. The FCC in turn, petitioners complain, "relegated its one-sentence response to the wireless CETCs' comments to the margin of the Order," and "declined to create a Mobility Fund for insular areas[] because 'these areas generally do not face the same level of deployment challenges as Tribal areas.'" Id. (quoting Order ¶ 481 n.790). "That unexplained statement," petitioners assert, "was unresponsive to the comments the FCC invited and received" and was therefore irrational. Id.

The statement at issue was contained in a footnote to the portion of the Order establishing the Tribal Mobility Fund Phase I, which was intended by the FCC "to provide one-time support to deploy mobile broadband to unserved Tribal lands." JA at 546 (Order ¶ 481). In that footnote, the FCC stated:

> Some carriers request a separate funding mechanism for insular areas. See, e.g., PR Wireless Mobility Fund NPRM Comments at 1-5. Because these areas generally do not face the same level of deployment challenges as Tribal lands, we decline to create a separate component of the Mobility Fund for them.

Id. (Order ¶ n.790).

The FCC asserts in its response brief that it was unnecessary for the Order to go into greater detail in justifying this conclusion. In support, the FCC notes that in 2010 it issued an order, referred to in the record as the "2010 Insular Order," that "declin[ed] to adopt a new high-cost support mechanism for non-rural insular carriers." JA at 974 (Appendix D at ¶ 1). The Puerto Rico Telephone Company (PRTC) filed a petition for reconsideration of the 2010 Insular Order. In Appendix D to the Order, the FCC rejected PRTC's petition. In doing so, the FCC noted that PRTC "failed to show that consumers in Puerto Rico lack access to supported voice services because of inadequate federal universal service support." Id. Relatedly, the FCC noted, to the extent that telephone subscribership in Puerto Rico "falls below the national average because of the number of low-income consumers who are unable to afford access to telephone service," id. at 976-977, "it [wa]s not at all apparent why the Commission should establish a new insular high-cost support mechanism rather than increase support for low-income consumers through its existing low-income support programs," id. at 977. Indeed, the FCC noted, "subscribership in Puerto Rico [wa]s on the rise due, in part, to efforts by the Commission, the Telecommunications Regulatory Board of Puerto Rico, and telecommunications carriers in Puerto Rico to improve the effectiveness and consumer awareness of federal low-income support programs." Id. The FCC also rejected the notion that it was "arbitrarily treat[ing] carriers serving insular areas differently from carriers . . . serv[ing] rural areas." Id.

According to the FCC, "[p]etitioners' requests for an insular mobility fund relied on the same flawed arguments" as those raised by PRTC and other non-rural insular carriers. FCC Br. 5 at 45. In short, the FCC asserts, "there [we]re no changed circumstances that would [have] require[d] [it] to reconsider its longstanding (and repeatedly confirmed) view that a separate support mechanism for insular areas [wa]s unnecessary because those areas do not exhibit cost or other characteristics that warrant an exemption from generally applicable high-cost support mechanisms." Id. at 45-46. "Thus," the FCC asserts, "it was sufficient for [it] to deny petitioners' request by reiterating that insular areas do not face unique 'deployment challenges' that would warrant the creation of a separate support mechanism." Id. at 46.

Petitioners' reply brief is silent on this issue: they make no attempt to rebut the FCC's assertion that the issues they now raise regarding the need for a mobility insular fund are substantially similar to the issues raised by PRTC regarding the purported need for a special insular fund for Puerto Rico. Consequently, we reject petitioners' argument on this issue.

D. *Tribal Carriers Principal Brief*

1. *Did the FCC act arbitrarily and capriciously in prescribing funding cuts for tribal carriers?*

In Brief 9, petitioners Gila River Indian Community and Gila River Telecommunications, Inc. (collectively Gila River[26]) challenge the FCC's decision in the

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[26] Gila River Indian Community is a federally recognized Indian tribe that is "centered in a[] . . . reservation in rural southern Arizona." Pet'r Br. 9 at 8. The Gila

Order to cut USF funding to many rate-of-return carriers serving Tribal lands. More specifically, Gila River argues that the Order's application of § 254's universal service principles is arbitrary and capricious because there is no rational connection between the FCC's findings regarding the dismal state of communications services on Tribal lands and its subjection of tribal carriers to rules that result in funding cuts. In support, Gila River offers four specific arguments. As outlined below, however, we find no merit to any of these arguments, and we conclude that the FCC's decision was neither arbitrary nor capricious.

a) The relevant portions of the Order

In the Order, the FCC concluded that its existing high-cost support rules were outdated. JA at 396 (Order ¶ 6). In place of these rules, the FCC adopted what it considered "fiscally responsible, accountable, incentive-based policies" that further "a framework [designed] to distribute universal service funding in the most efficient and technologically neutral manner possible." Id. at 394 (Order ¶ 1). For instance, the Order establishes, for the first time, a "budget for the high-cost programs within USF" of $4.5 billion over six years, the apportionment of which "represent[s the FCC's] predictive judgment as to how best to allocate limited resources." Id. at 399 (Order ¶ 18). And because the reforms are "focused on rooting out inefficiencies, [they] will not affect all carriers in the same manner or in the same magnitude." Id. at 496 (Order ¶ 289).

