BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOS. 15-1038, 16-1002, & 16-1072

AT&T INC.; CENTURYLINK, INC.,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

All parties, intervenors, and amici appearing in this Court are listed in Petitioners' Brief.

2. Rulings under review.

The rulings under review are *Connect America Fund*, 29 FCC Rcd 15644 (2014) (*"2014 Order"*) (JA __) and *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks*, 63 Communications Reg. (P&F) 1721 (FCC) (2015) (*"2015 Order"*) (JA __).

3. Related cases.

The rulings under review have not previously been before this Court. We are not aware of any related cases.

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GLOSSARY

1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104
2014 Order	*Connect America Fund*, 29 FCC Rcd 15644 (2014) (JA __)
2015 Order	*Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks*, 63 Communications Reg. (P&F) 1721 (FCC) (2015) (JA __)
2016 Lifeline Order	*Lifeline and Link Up Reform and Modernization*, 31 FCC Rcd 3962 (2016)
Act	Communications Act of 1934, Pub. L. No. 73-416
CETC Interim Cap Order	*High-Cost Universal Service Support*, 23 FCC Rcd 8834 (2008)
ETC	Eligible Telecommunications Carrier
First Universal Service Order	*Fed.-State Joint Bd. on Universal Serv.*, 12 FCC Rcd. 8776 (1997)
Lifeline FNPRM	*Lifeline and Link Up Reform and Modernization* 30 FCC Rcd 7818 (2015)
Transformation NPRM	Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd. 4554 (2011)
Transformation Order	*Connect America Fund*, 26 FCC Rcd 17686 (2011)
Seventh Order	Seventh Order on Reconsideration, *Connect America Fund*, 29 FCC Rcd. 7051 (2014)

STATEMENT OF THE ISSUES PRESENTED

This case concerns the Federal Communications Commission's ongoing efforts to modernize and reform its "high-cost" universal service program, which subsidizes telecommunications service to the nation's most expensive-to-serve communities. Program subsidies are limited to telecommunications carriers designated as "eligible telecommunications carriers" (ETCs). Designation as an ETC historically has included the obligation to provide voice telephone service throughout an ETC's service area, which generally means throughout a carrier's territory in a state.

In 2011, the FCC began a significant overhaul of the universal service system to subsidize networks capable of providing both voice and broadband Internet service, along with reforms to make high-cost support more efficient by targeting it specifically to the census blocks that are more expensive to serve. In that 2011 Order, the agency also sought to ensure that service to existing voice customers was not disrupted during the transition. Accordingly, the Commission did not then alter the obligations of "price cap"[1] ETCs to provide voice service throughout their service areas, even

[1] Price cap carriers are the larger local telephone companies subject to a system of regulation in which the FCC "sets a maximum price" beneath which carriers must set their rates. *Nat'l Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 178 (D.C. Cir. 1993).

though, during the transition to "Phase II" of the USF transformation, those carriers would not receive Phase II universal service high-cost support in some census blocks. The agency asked for further comment on these obligations.

AT&T Inc. and others urged the agency to narrow the historical ETC designations and corresponding service obligations of price cap ETCs to areas in which they receive Phase II high-cost support. Meanwhile, before the agency had ruled on the issue, the United States Telecom Association (USTelecom)—a telecommunications industry trade association of which AT&T is a member—petitioned the FCC under 47 U.S.C. § 160 to forbear from enforcing Section 214(e) of the Communications Act of 1934 ("the Act"), 47 U.S.C. § 214(e), including the duty to provide voice service in areas in which price cap carriers do not receive Phase II high-cost support.

In the *2014 Order*, the first of the two orders on review, the FCC granted in part USTelecom's request for forbearance from high-cost service obligations in certain categories of census blocks, without granting or denying forbearance from the remaining census blocks in question. With that forbearance, price cap carriers retained service obligations without yet receiving Phase II funding in only about 6% of the census blocks that they serve. When AT&T petitioned this Court for review, the agency explained

that the *2014 Order* had neither granted nor denied forbearance from service obligations in the remaining census blocks; it would reach the issue in an upcoming proceeding. This Court held the case in abeyance pending a decision on the matter.

In the *2015 Order*, the second order on review, the FCC did reach the issue and held that USTelecom had not carried its burden to justify forbearance in the remaining census blocks during this transition. The agency also declined to reach the equivalent result through rulemaking. The Commission explained that without those service obligations, it had no assurance customers would receive service during the transition to the new high-cost support regime. Once the agency has completed an upcoming auction and has taken any necessary action to allot funding for remaining census blocks, price cap carriers will either be funded in the remaining service areas or be replaced by new carriers, leaving vanishingly few areas in which they must provide service but do not receive high-cost support. And the Commission has promised to revisit ETCs' service obligations once the transition is complete. Maintaining the high-cost voice service obligations in the meantime protects consumers during the transition.

This case presents the following issues:

(1) Whether the FCC reasonably interpreted the Act to permit the agency to maintain price carriers' ETC designations and obligations to provide voice service throughout their service areas, even in census blocks in which they do not yet receive Phase II high-cost support, as the agency transitions to a new universal service funding regime.

(2) Whether in preserving those ETC designations and obligations during the transition, the agency reasonably balanced universal service principles, including the principles of comparable service to all parts of the country at comparable rates, sufficient funding to preserve and advance universal service, and competitive neutrality.

JURISDICTION

The *Orders* under review are final agency action over which this Court has jurisdiction under 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a). The *2014 Order* was released December 18, 2014, with notice published in the Federal Register on January 27, 2015. AT&T timely petitioned for review on February 19, 2015. (Case No. 15-1038.) The *2015 Order* was released December 28, 2015. AT&T timely petitioned for review on January 6, 2016. (Case No. 16-1002.) CenturyLink timely petitioned for review on February 26, 2016. (Case No. 16-1072.) *See* 28 U.S.C. § 2344.

STATUTES AND REGULATIONS

An addendum to this brief sets forth the relevant statutes and rules.

COUNTERSTATEMENT

A. Universal Service and the 1996 Act

The availability of affordable, reliable communication services to consumers throughout the nation—or "[u]niversal service"—"has [long] been a fundamental goal of federal telecommunications." *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 614 (5th Cir. 2000). Indeed, the FCC was established "to make available, so far as possible, to all the people of the United States…communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. When local telephone service was regulated as a natural monopoly, the Commission and state regulators relied on implicit subsidies to implement this mandate, setting rates above cost in dense urban areas which are comparatively inexpensive to serve, and below cost in more expensive rural areas. *See Rural Cellular Ass'n v. FCC*, 685 F.3d 1083, 1085 (D.C. Cir. 2012) (*"Rural Cellular II"*). This cross-subsidy helped to ensure affordable rates in rural America.

In the Telecommunications Act of 1996, Pub. L. No. 104-104 ("1996 Act") Congress comprehensively amended the Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.) ("the Act"), "to introduce competition into local telephone"

markets. *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1098 (D.C. Cir. 2009) ("*Rural Cellular I*"). Anticipating that competition would undermine the implicit subsidies that had previously supported universal service, Congress directed the FCC to adopt a system of explicit subsidies. *See Rural Cellular II*, 685 F.3d at 1085.

Section 254 of the Act, titled "Universal Service," defines "universal service" as "an evolving level of telecommunications services that the Commission shall establish periodically under this section." 47 U.S.C. § 254(c)(1). Thus, it tasks the agency with determining "the definition of the services that are supported by Federal universal service support mechanisms." *Id.* Section 254(b) also directs that the Commission "shall" base its universal service policies on six principles, including that rates be "just, reasonable, and affordable," that consumers in rural and high-cost areas have access to services "comparable to those services provided in urban areas" at "comparable" rates, and that support be "specific, predictable and sufficient…to preserve and advance universal service." 47 U.S.C. § 254(b)(2), (3), & (5). Section 254(b) also authorizes the agency to set out other principles that it believes are in the public interest. 47 U.S.C. § 254(b)(7). In 1997, the agency exercised this discretion to establish the additional principle of "competitive neutrality," which requires that

"universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another…." *Federal-State Joint Bd. on Universal Serv.*, 12 FCC Rcd. 8776, 8801 ¶ 47 (1997) (*"First Universal Service Order"*).