River tribe "wholly own[s] and operate[s]" Gila River Telecommunications, Inc. Id. at i. Gila River Telecommunications, Inc. is "the only Tribal carrier to challenge the *Order*." FCC Br. 9 at 14. The tribe and the carrier will be referred to, collectively, as "Gila River."

At the same time, the Order also implements several new measures aimed at helping Tribal lands, which, the FCC expressly noted, "have significant telecommunications deployment and connectivity challenges." Id. at 546 (Order ¶ 481). First, the FCC created the Tribal Mobility Fund Phase I, which is a $50 million fund distributed by reverse auction "to provide one-time support to deploy mobile broadband to unserved Tribal lands." Id. This is in addition to the general $300 million Mobility Fund Phase I, for which Tribal lands are eligible. Id. Second, the FCC "adopt[ed] a preference for Tribally-owned or controlled providers seeking general or Tribal Mobility Fund Phase I support." Id. at 550 (Order ¶ 490). This preference comes in the form of a bidding credit in the reverse auction. Third, of the $500 million designated annually "for ongoing support for mobile services" as part of the Mobility Fund Phase II, up to $100 million will be allocated "to address the special circumstances of Tribal lands." Id. at 551 (Order ¶ 494). The FCC "designated [this] substantial level of funding to ensure that [Tribal] communities are not left behind." Id. at 552 (Order ¶ 497). Finally, carriers serving Tribal lands, like all carriers, can petition for an exemption ("waiver") from a reduction in subsidies. Id. at 566 (Order ¶ 539).

b) Did the FCC fail to explain how it balanced the § 254(b) universal service principles in determining how much funding to give rate-of-return carriers serving Tribal lands?

Gila River asserts that the FCC "fail[ed] to articulate [in the Order] how it balanced the Section 254(b) principles as they pertain to rate-of-return carriers serving

Tribal lands," and that this failure "renders the Order arbitrary and capricious with respect to such carriers." Pet'r Br. 9 at 25.

We conclude, however, that the FCC offered sufficient justification for its decision. In its Order, the FCC stated that the funding it was allocating to rate-of-return carriers serving Tribal lands was enough to "make a difference" while remaining "consistent with [the FCC's] commitment to fiscal responsibility and the varied objectives [it had] for [its] limited funds." JA at 548 (Order ¶ 485). In support, the FCC pointed out that the $50 million in allocated funding "is approximately 25 percent of the ongoing support awarded to competitive ETCs serving Covered Locations in 2010," which the FCC predicted will be enough to "help the availability of mobile voice and broadband services" on Tribal lands. Id. at 547 (Order ¶ 482), 548 (Order ¶ 485). Moreover, the FCC noted, the $100 million from the Mobility Fund Phase II "is roughly equivalent to the amount of funding currently provided to Tribal lands in the lower 48 states and in Alaska, excluding support awarded to study areas that include the most densely populated communities in Alaska." Id. at 552 (Order ¶ 497). In short, the FCC concluded, taking into account the special concerns facing carriers serving Tribal lands, that its funding allocations struck the right balance between fiscal efficiency and the need to advance telecommunications access on Tribal lands. Although Gila River disagrees with the FCC, we are not persuaded that the FCC acted arbitrarily or capriciously in reaching its decision.

c) Was it arbitrary and capricious for the FCC to treat carriers serving Tribal lands in a manner similar to rate-of-return carriers or to give certain funding to price-cap carriers and not to rate-of-return carriers?

Gila River next argues that the Order's "nearly universal cutbacks in support for rate-of-return carriers simply cannot be squared with the evidentiary record that the FCC itself made documenting quite powerfully that Tribal carriers are in an entirely different situation from other carriers." Pet'r Br. 9 at 28. We agree with the FCC, however, that Gila River's "assertion is . . . difficult to fathom." FCC Br. 9 at 22. As explained above, the Order contains several Tribal-specific initiatives that differ from the treatment of rate-of-return carriers generally. We therefore reject Gila River's argument.

Gila River also asserts that the FCC's "decision to maintain the annual support of price-cap carriers, including those serving Tribal lands, at 2011 levels, while also making these same carriers (but not rate-of-return carriers) eligible for up to an additional $300 million of new funding to promote broadband deployment, is arbitrary and capricious." Pet'r Br. 9 at 28. This is because, Gila River asserts, "nowhere did the FCC conclude that Tribal lands served by price-cap carriers were worse served than Tribal lands served by rate-of-return carriers." Id.

As the FCC correctly points out, however, "[t]his contention overlooks the historical distinctions between the existing universal service regimes for price cap and rate-of-return carriers." FCC Br. 9 at 28. The previous framework for rate-of-return carriers provided a stable return "regardless of the necessity or prudence of any given investment." JA at 496 (Order ¶ 287). As a result, the FCC's goal of "rooting out inefficiencies" requires particular focus on rate-of-return carriers. Id. (Order ¶ 289). Furthermore, although "more than 83 percent of the unserved locations in the nation are in price cap areas, . . . such areas currently receive approximately 25 percent of high-cost support." Id. at 452 (Order ¶ 158). In light of these facts, the FCC "conclude[d] increased support to areas served by price cap carriers . . . [wa]s warranted." Id. at 452 (Order ¶ 159). And we cannot say that this conclusion was arbitrary or capricious.

d) Did the FCC fail to explain how its funding cuts will allow carriers serving Tribal lands to reasonably fulfill the new broadband obligations imposed in the Order?

Gila River complains that "[a]t the same time it financially hobbled rate-of-return carriers serving Tribal lands, the FCC increased their load, imposing new and expensive broadband obligations on them." Pet'r Br. 9 at 30. In other words, Gila River argues, "the Order irrationally mandates that rate-of-return carriers serving Tribal lands do vastly more while depriving them of the funding needed just to break even." Id. And that, Gila River asserts, "confounds the fundamental purpose of Section 254" and is thus arbitrary and capricious. Id.

"[W]hen an agency's decision is primarily predictive, our role is limited; we require only that the agency acknowledge factual uncertainties and identify the considerations it found persuasive." Rural Cellular Ass'n v. FCC, 588 F.3d 1095, 1105 (D.C. Cir. 2009). The FCC did that here. By way of the Order, the FCC explained its reasoning for each of the subsidies and initiatives that it chose to promote telecommunications access on Tribal lands.

Particularly irksome to Gila River is the Order's repeal of the "identical support rule." The identical support rule provided competitive ETCs the same per-line amount of high-cost universal service support as the incumbent carriers in the same area, regardless of the competitive carriers' costs. But the FCC, "[b]ased on more than a decade of experience with the operation of the [identical support] rule and having received a multitude of comments noting that [it] fail[ed] to efficiently target support where it [wa]s needed," concluded "that [it] ha[d] not functioned as intended." JA at 554, ¶ 502.

Gila River points out that the identical support rule was worth $150 million in 2011 to carriers serving Tribal lands. But Gila River fails to acknowledge that the combination of $50 million from the Tribal Mobility Fund Phase I, up to $100 million annually from the Mobility Fund Phase II, and the additional amount that carriers will receive from the general $300 million Mobility Fund Phase I, should cover most, if not all, of the funds lost from the identical support rule. And, in any event, because the FCC made no claims that the Order would be revenue neutral, a deficit is not fatal to the Order.

For these reasons, we conclude that Gila River has failed to demonstrate that the FCC's line-drawing was unreasonable.

e) Did the FCC act arbitrarily and capriciously by granting an exemption to one Tribally-owned carrier?

Although the Order imposes a five-year funding phase-out of all high-cost support that competitive carriers receive under the identical support rule, one Tribally-owned carrier, Standing Rock Telecommunications, received a two-year freeze at current funding levels. JA at 563 (Order ¶ 530). Gila River argues that the reasoning behind this exemption applies equally to Gila River and other Tribally-owned carriers. And, Gila River argues, "[t]he very essence of arbitrariness and capriciousness is the erratic and profoundly disparate treatment of identically situated entities without any reasoned explanation." Pet'r Br. 9 at 35.

Gila River ignores, however, the key distinction noted by the FCC in its Order. The Order explained that Standing Rock is "a nascent Tribally-owned ETC that was designated to serve its entire Reservation and the only such ETC to have its ETC designation modified since release of the USF-ICC Transformation NPRM in February 2011." JA at 564 (Order ¶ 531). The FCC concluded that because the company was new, it needed extra time "to ramp up its operations in order to reach a sustainable scale to serve consumers in its service territory." Id. In other words, the FCC explained, it was adopting this approach "in order to enable Standing Rock to reach a sustainable scale so that consumers on the Reservation c[ould] realize the benefits of connectivity that, but for Standing Rock, they might not otherwise have access to." Id.

To be sure, Gila River argues in its reply brief that the age of Standing Rock should not be dispositive, and that "[s]upport for older carriers could promote Tribal self-sufficiency and economic development just as much as support for newer carriers." Pet'r Reply Br. 9 at 15. But, that argument notwithstanding, we discern no unreasonableness in the FCC's limited exemption, aimed at giving a new carrier an extra subsidy in order to advance universal service.

V. *Conclusion*

We GRANT in part and DENY in part respondent's Motion to Strike New Arguments in the Joint Universal Service Fund Reply Brief of Petitioners. We DENY the petitions for review, to the extent they are based upon the issues raised in the Joint Universal Service Fund Principal Brief, the Additional Universal Service Fund Issues Principal Brief, the Wireless Carrier Universal Service Fund Principal Brief, and the Tribal Carriers Principal Brief.

In re FCC 11-9900,

BACHARACH, J., concurring in part and dissenting in part.