Section 214 of the Act governs when carriers may and must provide service, including, in subsection (e), requirements for the "provision of universal service." 47 U.S.C. § 214(e). Section 214(e)(5) directs state regulatory commissions to designate "service area[s]," while sections 214(e)(2) and (3) require states to designate providers as "eligible telecommunications carriers" ("ETCs") for those service areas.[2] And Section 214(e)(1) states that a designated eligible telecommunications carrier "shall be eligible to receive universal service support in accordance with section 254." It further requires that such a carrier "offer the services that are supported by Federal universal service support mechanisms under section 254" "throughout the service area for which the designation is received." 47 U.S.C. § 214(e)(1). The Act also directs that a state commission "shall" permit an ETC to relinquish its ETC designation "in any area served by more than one ETC." *Id.* § 214(e)(4).

[2] Under certain circumstances, the FCC also designates ETCs. *See* 47 U.S.C. § 214(e)(6).

Although the Commission had encouraged states to implement modestly-sized service areas in order to encourage smaller providers to compete, states generally set large, often statewide, service areas coextensive with existing providers' service footprints. *See* Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd. 4554, 4669 ¶ 372 (2011) (JA __) ("*Transformation NPRM*"). As originally implemented, the need for high-cost support was determined on a statewide basis, though the resulting support was targeted to areas within a state that had high costs. *See id.* at n.519; *Federal-State Joint Bd. on Universal Serv.*, 14 FCC Rcd. 20432, 20472 ¶73 (1999).

The universal service regime has two components important in this case.[3] First, to subsidize those "services in high-cost areas," the agency created the universal service high-cost program. *Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 57 (D.C. Cir. 2011). Second, to "subsidize[] rates for individuals [who] might not otherwise be able to afford basic telephone services," *id.*, the FCC maintained, in revised form, its preexisting Lifeline program, *see Lifeline and Link Up Reform and Modernization*, 30 FCC Rcd 7818, 7866–67 ¶¶ 133–135 (2015) ("*Lifeline FNPRM*"). For a carrier to receive subsidies

[3] There are additional components to subsidize rates to schools, libraries, and rural health care facilities. *See* 47 U.S.C. § 254(h)(1).

through either of those programs, the FCC historically has required that the carrier be designated an ETC. *See* 47 U.S.C. § 254(e); 47 C.F.R. § 54.401(b); *Applications of GCI Communication Corp., et al. for Consent to Assign Licenses to the Alaska Wireless Network, LLC*, 28 FCC Rcd 10433, 10482 ¶ 131 (2013). When a carrier is designated as an ETC, even for high-cost purposes, it generally must also participate in the Lifeline program. *See* 47 C.F.R. § 54.405(a). In some states, designation as an ETC may also entail state-specific service obligations. 47 U.S.C. § 254(f).

B. 2011 Transformation of the High-Cost Program to Subsidize the Deployment of Broadband Service

When first implementing the section 254(c)(1) mandate to define "universal service" in 1997, the agency determined that universal service would support voice telephone services. *See First Universal Service Order* ¶¶ 61–82 (requiring ETCs to provide "voice grade access to the public switched [telephone] network.") In the following years, however, "the communications landscape changed dramatically," including especially the explosive growth of the Internet and demand for broadband services. *Transformation NPRM* ¶ 8 (JA__). The legacy voice-centered telephone network was "no longer adequate for the country's communication needs." *Id.* ¶ 2 (JA __).

In November 2011, the FCC fundamentally reoriented its universal service high-cost program to subsidize dual-use networks capable of

providing both voice and broadband services. *See Connect America Fund*, 26 FCC Rcd. 17663, 17686 ¶ 65 (2011) (*"Transformation Order"*) (JA __). The FCC began requiring ETCs "to offer broadband service in their supported area that meets certain basic performance requirements." *Id.* ¶ 86 (JA __). And for the first time, the agency permitted ETCs "to provision voice service over any platform, including the [legacy switched] or [Internet] networks." *Id.* ¶ 78 (JA __).

ETCs remained obligated, however, to provide "voice telephony service" "on a standalone basis," sold separately from other services (such as broadband). *Id.* ¶ 81 & n.117 (JA __). The FCC also continued to require ETCs to "provide Lifeline service throughout their designated service area," *id.* ¶ 79 (JA __).

In conjunction with those reforms to the types of services offered, the FCC also overhauled the support system to make it more "efficient and technologically neutral." *Id.* ¶ 1 (JA __). The new system uses different approaches for smaller "rate-of-return" carriers and larger, "price cap" carriers. Price cap carriers are "Bell Operating Companies and other large and mid-sized carriers," primarily the incumbent carriers at the time of the 1996 Act and their descendants. *Id.* ¶ 21 (JA __). This case concerns funding and service obligations only for price cap carriers.

The implementation of this funding reform for price cap carriers would happen in two phases. In Phase I, the FCC "provide[d] frozen high-cost support to [price cap] carriers equal to the amount of support each carrier received in 2011," and authorized more than $400 million in additional support to bring broadband to more customers. *See Id.* ¶ 133 (JA __). Thus, carriers still receiving frozen Phase I funding would not see a reduction in support from pre-reform levels.

In Phase II, the agency would calculate the costs to serve areas on a census block basis, rather than statewide as before. *Id.* ¶ 167. Each census block would be categorized as "low-cost," "high-cost," or "extremely high-cost," *Id.* ¶ 24 (JA __); *see also 2014 Order* ¶¶ 30–32 (JA __–__) (concerning "extremely high-cost" areas). Low-cost areas would receive no funding support. High-cost subsidies would be awarded for a given area to a single ETC, with no subsidies in areas where at least one provider already offers voice and broadband service meeting the agency's performance standards without receiving universal service subsidies. *Transformation Order* ¶ 170 (JA __). Extremely high-cost areas—estimated to make up fewer than 1% of census blocks—will be supported by a separate "Remote Areas Fund," *id.* ¶ 533 (JA __), though the Commission has since also made those part of the

Phase II funding process as well. *See Connect America Fund*, 29 FCC Rcd. 7051, 7060-61 ¶¶ 31-32 (2014) ("*Seventh Order*").

At the beginning of the implementation of Phase II, incumbent price cap carriers were given a choice. They could elect to accept all of the Phase II funding available for their entire service territory in a state, along with the attendant ETC obligations. *Transformation Order*. ¶ 166 (JA __). The agency would calculate which census blocks needed funding and the amount of support available through a model of "forward-looking costs" "of deploying broadband-capable networks in high-cost areas." *Id.* Alternately, if a price cap carrier declined the offer of this "model-based support" in a state, the agency would select ETCs for each census block that needed support through a competitive bidding mechanism. *Id.* A price cap carrier that refuses the statewide funding is permitted to participate in this auction, and continues to receive "frozen" subsidies as in Phase I until the auction is implemented. *See id*. ¶ 180 (JA __).

C. Tenth Circuit Upholds 2011 *Transformation Order*

On review, the Tenth Circuit upheld the 2011 *Transformation Order* in its entirety. *See In re FCC 11-161*, 753 F.3d 1015, 1033 (10th Cir. 2014), *cert. denied sub nom., inter alia, Cellular S., Inc. v. FCC*, 135 S. Ct. 2050 (2015). Some parties had argued that, because the FCC eliminated high-cost

support for ETCs in census blocks also served by an unsubsidized competitor, the agency erred "by refusing to relieve [ETCs] of their ongoing duty to serve all comers without USF support." *Id.* at 1087. The Tenth Circuit, however, held that the agency's decision was neither irrational nor unlawful, and that designation as an ETC under section 214 does not "entitle" a carrier to funding. *Id.* at 1088.

D. Proposals to Reform Price Cap Carriers' ETC Designations and Associated Obligations

When adopting these reforms to the universal service high-cost program, the FCC recognized that "ETCs may receive reduced support in their existing service areas, and ultimately may no longer receive any federal high-cost support." *Transformation Order* ¶ 1095 (JA __). Accordingly, when issuing the 2011 *Transformation Order*, the agency sought "comment on whether such reductions should be accompanied by a relaxation of . . . [ETC] voice service obligations." *Id.* The agency stated its "aim to ensure that obligations and funding are appropriately matched, while avoiding consumer disruption in access to communications services." *Id.* ¶ 1089 (JA __).[4] The request for comment also encompassed more general proposals to

[4] Petitioners quote this language, but omit the phrase "while avoiding consumer disruption." Br. 32

tailor price cap carriers' ETC and service-area designations to the specific areas where they receive federal high-cost subsidies. *See id.* ¶¶ 1098–1101 (JA __).

In response, AT&T and others urged the agency to "clarify" that a carrier's ETC designation, service area, and service obligations are limited to the areas in which it receives support. AT&T August 2014 Comments 18 (filed Aug. 8, 2014) (JA __) ("AT&T August 2014 Comments"). These commenters also urged the FCC to "reinterpret section 214(e)(1)" of the Act, *id.* at 21 (JA __), to reach the same result, *see id.* at 11–15, 20–23 (JA __–__, __–__).

Commenters also invoked the FCC's "competitive neutrality" principle to support their proposals. *E.g.*, *id.* at 23 (JA __). Under the new rules, non-price cap carriers are permitted to defer seeking ETC designations until after they win the right to serve particular locations through competitive bidding—thus ensuring that their ETC designations and accompanying obligations will be tailored to where they receive federal high-cost subsidies. *See Seventh Order* ¶ 43 (JA __). AT&T suggested that unless the FCC similarly limited price cap carriers' ETC designations and service obligations, carriers that become ETCs through the competitive bidding process would enjoy an unfair

competitive advantage. *See* AT&T August 2014 Comments 18–19, 23 (JA __–__, __).

E. USTelecom Initiates a Forbearance Proceeding

In October 2014, before the agency had acted on comments in the rulemaking, USTelecom petitioned the FCC to forbear, among other things, from "applying its requirement that price cap ETCs provide 'supported services'…in those areas where they do not receive high-cost support." *See* Petition for Forbearance of the United States Telecom Association 61 (filed Oct. 6, 2014) (JA __) ; *see also* AT&T Forbearance Comments (filed Dec. 5, 2014) (JA __) (supporting USTelecom's forbearance petition).[5]

[5] Under Section 10 of the Act, the FCC "shall forbear" from applying any regulation or requirement of the Act "if the Commission determines that" the following three conditions are satisfied:

> (1) [E]nforcement of [the requirement] is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement [of that requirement] is not necessary for the protection of consumers; and (3) forbearance from applying [that requirement] is consistent with the public interest.

47 U.S.C. § 160(a). A party seeking forbearance bears the burden of proving these conditions are met. *Verizon v. FCC*, 770 F.3d 961, 967 (D.C. Cir. 2014).

F. *2014 Order*

In the *2014 Order*, the first Order on review here, the FCC granted USTelecom's forbearance petition in part and deferred ruling on the rest. *See Order* ¶¶ 50–70, 167 (JA __–__, __). The FCC granted price cap carriers forbearance from their obligation to "offer voice telephony service throughout their service areas pursuant to section 214(e)(1)(A)" in three categories of census blocks:

> (1) census blocks that are determined to be low-cost, (2) all census blocks served by an unsubsidized competitor . . . offering voice and broadband at speeds of 10/1 Mbps to all eligible locations, and (3) census blocks where a subsidized competitor—i.e., another ETC—is receiving federal high-cost support to deploy modern networks capable of providing voice and broadband to fixed locations.

Id. ¶ 51 (JA __) (footnotes omitted).

That left certain categories of census block unaddressed, where the agency had neither granted nor denied forbearance. Price cap carrier ETCs maintained their ETC designation throughout their service areas, even though the agency had forborne from many service obligations that normally accompany such a designation. The carriers also continued to have high-cost ETC service obligations without Phase II high-cost support in some census blocks: In areas where the incumbent price cap carrier accepted the offer of statewide model-based support—which most have now done, *see* below p.

27—it would not receive support but still have ETC service obligations in "extremely high-cost areas" and a narrow group of high-cost blocks excluded from the offer of model-based support.[6] Where a price cap carrier refused the offer of statewide model-based support, it would receive frozen Phase I support and would have ETC service obligations in all high-cost and extremely high-cost blocks. *2014 Order* ¶ 52 (JA _). And in all areas—whether or not the carrier accepted the offer of statewide support—price cap ETCs would not have service obligations where an unsubsidized competitor provided voice and broadband service above a certain standard. *Id.*

G. *2014 Order* Litigation in Case No. 15-1038

Petitioner AT&T petitioned for review of the *2014 Order*, challenging what it described as the agency's "adopt[ion of] a rule that…failed to address, or even to acknowledge, the majority of the" arguments regarding remaining ETC designation in unsupported areas. Pet. Br. 3 (filed June 15, 2015) [Doc.

[6] In order to promote competition, the agency decided to exclude from the offer of model-based support certain census blocks, including 1) census blocks served by a subsidized competitor at speeds greater than 3 Mbps/768 kbps, and 2) census blocks that were included in certain "rural broadband experiment bids." *2014 Order* ¶¶ 73-75, 84 (JA __-__). Census blocks that were served by an unsubsidized competitor with broadband at speeds of 3 Mbps/768 kbps or greater but less than 10/1 Mbps were also not included in the offer of model-based support, but were made eligible for the Phase II auction to the extent they remained unserved with 10/1 Mbps speeds or greater. *Id.* ¶ 77.

No. 1557573]. The FCC moved for abeyance, explaining that the *2014 Order* had "not yet decided, one way or the other, any of the arguments that AT&T now advances" on the issue. Resp'ts Mot. for Abeyance 13 (filed July 2, 2016) [Doc. No. 1560813]. The agency noted, for example, that the *2014 Order* stated that USTelecom's forbearance petition was "GRANTED IN PART to the extent described herein" with no part described as denied. *2014 Order* ¶ 167 (JA __). This Court granted abeyance pending further agency proceedings in which the FCC would address the "the issues raised by this petition." Court Order (issued Sept. 5, 2015) [Doc. No. 1571313].

H. *2015 Order*

In December of 2015 in the Order on review, the agency ruled on both the remainder of USTelecom's forbearance petition and the issues regarding ETC obligations in the ongoing USF rulemaking. *2015 Order* ¶¶ 101-143 (JA __).

1. Forbearance

First, the FCC denied USTelecom's request for forbearance from their ETC designations throughout their service areas and the obligation to provide voice telephony in areas in which ETCs do not now receive (Phase II) high-cost support. *Id.* ¶¶ 101-102 (JA __-__). The Commission stated: "As we transition from the elimination of our legacy high-cost support mechanisms

[to] full implementation of our USF/ICC Transformation Order reforms, we have an obligation to ensure that all consumers that are served by price cap carriers continue to have access to voice services at rates that are reasonably comparable to rates offered in urban areas." *Id.* It found that USTelecom had "not met its burden under section 10 of the Act to demonstrate that these consumers would continue to have access to such service" if the agency granted the forbearance requested. *Id.*; *see id.* ¶ 113 (JA __) (USTelecom "does not provide specific evidence" that ETC obligations are "no longer necessary…to protect consumers").

The Commission explained that, unlike the areas in which it had already forborne because of low cost or existing competition, "we cannot make a blanket determination that absent an ETC obligation, there will be a provider able to provide voice service at reasonably comparable rates." *Id.* ¶ 114 (JA __). Although some parties had submitted national-level data on widespread wireless and VoIP service from competitors, the agency found that "these high-level statistics do not provide us with assurance that in each census block at issue" consumers "would have adequate alternatives — either a wireline or wireless option — for such service" absent ETCs' voice service obligation. *Id.* ¶ 115 (JA __). And though AT&T had submitted more specific data for two states, showing multiple Lifeline ETCs in each of its "wire

centers," this did not prove adequate evidence of alternatives nationwide for all price cap ETCs, or even that in these AT&T wire centers, every census block would receive service. *Id.* ¶¶ 116–117 (JA __-__).[7]

Although the Commission denied forbearance from the remaining high-cost service obligations, it emphasized that those obligations were both temporary and limited. They were temporary because, after the Phase II auction, price cap carriers may either win support in remaining areas, or be replaced by another winning bidder, which would relieve them of ETC high-cost service obligations, given the 2014 forbearance for blocks served by other supported carriers. *Id.* ¶ 108 n.365 (JA __). The agency also made clear that it "intend[s] to re-examine these [ETC service] obligations once we complete implementation of the Phase II framework." *Id.* ¶ 147 (JA__); *see* ¶ 156 (JA __) ("[O]nce Phase II has been fully implemented" "it may serve the public interest to make certain adjustments to legacy ETC designations").