I join virtually all of Chief Judge Briscoe's thorough, persuasive opinion. But, I respectfully dissent on Part IV(A)(2). There, the majority rejects the Petitioners' challenge to the sufficiency of the budget for the Universal Service Fund. On this limited issue, I respectfully dissent. In my view, the FCC failed to supply a rational basis for its conclusion that an annual budget of $4.5 billion would suffice with the new requirements for broadband capability. In this respect, I believe the FCC acted arbitrarily in violation of the Administrative Procedure Act.

The FCC budgeted $4.5 billion for the high-cost portion of the Universal Service Fund. *See* 2 R. at 399 ¶ 18, 438-39 ¶¶ 125-26.[1] This fund includes a variety of mechanisms to provide financial support to carriers. *Id.* at 399 n.16. One of these mechanisms is called the "Connect America Fund." *Id.* at 394 ¶ 1, 399 n.16. To obtain support from this fund, a carrier "must provide broadband with actual speeds of at least 4 [megabits per second] downstream and 1 [megabit per second] upstream." *Id.* at 400 ¶ 22, 423-24 ¶¶ 92-93.

The FCC does not suggest that it considered any cost projections for the new broadband requirements. *See* Combined Responses of Federal Respondents and Support Intervenors to the Joint Universal Services Fund Principal Brief at 36-38 (July 29, 2013). Nonetheless, the FCC urges us to endorse its $4.5 billion budget as a "reasonable

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[1] On the challenges involving sufficiency of the budget, many of the petitioners are rate-of-return carriers. The FCC has budgeted $2 billion (out of the annual $4.5 billion) for rate-of-return carriers. *See* 2 R. at 438-39 ¶ 126.

predictive judgment." *Id.* at 33. It is true that predictive judgments within an agency's area of expertise are entitled to "particularly deferential review, so long as they are reasonable." *BNSF Ry. Co. v. Surface Transp. Bd.*, 526 F.3d 770, 781 (D.C. Cir. 2008). But here, the FCC's prediction is not reasonable, for it lacks support in any empirical findings or even rough estimates of the anticipated costs of requiring carriers to upgrade their equipment to meet the newly mandated requirements. Without at least some findings or estimate regarding the new costs, how could the FCC reasonably predict that its $4.5 billion budget for universal fund support would be "sufficient . . . to preserve and advance universal service"? 47 U.S.C. § 254(b)(5).[2]

The majority notes that in *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001), we qualified the sufficiency requirement, stating that the FCC "should" (rather than "shall") base its universal service policies on sufficiency. Majority Op. at 61. But there, we emphasized the need for at least some data before the FCC could determine the sufficiency of financial support for carriers. *Qwest Corp.*, 258 F.3d at 1195, 1202.

In *Qwest*, the FCC had set a benchmark figure to determine the amount of support that a state would receive. *See id*. at 1197, 1202. The FCC attempted to justify the benchmark as "a 'reasonable compromise of commenters' proposals.'" *Id*. at 1202. We

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[2] The majority concludes that the FCC had no duty to estimate the cost of the new broadband requirements. Majority Op. at 63 n.7. I respectfully disagree. The FCC imposed these requirements to promote universal service and justified the budget for high-cost support based on its sufficiency "to achieve [the FCC's] universal service objectives." 2 R. at 397 ¶ 10, 437-38 ¶ 123. The FCC cannot rationally justify the sufficiency of its high-cost support for universal service without considering the costs that are being imposed on the industry.

rejected this justification because the FCC had not made any empirical findings on sufficiency. Without such findings, we concluded that the FCC had failed to set forth a rational basis for the chosen benchmark. *Id.* at 1195, 1202. We reasoned that the FCC is not

> a mediator whose job is to pick the "midpoint" of a range or to come to a "reasonable compromise" among competing positions. As an expert agency, its job is to make rational and informed decisions on the record before it in order to achieve the principles set by Congress. Merely identifying some range and then picking a compromise figure is not rational decision-making.

Id.

The $4.5 billion budget is just as arbitrary as the benchmark struck down in *Qwest Corp.* The FCC has required carriers to upgrade their broadband speeds, as a condition of universal service fund support, without pointing to any data or estimates of the costs to be borne by the carriers.

The sufficiency of the budget was challenged in the FCC proceedings. *See, e.g.*, 6 R. at 4074-75 (petition for reconsideration by Windstream Communications, Inc. and Frontier Communications Corp.), 4094, 4098-99 (comments of Gila River Telecommunications, Inc.). For example, the Rural Broadband Alliance stated in the FCC proceedings:

> [America's Broadband Connectivity Plan] assumes that the [Universal Service Fund] is constrained as suggested by the [notice of proposed rulemaking]. We respectfully submit that the size of the fund required to meet the statutory requirements of the Act should be determined by the FCC on the basis of fact and applicable law. The fact that a group of carriers has utilized the proposed $4.5 billion "budget" in the formulation of

> a consensus proposal does not provide the Commission with a basis to constrain the fund in the absence of specific findings consistent with the Commission's obligations under the Act. It is not sufficient for the Commission to claim that it has discretion to constrain the size of the [Universal Service Fund] on the basis that a group of providers suggest that a $4.5 billion fund is "sufficient."