The obligations were limited because after the *2014 Order's* forbearance, price cap carriers retain high-cost ETC obligations in areas without Phase II model-based support in only about 6% of the census blocks

[7] A "wire center" here refers to the areas served by a specific local switching facility of a carrier. 47 C.F.R. § 54.5. It is based on a carrier's infrastructure and has no necessary correlation to census blocks. The area served by a wire center may encompass several census blocks.

where they are an incumbent provider. *Id.* ¶ 108 n.365 (JA __) (approximately 385,000 out of 6.3 million census blocks).

While AT&T had submitted figures purporting to show roughly $800 million in unrecovered costs from high-cost and extremely high-cost areas, the agency noted that this was based on a previous model of costs that the agency did not adopt, and so did not reliably show the costs of "maintaining standalone voice service." *Id.* ¶ 141 n.440 (JA __); *see* AT&T *Ex Parte* at 2 (filed Nov. 19, 2014) (JA __). As the agency explained elsewhere, the cost model was designed to "calculate[] support for both capital investment and operating costs for a voice and broadband network, so the operating costs associated with the continued provision of voice service for these remaining locations are far less than the amount estimated by the model for the interim period while we complete implementation of Phase II." *Id.* ¶ 108 n.365 (JA __).

In sum, the agency "conclude[d] that it serves the public interest to require that the providers best situated to ensure that consumers maintain access to voice service at reasonably comparable rates continue to be subject to a legal obligation to provide that service at the present time, while the Commission completes the full implementation" of the new funding framework set out in the *Transformation Order*. *Id.* ¶ 127 (JA __). That

"approach reasonably balances" the agency's "goals of maintaining voice service, encouraging the deployment of modern networks, ensuring customers have access to reasonable rates, and minimizing the universal service contribution burden on consumers." *Id.*

2. Interpretation of section 214(e)(1) and balancing of competing principles

The agency also declined petitioners' request to "reinterpret section 214(e)(1) to require that price cap carriers only provide voice service in areas where they are *receiving* support." *2015 Order* ¶ 138 (JA __). The agency reiterated its prior reading that section 214(e)(1) "does not 'require that all ETCs must receive support, but rather only that carriers meeting certain requirements be *eligible* for support.'" *Id.* ¶ 139 (JA __) (quoting *High-Cost Universal Service Support*, 23 FCC Rcd 8834, 8847 ¶ 29 (2008) (*"CETC Interim Cap Order"*)). Because price cap carriers receive model-based Phase II support in most census blocks, are eligible to participate in the upcoming

auction for the great majority[8] of remaining high- and extremely high-cost blocks, and can petition for more support where it is necessary, they "remain eligible to receive high-cost support in every census block" in which they must serve. *Id.* ¶ 141 & n.440 (JA __).

The agency likewise rejected petitioners' arguments that section 214(e)(1), which requires ETCs to "offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title," 47 U.S.C. § 214(e)(1), means that ETCs may only be required to serve in particular areas that are supported. *2015 Order* ¶ 140 (JA __). The agency instead "remain[ed] persuaded to interpret the quoted language to refer broadly to the services that the Commission establishes as universal service"—i.e., voice telephony—"rather than only referring to services

[8] As a result of its most recent rulemaking on the Phase II auction, the FCC removed two narrow categories of census blocks from the auction. As a result, carriers, including price cap ETCs, cannot bid for Phase II support there. The categories are (1) certain "split" census blocks served by more than one carrier, including "split" census blocks where at least one of the carriers is a price cap carrier who accepted statewide model-based support or where there is both a price cap carrier and a rate-of-return carrier, and (2) blocks which, though technically "high-cost" according to the agency's model, already receive broadband from the incumbent price cap carrier at speeds of at least 10 Mbps. *See Connect America Fund*, 31 FCC Rcd 5949, 5972-73 ¶¶ 66 & 70 (2016) (additional support for the latter would not be in the public interest, given the agency's "finite budget").

insofar as an ETC actually receives universal service support for its provision of them." *Id.*

The agency also rejected the argument that the Act's definition of "service area" to mean "a geographic area established . . . for the purpose of determining universal service obligations and support mechanisms," 47 U.S.C. § 214(e)(5), "requires that ETC designations expire in all areas where price cap carriers no longer receive high-cost support as a result of our decision to target high-cost support to certain areas." *2015 Order* ¶ 142 (JA __). As the agency pointed out, ETCs remain eligible for Lifeline and state universal support throughout their service area, and are eligible for high-cost support in every census block in which they still have service obligations. *Id.*

Finally, the agency rejected requests made in the USF rulemaking that, because the *Transformation Order* adopted a more targeted approach for high-cost support, the FCC should preempt or otherwise limit state ETC designations. *Id.* ¶ 144 (JA __). The agency found that "on balance," retaining the existing service area designations and obligations would "serve the public interest and advance universal service principles." *Id.* ¶ 146 (JA __).

The agency disagreed that its principle of "competitive neutrality" required redefined service areas. It first pointed out that, because of

forbearance in the *2014 Order*, price cap carriers would not need to provide service in areas in which they are replaced by another provider that receives high-cost support. *Id.* ¶ 147 (JA __). Moreover, the agency noted, carriers remain eligible for high-cost support in the census blocks where forbearance has not been granted, "including areas where the price cap carriers are eligible to compete to receive Phase II support and where they will potentially be replaced by another ETC which would eliminate their federal high-cost ETC voice obligation." *Id.*

The agency also explicitly balanced the competing principles of competitive neutrality and service to all Americans: "Any departure from strict competitive neutrality…is outweighed by the advancement of the section 254(b) principle that '[c]onsumers in all regions of the Nation…should have access to [comparable] services" at comparable rates. *Id.* ¶ 148 (JA __). The agency explained that incumbent price cap carriers' "long history of providing service in the relevant service areas, coupled with [their existing] ETC designation[s]…, puts them in a unique position to maintain voice service as we transition fully to Phase II support." *Id.* ¶ 149 (JA __). And the agency had "seen no other proposals in the record that would provide assurance that consumers will continue to have access to voice

service at reasonably comparable rates" during the transition in the census blocks at issue. *Id.*

The agency was not persuaded that continuing the service obligations is inconsistent with the section 254(b) requirement that "there be sufficient support mechanisms to preserve and advance universal service." *Id.* ¶ 150 (JA __). The agency emphasized that it had already granted extensive forbearance, and that price cap carriers remain eligible for support in all areas in which they have service obligations, including Lifeline support (petitioners had emphasized Lifeline obligations). *Id.* Earlier in the *Order*, the agency had also stated that, as has always been the case with high-cost service, "to the extent any carrier believes it needs additional support to provide voice service at reasonably comparable rates" in particular census blocks, "it may bring to the Commission's attention the particular facts that demonstrate it is unable to provide voice service" at reasonable rates. *Id.* ¶ 141 n.440 (JA __). Although USTelecom sought relief as to all price-cap carriers, no provider besides AT&T had introduced evidence of costs for high-cost service obligations in the census blocks at issue, and no "carrier provided specific evidence about

its actual associated revenues to demonstrate a discrepancy between costs and revenues."[9]

I. Further Developments

The FCC has continued to move forward with implementation of Phase II of its USF reform. In 2015, most price cap carriers accepted most or all of the statewide "model-based" support, totaling some $1.5 billion in annual support of the $1.67 billion offered. *Wireline Competition Bureau Authorizes Additional Price Cap Carriers to Receive Almost $950 Million in Phase II Connect America Support*, 30 FCC Rcd 8577 (Wireline Competition Bur. 2015); *2015 Order* ¶ 108 (JA __). For example, AT&T accepted the offer in 18 states and declined it in three for a total of over $427.7 million in annual funding. *Id.*

In May of 2016, the Commission adopted rules to implement the competitive bidding process for the remaining census blocks in Phase II, including service requirements and milestones for winning bidders, a budget, and general auction procedures. *Connect America Fund*, 31 FCC Rcd 5949,

[9] The Commission did not find AT&T's data a reliable estimate of its costs in continuing voice service during the Phase II transition, *see* above p. 21. And AT&T had provided an estimate of revenues, rather than "specific evidence about its actual associated revenues." *2015 Order* ¶ 141 n.440 (JA __); *see* AT&T *Ex parte* at 2 & nn.4-5 (filed Nov 19, 2014) (JA __).