Id. at 3182; *see also id.* at 3316-17 (Moss Adams LLP's challenge to the sufficiency of the $4.5 billion fund in light of the new cost of developing and upgrading broadband networks).

Other carriers pointed out that only a minority of existing broadband networks were able to satisfy the new speed requirements. *See id.* at 2053-54 (comments of CenturyLink); *see also* Supp. R. at 60-61 ¶ 170 & Figure 8 (FCC's reference to a survey by the National Telecommunications Cooperative Association, showing that in 2010, 75% of the member carriers reported offering internet access speeds of 1.5 to 3.0 megabits per second).

Faced with these comments, the FCC defended its $4.5 billion budget based on expectations of greater efficiencies, the presence of "safety valves," and the difficulty of projecting the cost for each carrier seeking support from the Universal Service Fund. In my view, these arguments do not supply a rational basis for the FCC's conclusion that the budget would be sufficient with the new broadband requirements.

First, the FCC predicted that its efforts to "root[] out inefficiencies" and "improve accountability" in the legacy system would reduce reliance on the Universal Service Fund. 2 R. at 437-38 ¶ 123; 496 ¶ 289. At the same time, the FCC set the budget at the

2011 expenditure level. *Id.* at 399 ¶ 18. But the FCC did not compare the anticipated cost *savings* to the cost *burdens* associated with the new broadband requirements. Thus, the FCC did not articulate a reasonable basis to predict that the new cost-control measures would materially soften the burden of the new broadband requirements.

Second, the FCC relied on the presence of "safety valves." For example, if a rate-of-return carrier obtains a request for broadband service, it can decline when the request would be considered "unreasonable." *Id.* at 468 ¶¶ 207-08. And when a carrier encounters extenuating circumstances, it can seek relief under the Total Cost and Earnings Review Mechanism. *Id.* at 723-24 ¶ 924. In light of these safety valves, the FCC may have considered the industry-wide cost to be sufficient because it is planning to: (1) generously consider refusals to provide broadband service, and (2) liberally apply the Total Cost and Earnings Review Mechanism. But these safety valves are designed to relieve carriers on a case-by-case basis, not to relieve an entire industry of the additional costs of the new requirements for broadband speed.

Finally, the FCC's counsel argued that the agency could not have determined the cost of the broadband condition for each carrier seeking relief through the Universal Service Fund. I agree, and no one has suggested otherwise. But the FCC made no effort to provide *any* estimate regarding the cost of its new broadband requirements on the industry as a whole.

The development of industry-wide cost estimates were not only feasible, but also part of the record. Six price-cap companies proffered a plan, called "America's

Broadband Connectivity Plan," which included broadband speed requirements similar to those adopted by the FCC. 5 R. at 2990. For these speed requirements, proponents of the plan provided three cost estimates: $2.2 billion, $5.9 billion, and $9.7 billion. *Id.* at 2993-3004. The applicable estimate depended on whether the FCC would require broadband service beyond the areas already being served by price-cap carriers or exclude the highest-cost census blocks. *Id.* The FCC did not comment on these cost estimates or explain how they would affect the scope of the eventual broadband condition.

As the FCC's counsel states, the agency couldn't feasibly project the eventual costs for every single carrier to construct facilities allowing for the newly mandated broadband speeds. But the six price-cap carriers provided detailed estimates of the overall cost, and the FCC never explains its inability to provide this sort of estimate. Instead, the FCC states that it regards the $4.5 billion budget as "sufficient" without *any* information, estimate, or even guess about the cost of what it is requiring.

In *Qwest* we required more of the FCC, and we should do so here. Accordingly, I respectfully dissent on Part IV(A)(2) of the majority opinion.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

No. 11-9900

Consolidated Case Nos. 11-9581, 11-9585, 11-9586, 11-9587, 11-9588, 11-9589, 11-9590, 11-9591, 11-9592, 11-9594, 11-9595, 11-9596, 11-9597, 12-9500, 12-9510, 12-9511, 12-9513, 12-9514, 12-9517, 12-9520, 12-9521, 12-9522, 12-9523, 12-9524, 12-9528, 12-9530, 12-9531, 12-9532, 12-9533, 12-9534, 12-9575

IN RE: FCC 11-161

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

**PETITION FOR REHEARING EN BANC OF
ALLBAND COMMUNICATIONS COOPERATIVE
AS TO ISSUES RAISED IN ADDITIONAL
UNIVERSAL SERVICE FUND ISSUES BRIEFS**

ATTACHMENT 2

TO

**PETITION FOR REHEARING EN BANC OF
ALLBAND COMMUNICATIONS COOPERATIVE
AS TO ISSUES RAISED IN ADDITIONAL
UNIVERSAL SERVICE FUND ISSUES BRIEFS**