5950 ¶ 2 (2016). Most recently, an FCC bureau released a preliminary list and map of census blocks eligible for the auction. *Wireline Competition Bureau Releases Preliminary List and Map of Eligible Census Blocks for The Connect America Phase II Auction*, DA 16-908 (Wireline Competition Bur., Rel. Aug. 10, 2016).[10]

The agency has also given price cap carriers some relief from Lifeline obligations. In the *2016 Lifeline Order*, the agency declined to forbear from all Lifeline voice service obligations for ETCs who also participate in the high-cost program, finding the obligations were still necessary to protect consumers. *Lifeline and Link Up Reform and Modernization*, 31 FCC Rcd 3962, 4080 ¶ 328 (2016) (*"2016 Lifeline Order"*). However, in order to spur broadband development, it offered conditional forbearance from the voice service obligation where certain broadband adoption and competition goals are met. *Id.* ¶ 335.

SUMMARY OF ARGUMENT

Congress established universal service to benefit consumers, not carriers. Consistent with that goal, the FCC is in the midst of a complex and

[10] *Available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0810/DA-16-908A1.pdf

important overhaul of the universal service system, moving to target support where it is most needed in order to provide all parts of the country with much-needed broadband networks. However, during this transition, it must also take care that customers who rely on wireline voice service in remote and rural areas are not left behind. The agency therefore kept in place certain of incumbent price cap carriers' existing obligations to serve customers, including—for a limited scope of some 6% of census blocks and a limited time during this transition—in census blocks where carriers do not yet receive Phase II funding. Incumbent price cap carriers want support to update their networks, but do not want to be required to serve legacy customers during the transition. However, the agency acted both lawfully and reasonably in keeping the status quo for an interim period to protect these consumers as it moves to the new regime.

I.A. This protection complies with the requirement that ETCs "shall be eligible to receive universal service support," 47 U.S.C. § 214(e)(1), because, nationwide, carriers are "eligible" for, and receive, considerable high-cost support, both model-based Phase II support and frozen Phase I support. And they may petition the Commission for more support if needed. Even as to particular census blocks, they are "eligible" to participate in the Phase II auction to win support as soon as the auction takes place. The FCC and courts

have held that eligible means only that—it does not mean carriers must actually receive support in every particular area in which service is required. Indeed, under the previous regime, ETCs could likewise be required to provide service in states or areas for which high-cost support was not available.

The protection is also consistent with the requirement that ETCs shall "offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title." 47 U.S.C. § 214(e)(1). The agency reasonably reads the phrase "services that are supported by Federal universal service support mechanisms" to refer not to *instances* of service that are supported (as petitioners contend), but rather to *types* of service that are supported—here, voice telephony. In fact, the same phrase is used in section 254(c), which gives the FCC the duty to define the type of services that are included within universal service.

B. The *2015 Order* is also consistent with Section 214(e)(5) of the Act, which defines service area as "a geographic area established…for the purpose of determining universal service obligations and support mechanisms." Service areas are still used to establish incumbent carrier's service obligations—those carriers must provide voice service throughout the statewide service areas. And they are still used to establish support

mechanisms, in particular Lifeline Universal Support and any universal support from state commissions. *2015 Order* ¶ 142 (JA__). And even as to high-cost support, service areas are still used to determine high-cost support mechanisms; an ETC's service area circumscribes the area in which it may receive support. The service area is thus used as part of the mechanism for determining support, even if an ETC does not actually receive support in every census block within its service area. Again, under the previous regime, high-cost support was likewise not targeted to every wire center inside an ETC's service area.

II.A.-B. The agency reasonably exercised its "broad discretion," *Rural Cellular I*, 588 F.3d at 1103 to balance competing universal service principles in the *2015 Order*. It found that maintaining price cap ETCs' obligations to provide service in certain census blocks, even where they do not receive Phase II high-cost support, was necessary to ensure that consumers in all areas of the country "have access to telecommunications and information services…that are reasonably comparable to those services provided in urban areas" at reasonably comparable rates. 47 U.S.C. § 254(b)(3). Critically, "no other proposals in the record…would provide assurance that consumers will continue to have access to voice service at reasonably comparable rates as we complete the transition." *2015 Order* ¶ 149 (JA __).

Petitioners argued that such protections were unnecessary, pointing to data AT&T had provided about competition in its service areas. But the agency found that this data did not provide adequate assurance about areas served by other carriers, and in any case often referred to wireless competition, which may have coverage gaps.

Petitioners also argue that the agency decided the issue in the *2014 Order* and that this court should ignore the purportedly belated explanation in the *2015 Order*. But the *2014 Order* did not state that the forbearance petitions were denied in any part, and the agency's reasonable reading of its own *2014 Order* is entitled to respect.

II.C. The Commission adequately accounted for the principle that support be "sufficient…to preserve and advance universal service." 47 U.S.C. § 254(b)(5). The agency had forborne or provided Phase II support in all but approximately 6% of price cap carriers' census blocks. In some remaining blocks Phase I frozen support is still available. Moreover, once Phase II is fully implemented, price cap carriers will be supported or receive forbearance in all or nearly all blocks. The agency has promised to revisit the issue of these obligations after the transition is complete, and in the interim, carriers are free to prove that they require additional support in order to provide service—a showing no carrier made here.

II.D. The FCC also adequately accounted for its principle of competitive neutrality. The agency had good reason to treat incumbent carriers—who already have ETC designations and serve customers—differently from smaller would-be competitors who would need to build out networks from scratch. The agency found that letting new carriers wait until the auction to seek ETC designation would encourage more entrants; there were no similar disincentives for price cap carriers to participate in the auction. Moreover, the agency found that allowing price cap carriers to cut off service in unsupported areas could leave customers unserved. The agency reasonably balanced these competing concerns and found the protection of consumers paramount during this transition.

STANDARD OF REVIEW

Petitioners' claims that the *Orders* are contrary to the language of sections 214 and 254 are reviewed pursuant to *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). Thus, where a "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.* at 843. If so, this Court will "accept the agency's construction of the statute, even if the agency's reading differs from what the [Court] believes is the best statutory interpretation." *NCTA v. Brand X*, 545 U.S. 967, 980 (2005); *see*

Rural Cellular I, 588 F.3d at 1101, 1103 (Because section 254(b) uses "vague, general language," "the Commission enjoys broad discretion when…balancing" the principles set out there.).

Petitioners' claim that the agency acted unreasonably is subject to "highly deferential" arbitrary-and-capricious review. *Nat'l Tel. Co-op. Ass'n v. FCC*, 563 F.3d 536, 541 (D.C. Cir. 2009). "That is particularly true with regard to an agency's predictive judgments about the likely economic effects of a rule." *Id.*

Finally, the agency interpretation of "its own orders and regulations"—here that the *2014 Order* did not decide the matters at issue—is entitled to a "high level of deference." *Cellco P'ship v. FCC*, 700 F.3d 534, 544 (D.C. Cir. 2012) (quoting *MCI Worldcom Network Servs., Inc. v. FCC*, 274 F.3d 542, 548 (D.C. Cir. 2001)); *see Auer v. Robbins*, 519 U.S. 452, 461 (1997).

ARGUMENT

I. THE FCC'S INTERIM CONTINUANCE OF INCUMBENT'S SERVICE OBLIGATIONS DURING THE TRANSITION IS CONSISTENT WITH THE ACT.

A. Section 214(e)(1)

1. ETCS are still eligible to receive support

Section 214(e)(1) requires that ETCs "shall be eligible to receive universal service support," and under the *Orders*, they still are. First, ETCs are eligible to receive Lifeline funding throughout their service area,

regardless of the availability of high-cost support funding, and Lifeline is a form of Universal Service support. *See 2015 Order* ¶ 142 (JA __). Second, in the roughly 6% of census blocks in which price cap ETCs do not now receive high-cost support during the transition to Phase II, those ETCs are "eligible" to receive funding through the Phase II bidding process and the extremely high-cost support mechanisms, as soon as those systems are implemented, or by petitioning the Commission for support. *See 2015 Order* ¶ 141 & n.440 (JA __) ("Price cap carriers remain eligible to receive high-cost support in every census block where they continue to have the federal ETC high-cost obligation to provide voice service.").

This reading of the statute is consistent with the Commission's long-standing interpretation "that the Act does not 'require that all ETCs must receive support, but rather only that carriers meeting certain requirements be *eligible* for support." *2015 Order* ¶ 139 (JA __) (*quoting CETC Interim Cap Order*, 23 FCC Rcd at 8847 ¶ 29). Indeed, this interpretation was litigated earlier in this proceeding, and the Tenth Circuit upheld the agency's reading of the section 214(e)(1) in the *Transformation Order*. *See In re FCC 11-161*, 753 F.3d at 1088. There, the agency "recognized the possibility that ETCs might be required to provide service in areas where they no longer receive support, or receive reduced support," and parties alleged that it was unlawful

"to maintain the [214(e)] service obligations while eliminating support." *Id.* The Tenth Circuit disagreed, explaining that "ETC designation simply makes a carrier eligible for USF. Nothing in the language of § 214(e) entitles an ETC to USF funding." *Id.*

Petitioners attempt to re-argue this point, asserting that they are not "eligible" to receive high-cost funding for those census blocks in which they do not now receive high-cost funding. But nothing in the statute requires this census-block-focused analysis. Nationwide, these carriers are "eligible" for, and receive, a good deal of support: Phase II support where they have accepted statewide model-based support, and frozen Phase I support in several other states. This does not establish 100% of the cost of all obligations, but ETCs are still "eligible" for the funding they receive, and the statute does not require "that universal service support must equal the actual costs incurred by" carriers. *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 412 (5th Cir. 1999). And ETCs can petition for more funding by showing it is needed to offer service. *2015 Order* ¶ 141 n.440 (JA __).

Even on a census-block basis, petitioners are "eligible" to bid for support in the Phase II auction which the FCC is now developing. To petitioners, such a definition "stretches the notion of eligibility well past the breaking point." Br. 40. But *Black's* defines *eligible* as "[f]it and proper to be

selected or to receive a benefit; legally qualified for an office, privilege, or status." *Black's Law Dictionary* (10th ed. 2014). For example, we would normally say that all "natural born" citizens at least 35 years old are eligible to run for president. And we would still say this outside of election season, because when election season begins, such a person could run. So too, the ETCs are "fit...to receive a benefit" even though the framework for awarding the benefit is still under development. Conversely, it would be inaccurate to assert that price cap ETCs are "ineligible" to receive funding, since that would imply that they are excluded from funding made available to others, which is not the case.

2. ETCs still offer the services that are supported.

Section 214(e)(1) also requires that an ETC "shall, throughout the service area for which the designation is received, offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title." 47 U.S.C. § 214(e)(1). Here too, the agency's interim continuance of the obligation to offer voice service during the transition to Phase II, even in the relatively few census blocks without Phase II support, is consistent with the statute. As the Order explains, the agency has interpreted the phrase "the services that are supported by Federal universal service support mechanisms under section 254(c)" to "refer broadly to the services

that the Commission establishes as universal service, rather than only referring to services insofar as an ETC actually receives universal service support for its provision of them." *2015 Order* ¶ 140 (JA __). Thus, the phrase "services that are supported by Federal universal service support mechanisms" refers to the *types* of services that ETCs must provide—here voice telephony, but not, say caller ID—rather than to *instances* of service for which a carrier receives support.

This reading is buttressed by statutory structure and history. Section 214 requires an ETC to provide "the services that are supported by Federal universal service support mechanisms under section 254(c)," and section 254(c) uses the same phrase, requiring the Commission to "defin[e] the services that are supported by Federal universal service support mechanisms." 47 U.S.C. §§ 214(e)(1) & 254(c). It is thus reasonable to conclude that section 214 was cross referencing section 254, and referring to the types of service defined by the Commission under that section. This reading is reinforced by the Conference Report on the 1996 Act, which characterized section 214(e)(1) as imposing the obligation "that a common carrier designated as an 'eligible telecommunications carrier' shall offer *the services included in the definition of universal service* throughout the area specified by the State commission." S. Conf. Rep. 104-230 at 141 (Feb. 1, 1996)

(emphasis added).[11] This indicates that Congress intended the phrase "services that are supported by Federal universal service support mechanisms" in section 214 to mean "the services included in the definition of universal service" by the Commission.[12]

Petitioners argue that under Section 214(e)(1), they cannot be required to "provide service in census blocks in which they do *not* receive high-cost support from the Fund" because those are not "services that are supported." Br. 31-32. But this argument is premised on a reading of the statute that the FCC and the Tenth Circuit have rejected—that "services that are supported" means the specific *instances of service* in which they receive high-cost support, rather than the *types of services* which receive support. At root, they argue they cannot be compelled to provide service that is not supported. But, as the Tenth Circuit has already decided, "that argument rests on the faulty assumption that being designated an ETC under § 214(e) entitles a carrier to

[11] The Report states further that an ETC "is eligible for *any* specific support provided under new section 254 for the provision of universal service in the area for which that carrier is designated," *id.* (emphasis added), further supporting the reading that section 214 contemplates the possibility that no support may be available in some areas.

[12] Petitioners point out that legislative history cannot trump unambiguous text (Br. 36 n.17), but here the statute is at a minimum ambiguous, and the legislative history supports the reasonableness of the Commission's reading.

USF funds….Nothing in the language of § 214(e) entitles an ETC to USF funding." *In re FCC 11-161*, 753 F.3d at 1087-88. Petitioners deny that the Tenth Circuit has already decided this issue, pointing out that the court emphasized the agency's ongoing rulemaking, which they now appeal. Br. n.18. But the court definitively rejected the legal argument that section 214(e)(1) requires all service to be supported. *Id.* (rejecting argument that "Congress intended eligibility for support and the duty to serve to be two sides of the same coin"). And as the agency points out, this would be a rather indirect way to protect ETCs from having to provide unsupported service, in contrast to the affirmative protections offered by other parts of the Act. *See 2015 Order* ¶ 139 n.431 (JA __) (comparing § 214(e) with 47 U.S.C. § 254(h)(1)(A), which states carriers "shall be entitled" to support for certain discounts given to rural health care providers).

Moreover, if petitioners were correct that they cannot be compelled to provide service where they do not receive support, the previous regime in place from 1997 to 2011 would be equally invalid because there too ETCs could be required to provide service in areas with no funding—both in an entire state, and in "wire centers" within a state that did not get funding. *See* Br. n.8 (AT&T receives no frozen Phase I funding in one state, where such funding mirrors funding before *Transformation Order*); above p. 8.

(describing funding targeted to wire centers). In *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001) regarding that previous regime, the Tenth Circuit "reject[ed the] argument that the use of statewide and national averages is necessarily inconsistent with § 254." *Id.* at 2102 n.9 ; *see also Order* ¶ 145 (JA __) (Price cap carriers "should have challenged those service areas at the time they were designated, not years later after many price cap carriers have benefited from receiving universal service support in these large service areas.").

Petitioners argue that, even if it was permissible to interpret 214(e)(1) to allow obligations in unsupported service areas before, when support was awarded on a state-by-state basis, such an interpretation is "unreasonable" now that support is awarded on a census-block-by-census-block basis. Br. at 38. But whether under a statewide or census-block regime, the gravamen of their complaint (that some service is supported) remains the same. Moreover, the agency's interpretation is reasonable. As explained below, *see* part II.B, the agency balanced competing objectives and found that this transitional regime is necessary to ensure that all consumers continue to have access to affordable service until the new funding mechanisms are all in place.

B. Section 214(e)(5)

The *2015 Order* is also consistent with Section 214(e)(5) of the Act, which defines service area as "a geographic area established…for the purpose of determining universal service obligations and support mechanisms." Service areas are still used to establish incumbent carriers' service obligations—those carriers must provide voice service throughout the statewide service areas. And they are still used to establish support mechanisms, in particular Lifeline universal support and any universal support from state commissions. *2015 Order* ¶ 142 (JA __). And even as to high-cost support, an ETC's service area "determine[s]" the area in which it is eligible for funding through the "support mechanism" of more targeted funding. The service area is thus a critical part of the mechanism for determining support, even if an ETC does not yet receive support in every census block within its service area where it has a voice obligation. *See id.* ("[P]rice cap carriers remain eligible for high-cost support in the census blocks where they maintain a federal high-Cost ETC voice obligation.") This is not unlike the previous regime, under which the total amount of high-cost support was determined at a statewide level, but funding was actually targeted to particular "wire centers" with above-average costs, so that not every wire center received high-cost support. *See Transformation NPRM* ¶ 372 n.519

(JA __); *Federal-State Joint Bd. on Universal Serv.*, 14 FCC Rcd. at 20472 ¶ 73.