July 7, 2014

FILED
United States Court of Appeals
Tenth Circuit

May 23, 2014

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

IN RE: FCC 11-161

No. 11-9900

DIRECT COMMUNICATIONS CEDAR VALLEY, LLC, a Utah limited liability company; TOTAH COMMUNICATIONS, INC., an Oklahoma corporation; H & B COMMUNICATIONS, INC., a Kansas Corporation; MOUNDRIDGE TELEPHONE COMPANY, a Kansas corporation; PIONEER TELEPHONE ASSOCIATION, INC., a Kansas corporation; TWIN VALLEY TELEPHONE, INC., a Kansas corporation; PINE TELEPHONE COMPANY, INC., an Oklahoma corporation; PENNSYLVANIA PUBLIC UTILITY COMMISSION; CHOCTAW TELEPHONE COMPANY; CORE COMMUNICATIONS, INC.; NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES; NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION d/b/a NTCA-THE RURAL BROADBAND ASSOCIATION; CELLULAR SOUTH, INC.; AT&T INC.; HALO WIRELESS, INC.; THE VOICE ON THE NET COALITION, INC.; PUBLIC UTILITIES COMMISSION OF OHIO; TW TELECOM INC.; VERMONT PUBLIC SERVICE BOARD; TRANSCOM ENHANCED SERVICES, INC.; THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS; CENTURYLINK, INC.; GILA RIVER INDIAN COMMUNITY; GILA RIVER TELECOMMUNICATIONS, INC.;

Consolidated Case Nos.:
11-9581, 11-9585, 11-9586, 11-9587, 11-9588, 11-9589, 11-9590, 11-9591, 11-9592, 11-9594, 11-9595, 11-9596, 11-9597, 12-9500, 12-9510, 12-9511, 12-9513, 12-9514, 12-9517, 12-9520, 12-9521, 12-9522, 12-9523, 12-9524, 12-9528, 12-9530, 12-9531, 12-9532, 12-9533, 12-9534, 12-9575

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ALLBAND COMMUNICATIONS COOPERATIVE; NORTH COUNTY COMMUNICATIONS CORPORATION; UNITED STATES CELLULAR CORPORATION; PR WIRELESS, INC.; DOCOMO PACIFIC, INC.; NEX-TECH WIRELESS, LLC; CELLULAR NETWORK PARTNERSHIP, A LIMITED PARTNERSHIP; U.S. TELEPACIFIC CORP.; CONSOLIDATED COMMUNICATIONS HOLDINGS, INC.; NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS; RURAL TELEPHONE SERVICE COMPANY, INC.; ADAK EAGLE ENTERPRISES LLC; ADAMS TELEPHONE COOPERATIVE; ALENCO COMMUNICATIONS, INC.; ARLINGTON TELEPHONE COMPANY; BAY SPRINGS TELEPHONE COMPANY, INC.; BIG BEND TELEPHONE COMPANY, INC.; THE BLAIR TELEPHONE COMPANY; BLOUNTSVILLE TELEPHONE LLC; BLUE VALLEY TELE-COMMUNICATIONS, INC.; BLUFFTON TELEPHONE COMPANY, INC.; BPM, INC., d/b/a Noxapater Telephone Company; BRANTLEY TELEPHONE COMPANY, INC.; BRAZORIA TELEPHONE COMPANY; BRINDLEE MOUNTAIN TELEPHONE LLC; BRUCE TELEPHONE COMPANY, INC.; BUGGS ISLAND TELEPHONE COOPERATIVE; CAMERON TELEPHONE COMPANY, LLC; CHARITON VALLEY TELEPHONE CORPORATION; CHEQUAMEGON COMMUNICATIONS COOPERATIVE, INC.; CHICKAMAUGA TELEPHONE CORPORATION;

CHICKASAW TELEPHONE COMPANY; CHIPPEWA COUNTY TELEPHONE COMPANY; CITIZENS TELEPHONE COMPANY; CLEAR LAKE INDEPENDENT TELEPHONE COMPANY; COMSOUTH TELECOMMUNICATIONS, INC.; COPPER VALLEY TELEPHONE COOPERATIVE; CORDOVA TELEPHONE COOPERATIVE; CROCKETT TELEPHONE COMPANY, INC.; DARIEN TELEPHONE COMPANY; DEERFIELD FARMERS' TELEPHONE COMPANY; DELTA TELEPHONE COMPANY, INC.; EAST ASCENSION TELEPHONE COMPANY, LLC; EASTERN NEBRASKA TELEPHONE COMPANY; EASTEX TELEPHONE COOP., INC.; EGYPTIAN TELEPHONE COOPERATIVE ASSOCIATION; ELIZABETH TELEPHONE COMPANY, LLC; ELLIJAY TELEPHONE COMPANY; FARMERS TELEPHONE COOPERATIVE, INC.; FLATROCK TELEPHONE COOP., INC.; FRANKLIN TELEPHONE COMPANY, INC.; FULTON TELEPHONE COMPANY, INC.; GLENWOOD TELEPHONE COMPANY; GRANBY TELEPHONE LLC; HART TELEPHONE COMPANY; HIAWATHA TELEPHONE COMPANY; HOLWAY TELEPHONE COMPANY; HOME TELEPHONE COMPANY (ST. JACOB, ILL.); HOME TELEPHONE COMPANY (MONCKS CORNER, SC); HOPPER TELECOMMUNICATIONS LLC; HORRY TELEPHONE COOPERATIVE, INC.; INTERIOR TELEPHONE COMPANY; KAPLAN TELEPHONE COMPANY, INC.; KLM

TELEPHONE COMPANY; CITY OF KETCHIKAN, ALASKA, d/b/a KPU Telecommunications; LACKAWAXEN TELECOMMUNICATIONS SERVICES, INC.; LAFOURCHE TELEPHONE COMPANY, LLC; LA HARPE TELEPHONE COMPANY, INC.; LAKESIDE TELEPHONE COMPANY; LINCOLNVILLE TELEPHONE COMPANY; LORETTO TELEPHONE COMPANY, INC.; MADISON TELEPHONE COMPANY; MATANUSKA TELEPHONE ASSOCIATION, INC.; MCDONOUGH TELEPHONE COOPERATIVE; MGW TELEPHONE COMPANY, INC.; MID CENTURY COOPERATIVE.; MIDWAY TELEPHONE COMPANY; MID-MAINE TELECOM LLC; MOUND BAYOU TELEPHONE & COMMUNICATIONS, INC.; MOUNDVILLE TELEPHONE COMPANY, INC.; MUKLUK TELEPHONE COMPANY, INC.; NATIONAL TELEPHONE OF ALABAMA, INC.; ONTONAGON COUNTY TELEPHONE COMPANY; OTELCO MID-MISSOURI LLC; OTELCO TELEPHONE LLC; PANHANDLE TELEPHONE COOPERATIVE, INC.; PEMBROKE TELEPHONE COMPANY, INC.; PEOPLES TELEPHONE CO.; PEOPLES TELEPHONE COMPANY; PIEDMONT RURAL TELEPHONE COOPERATIVE, INC.; PINE BELT TELEPHONE COMPANY, INC.; PINE TREE TELEPHONE LLC; PIONEER TELEPHONE COOPERATIVE, INC.; POKA LAMBRO TELEPHONE COOPERATIVE, INC.; PUBLIC SERVICE TELEPHONE COMPANY;

RINGGOLD TELEPHONE COMPANY; ROANOKE TELEPHONE COMPANY, INC.; ROCK COUNTY TELEPHONE COMPANY; SACO RIVER TELEPHONE LLC; SANDHILL TELEPHONE COOPERATIVE, INC.; SHOREHAM TELEPHONE LLC; THE SISKIYOU TELEPHONE COMPANY; SLEDGE TELEPHONE COMPANY; SOUTH CANAAN TELEPHONE COMPANY; SOUTH CENTRAL TELEPHONE ASSOCIATION; STAR TELEPHONE COMPANY, INC.; STAYTON COOPERATIVE TELEPHONE COMPANY; THE NORTH-EASTERN PENNSYLVANIA TELEPHONE COMPANY; TIDEWATER TELECOM, INC.; TOHONO O'ODHAM UTILITY AUTHORITY; UNITEL, INC.; WAR TELEPHONE LLC; WEST CAROLINA RURAL TELEPHONE COOPERATIVE, INC.; WEST TENNESSEE TELEPHONE COMPANY, INC.; WEST WISCONSIN TELCOM COOPERATIVE, INC.; WIGGINS TELEPHONE ASSOCIATION; WINNEBAGO COOPERATIVE TELECOM ASSOCIATION; YUKON TELEPHONE CO., INC.; ARIZONA CORPORATION COMMISSION; WINDSTREAM CORPORATION; WINDSTREAM COMMUNICATIONS, INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA, Respondents,

and

SPRINT NEXTEL CORPORATION; LEVEL 3 COMMUNICATIONS, LLC; CENTURYLINK, INC.; CONNECTICUT PUBLIC UTILITIES REGULATORY AUTHORITY; INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE; WESTERN TELECOMMUNICATIONS ALLIANCE; NATIONAL EXCHANGE CARRIER ASSOCIATION, INC.; ARLINGTON TELEPHONE COMPANY; THE BLAIR TELEPHONE COMPANY; CAMBRIDGE TELEPHONE COMPANY; CLARKS TELECOMMUNICATIONS CO.; CONSOLIDATED TELEPHONE COMPANY; CONSOLIDATED TELCO, INC.; CONSOLIDATED TELECOM, INC.; THE CURTIS TELEPHONE COMPANY; EASTERN NEBRASKA TELEPHONE COMPANY; GREAT PLAINS COMMUNICATIONS, INC.; K. & M. TELEPHONE COMPANY, INC.; NEBRASKA CENTRAL TELEPHONE COMPANY; NORTHEAST NEBRASKA TELEPHONE COMPANY; ROCK COUNTY TELEPHONE COMPANY; THREE RIVER TELCO; RCA - The Competitive Carriers Association; RURAL TELECOMMUNICATIONS GROUP, INC.; T-MOBILE USA, INC., CENTRAL TEXAS TELEPHONE COOPERATIVE, INC.; VENTURE COMMUNICATIONS COOPERATIVE, INC.; ALPINE COMMUNICATIONS, LC; EMERY TELCOM; PEÑASCO VALLEY TELEPHONE COOPERATIVE, INC.; SMART CITY TELECOM; SMITHVILLE