Petitioners nevertheless argue that the *2015 Order* is contrary to section 214(e)(5) because support is allotted on the census block level. Br. 32-33, 40-41. They cite to the *2016 Lifeline Order* to argue that because ETCs may now obtain and relinquish their ETC designations for Lifeline purposes alone without changing high-cost support status, therefore "an ETC's statewide designation on the basis of its *Lifeline* eligibility constitutes a Lifeline-specific designation and cannot be the basis for statewide *high-cost* service obligations." Br. 41. This change occurred after the *Orders* and so is irrelevant. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). In any case, it remains true that an ETC's high-cost service obligations are coextensive with its service areas, consistent with section 214(e)(5). It is also true that for price cap carriers like petitioners, a statewide ETC designation serves to dictate both statewide service obligations and statewide Lifeline funding eligibility. To be sure, some small, mostly mobile carriers have received Lifeline-only ETC designations, but for price cap carriers like petitioners, the Commission has explicitly refused to "de-link" high-cost and Lifeline ETC obligations. *See 2016 Lifeline Order* ¶ 325

(describing Lifeline-only ETCs); *id.* at ¶ 326 (maintaining both service obligations for other ETCs).

Of course, petitioners' ultimate quarrel is not that *funding mechanisms* are more targeted than statewide "service areas." Rather, it is with their statewide *service obligations*, and there is no dispute that those obligations remain coextensive with their service area, as described in section 214(e)(5). Petitioners essentially argue that their service areas and obligations must be reduced to fit their support areas. But any discrepancy between price-cap carriers' service areas and support stems from the agency's decision in the 2011 *Transformation Order* to target support by census block, not from the *Order* on review, and the Tenth Circuit rejected arguments that a carrier's support and service obligations be precisely "complementary." *In re FCC 11-161*, 753 F.3d at 1088.[13]

[13] Petitioners argue that the Commission is empowered to preempt state-created service areas. Br. 44-49. The Commission never claimed otherwise. *See 2014 Order* ¶ 67 (JA __) (noting argument made by state commenters). Instead, as set out in the *2015 Order*, its decision to retain the existing service areas and service obligations was premised on the need to protect consumers during the transition. *See* below at II.B.

II. THE FCC'S BALANCE OF COMPETING UNIVERSAL SERVICE PRINCIPLES WAS REASONABLE AND CONSISTENT WITH THE ACT.

A. The Act grants the agency broad discretion.

The principles on which the Commission must base universal service policy—including that that rates be "just, reasonable, and affordable," that consumers in rural and high-cost areas have access to services "comparable to those services provided in urban areas" at "comparable" rates, and that support be "specific, predictable and sufficient," 47 U.S.C. § 254(b)(2), (3), & (5)— may be in tension or even conflict. When they do, "the Commission enjoys broad discretion when conducting exactly this type of balancing" under section 254. *Rural Cellular I*, 588 F.3d at 1103. As the Tenth Circuit has explained, "the FCC must base its policies on the principles, but any particular principle can be trumped in the appropriate case." *Qwest*, 258 F.3d at 1200. Thus, "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 other goal." *Id.*; *see Rural Cellular I*, 588 F.3d at 429 ("When an agency must balance a number of potentially conflicting [statutory] objectives... judicial review is limited to determining whether the agency's decision reasonably advances at least one of those objectives and its

decision making process was regular." (quoting *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C.Cir.1999))).

In the *Order*, the agency reasonably engaged in just such a balancing. It found that "on balance," retaining the universal service obligations for incumbent carriers throughout their state-designated service areas (in those areas from which it had not yet forborne) would best "serve the public interest and advance universal service principles" set out in section 254(b). *Order* ¶ 146 (JA __). And it did so on an interim basis. "Courts, including this one, have deferred to the Commission's decisions to enact interim rules based on its predictive judgment that such rules were necessary to preserve universal service." *Rural Cellular I*, 588 F.3d at 1106; *Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002) ("Avoidance of market disruption pending broader reforms is, of course, a standard and accepted justification for a temporary rule."); *Alenco Commc'ns*, 201 F.3d at 620; S*outhwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 537–39, 549–50 (8th Cir. 1998).

B. The FCC protected customers during the transition.

"The purpose of universal service is to benefit the customer, not the carrier." *Alenco Commc'ns*, 201 F.3d at 621. Under section 254(b)(3), universal service should advance the principle of "[a]ccess 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…services…that are reasonably comparable to those services provided in urban areas…at rates that are reasonably comparable." 47 U.S.C. § 254(c)(3). Here, the agency found that continued service from price cap ETCs in their remaining service areas was critical "to ensure that all consumers that are served by price cap carriers continue to have access to voice services at rates that are reasonably comparable to rates offered in urban areas" during the "transition [to] full implementation of [the] *USF/ICC Transformation Order* reforms." *2015 Order* ¶ 101 (JA __). As the agency explained, during the transition, "the existing service areas and corresponding obligations will help preserve existing voice service for consumers until Phase II is fully implemented, and even the most remote, extremely high-cost areas are served." *Id.* ¶ 146 (JA __). Critically, "no other proposals in the record…would provide assurance that consumers will continue to have access to voice service at reasonably comparable rates as we complete the transition." *Id.* ¶ 149 (JA __).

Petitioners fail to show the agency unreasonably balanced these competing factors. They argue first that the FCC failed to justify the rule at the time it was "adopted," that is, in the *2014 Order*. Br. 53. This mistakenly

assumes that the agency decided in 2014 whether price cap ETCs must continue to serve in unsupported areas during the transition. But the *2014 Order* did not decide this issue. *See* Resp'ts Reply in Support of Abeyance 1–3, 5, 9 (filed July 27, 2015) [Doc1564567]; Resp'ts Mot. for Abeyance 1, 11; *accord Lifeline FNPRM*, 30 FCC Rcd at 7864 ¶ 126 & n.261; *Public Notice*, 30 FCC Rcd 7417, 7419 ¶ 5 & n.12 (Wireline Competition Bur. 2015) ("In the December 2014 Connect America Order, the Commission did not resolve the issues…regarding possible forbearance or other relief from the price cap carriers' ETC designations or the regulatory requirements imposed on ETCs for those census blocks where forbearance was not granted.").[14]

The agency's reasonable reading of its own *Order* should be given "controlling weight." *Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997) (quoting *Stinson v. United States*, 508 U.S. 36, 45 (1993)). The agency's reading here is reasonable: The *2014 Order* stated that

[14] The agency codified in the Code of Federal Regulations rule changes for the forbearance it *did* grant in the *2014 Order*. *See 2014 Order* at App. A § 54.201(d)(3) (JA__). But, contrary to petitioners' arguments (Br. 54), that did not somehow codify or finalize the issues that the *2014 Order* did *not* reach. *Cf. Am. Petroleum Inst. v. E.P.A.*, 684 F.3d 1342, 1354 (D.C. Cir. 2012) (finding statement of agency intention in preamble to final rule was not itself final agency action because agency did not show "intention to bind either itself or regulated parties" (quoting *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1222-23 (D.C. Cir. 1996))).

USTelecom's forbearance petition was "GRANTED IN PART to the extent described herein" with no part described as denied. *2014 Order* ¶ 167 (JA __); *see also id.* ¶ 52 (JA __) (stating FCC did "not address at this time and in particular [did] not forbear" from high-cost obligations in "extremely high-cost" census blocks without Phase II support). Indeed, this Court granted abeyance on petitioner's appeal of the 2014 *Order* until the FCC "decides the issues raised by this petition," *Sept. 5, 2015 Court Order*.[15]

Petitioners next argue that the agency "'entirely failed to consider' several of the relevant factors" in balancing the 254(b) principles, instead resting its conclusion on just one. Br. 55 (quoting *Motor Vehicles Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Not so. The agency explicitly considered the principles of sufficiency of support and competitive neutrality, but found, as explained below, that they were outweighed by the need to ensure service to all consumers. *2015 Order* ¶ 148 (JA __) (concerns about competitive neutrality "outweighed" by principle of comparable service at comparable rates throughout the country); *id.* ¶ 150 (JA

[15] The point is also moot. Even if petitioners were correct, the appropriate remedy would be remand for further explanation, *see Verizon Tel. Companies v. FCC*, 570 F.3d 294, 305 (D.C. Cir. 2009), which the agency already gave in the *2015 Order*. Even vacatur would be pointless, since it would only keep in place the status quo, under which the agency had not forborne from the remaining obligations.