COMMUNICATIONS, INC.; SOUTH
SLOPE COOPERATIVE TELEPHONE
CO., INC.; SPRING GROVE
COMMUNICATIONS; STAR
TELEPHONE COMPANY; 3 RIVERS
TELEPHONE COOPERATIVE, INC.;
WALNUT TELEPHONE COMPANY,
INC.; WEST RIVER COOPERATIVE
TELEPHONE COMPANY, INC.; RONAN
TELEPHONE COMPANY; HOT
SPRINGS TELEPHONE COMPANY;
HYPERCUBE TELECOM, LLC;
VIRGINIA STATE CORPORATION
COMMISSION OF THE STATE OF
KANSAS; MONTANA PUBLIC
SERVICE COMMISSION; VERIZON
WIRELESS; VERIZON; AT&T INC.;
COX COMMUNICATIONS, INC.;
NATIONAL TELECOMMUNICATIONS
COOPERATIVE ASSOCIATION d/b/a
NTCA-THE RURAL BROADBAND
ASSOCIATION; INDEPENDENT
TELEPHONE &
TELECOMMUNICATIONS ALLIANCE;
NATIONAL EXCHANGE CARRIER
ASSOCIATION, INC. (NECA),
COMCAST CORPORATION; VONAGE
HOLDINGS CORPORATION; RURAL
TELECOMMUNICATIONS GROUP,
INC.; NATIONAL CABLE &
TELECOMMUNICATIONS
ASSOCIATION; CENTRAL TEXAS
TELEPHONE COOPERATIVE, INC.;
VENTURE COMMUNICATIONS
COOPERATIVE, INC.; ALPINE
COMMUNICATIONS, LC; EMERY
TELCOM; PEÑASCO VALLEY
TELEPHONE COOPERATIVE, INC.;
SMART CITY TELECOM; SMITHVILLE
COMMUNICATIONS, INC.; SOUTH
SLOPE COOPERATIVE TELEPHONE

CO., INC.; SPRING GROVE COMMUNICATIONS; STAR TELEPHONE COMPANY; 3 RIVERS TELEPHONE COOPERATIVE, INC.; WALNUT TELEPHONE COMPANY, INC.; WEST RIVER COOPERATIVE TELEPHONE COMPANY, INC.; RONAN TELEPHONE COMPANY; HOT SPRINGS TELEPHONE COMPANY; HYPERCUBE TELECOM, LLC,

Intervenors.

STATE MEMBERS OF THE FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE,

Amicus Curiae.

JUDGMENT

Before **BRISCOE**, Chief Circuit Judge, **HOLMES**, Circuit Judge, and **BACHARACH**, Circuit Judge.

It is the judgment of this court that the petitions for review filed in these consolidated proceedings involving rulemaking by the Federal Communications Commission are denied. The court has addressed the thirty-one consolidated petitions for review in two separately authored opinions being issued together.

With regard to the issues raised in the opinion authored by Chief Judge Briscoe, Judge Holmes joins and Judge Bacharach dissents in part but otherwise joins.

With regard to the issues raised in the opinion authored by Judge Bacharach, Chief Judge Briscoe and Judge Holmes join.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 11-9900

Consolidated Case Nos. 11-9581, 11-9585, 11-9586, 11-9587, 11-9588, 11-9589, 11-9590, 11-9591, 11-9592, 11-9594, 11-9595, 11-9596, 11-9597, 12-9500, 12-9510, 12-9511, 12-9513, 12-9514, 12-9517, 12-9520, 12-9521, 12-9522, 12-9523, 12-9524, 12-9528, 12-9530, 12-9531, 12-9532, 12-9533, 12-9534, 12-9575

IN RE: FCC 11-161

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

PETITION FOR REHEARING EN BANC OF
ALLBAND COMMUNICATIONS COOPERATIVE
AS TO ISSUES RAISED IN ADDITIONAL
UNIVERSAL SERVICE FUND ISSUES BRIEFS

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2014, I caused the foregoing Petitioner Allband Communications Cooperative's (Consolidated) Petition for Rehearing En Band as to Issues Raised in Additional Universal Service Fund Issues Briefs to be filed using the Court's CM/ECF system.

I further certify that the foregoing documents were furnished 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.

Respectfully submitted,

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