__) (agency was "not persuaded" that retaining the obligations during transition "is inconsistent with the requirement that there be sufficient support mechanisms to preserve and advance universal service"). That is, the FCC exercised its "broad discretion" to "balance a number of potentially conflicting [statutory] objectives," *Rural Cellular I*, 588 F.3d at 1103, and determined that protecting consumers was paramount here. *See Qwest*, 258 F.3d at 1200 ("any particular principle can be trumped in the appropriate case").[16]

[16] For good reason, petitioners do not argue here that the overall USF budget for price cap carriers should have been raised to make room for more funding. Through USF contributions, petitioners—and ultimately their customers in lower-cost areas—fund the USF budget. In the *Transformation Order*, the agency set an overall annual budget of $4.5 billion with the agreement of "a broad cross-section of interested stakeholders" in order to spur broadband service to all areas without unduly burdening contributing consumers; those burdens could perversely discourage use and so "undermine our broader policy objectives to promote broadband." *Transformation Order* ¶¶122-126 (JA -__). Of this total, the agency set aside $1.8 billion for support of price cap carriers to "balance many competing demands for universal service funds," including supporting non-price-cap carriers and mobile carriers. *Id.* ¶¶ 158-159 (JA __). The Tenth Circuit upheld these budgets as reasonable, "particularly when considered in light of the other statutory directives the FCC was charged with achieving." *In re FCC 11-161*, 753 F.3d at 1060; *see Rural Cellular I*, 588 F.3d at 1103 ("[T]he agency's broad discretion to provide sufficient universal service funding includes the decision to impose cost controls to avoid excessive expenditures that will detract from universal service." (*quoting Alenco*, 201 F.3d at 620–21)).

Finally, petitioners dispute the agency's judgment that retaining ETCs' obligations would protect service to consumers. Br. 56-60. They point to A&T's evidence that its affiliates were not the "sole provider of voice service" in any of its service units known as "wire centers." Br. 57. The agency properly found, however, that "the data do not sufficiently assure us that consumers would be protected" if it granted forbearance for all price cap ETCs in all unsupported areas. *2015 Order* ¶ 116 (JA __). First, the data described only AT&T, while USTelecom sought forbearance for all price cap carriers nationwide. *Id.* As AT&T acknowledged in its comments, "it is conceivable that other price cap carriers may now offer voice services in areas that are not served by any competing provider of wireline or wireless voice services." AT&T August 2014 Comments at 27 (JA __).

Second, even as to its own service areas, AT&T did "not provide evidence regarding the coverage of [other] providers in the specific census blocks at issue." *2015 Order* ¶ 117 (JA __). Because wire centers are different, and broader, than census blocks, the existence of competing providers in each wire center does not guarantee competing providers throughout each census block. For example, most of the competing ETCs offer wireless service only, and the record showed gaps in mobile wireless coverage, particularly in rural areas. *Id.* It was therefore reasonable to find

that AT&T had not shown, even as to its own service areas, "that for each census block at issue[,] other ETCs will have the ability to take on additional consumers within a reasonable timeframe." *Id.* ¶ 116 (JA __).

Finally, the FCC found that, even where there are other providers, it could not be assured that prices would remain just and reasonable, absent ETC service obligations. *Id.* ¶ 122 (JA __). Unlike the areas in which the FCC had already forborne, the agency had no assurance that service in the remaining "expensive to serve" areas will remain reasonable "without a specific showing that such conditions exist in every census block at issue." *Id.* ¶¶ 122-123 (JA __). Petitioners argue that it was irrational to forbear in low-cost areas—with average costs below $52.50 per household—but not in high-cost areas, which could conceivably have costs "just a penny" above that threshold. Br. 59. Any bright-line rule may create close cases, but this does not make the rule irrational. *See AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000) (agency "has wide discretion to determine where to draw administrative lines").

In any case, petitioners are attempting to shift their burden to show forbearance is warranted onto the agency. *See Verizon v. FCC*, 770 F.3d at 967 (petitioner seeking forbearance bears burden). The Commission properly found, "[b]ased on the limited record evidence" before it, that USTelecom

had not carried its burden to show that it would serve the public interest to "grant blanket forbearance" of ETCs' obligations in unsupported areas. *2015 Order* ¶ 125 (JA __).

Moreover, Congress has provided an avenue for relief: an ETC may relinquish service in an area if it can demonstrate to a state regulator that a remaining ETC can serve all customers. *Order* ¶¶ 111 & 125 (JA __, __), *citing* 47 U.S.C. § 214(e)(4) (state commission "shall" permit an ETC to relinquish its designation "in any area served by more than one eligible telecommunications carrier" and shall "ensure that all customers served by the relinquishing carrier will continue to be served"). The agency reasonably found that petitioners had not shown that all areas were fully served by competing ETCs, and so denied nationwide forbearance from this granular, fact-specific protection. *Id.* Petitioners do not explain why they should be excused from following that procedure.

C. The FCC adequately accounted for the principle of sufficiency.

The agency must also consider 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). Similarly, section 254(e) requires that support be "explicit and sufficient to achieve the purposes of this section." *Id.* at § 254(e). This Court has "recognized [that]

the principle of providing sufficient funding mechanisms to advance universal service may need to be balanced against the principle of affordability for consumers." *Rural Cellular I*, 588 F.3d at 1103.

The agency reasonably exercised that discretion when it found that the interim requirement for voice service, even in unsupported areas, did not run afoul of the statute's requirement of sufficient support. *2015 Order* ¶ 150 (JA __). The agency had already forborne from service requirements in many areas, leaving only about 6% of incumbents' census blocks in which they have obligations but do not yet receive Phase II support. *Id.* & ¶ 108 n.365 (JA __ & __). And carriers remain eligible to participate in the upcoming auction. *Id.* ¶ 150 (JA __). Moreover, "to the extent any carrier believes it needs additional support to provide voice service…," it may still go to the Commission with proof that "it is unable to provide voice service at rates equal to or less than the then applicable reasonable comparability benchmark for voice service." *Id.* ¶ 141 n.440 (JA __). Thus, as in *Rural Cellular II*, "the Commission provided a safety valve to ensure no [carrier] would receive a level of support insufficient to provide telephone service to consumers in high-cost areas." *Rural Cellular II*, 685 F.3d at 1095.

Petitioners argue that, because the agency acknowledged that carriers might not find it attractive to provide service in high-cost areas absent

support, a requirement to serve without support necessarily violates the agency's sufficiency requirement. Br. 33. The agency and courts, however, have not read the Act to mean carriers must receive support "sufficient" to make an attractive business case or hold carriers harmless. On the contrary, universal service serves to "benefit the customer, not the carrier." *Alenco*, 201 F.3d at 621. That is, support must be "sufficient" to ensure service. *See* 47 U.S.C. § 254(e) (support must be "sufficient to achieve the purposes of this section"); *Rural Cellular I*, 588 F.3d at 1103 ("The pertinent question is whether the interim cap will undercut adequate telephone services for customers."); *Texas Office of Pub. Util. Counsel*, 183 F.3d at 412 (finding "sufficient" ambiguous and deferring to agency's argument that "nothing in the statute defines 'sufficient' to mean that universal service support must equal the actual costs incurred by ILECs").

The question under section 254, then, is whether the USF system, as a whole, provides sufficient support to ensure customers get service at reasonable rates during this interim transition to Phase II. No carrier even attempted to show it would be unable to provide service. Indeed, no carrier "provided specific evidence about its actual associated revenues to demonstrate a discrepancy between costs and revenues." *2015 Order* ¶ 141 n.440 (JA __); *see Rural Cellular I*, 588 F.3d at 1103–04 ("Petitioners

include no cost data showing they would, in fact, have to leave customers without service…and therefore give us no valid reason to believe the principle of "sufficiency," …will be violated….").[17]

Again, if a carrier can demonstrate that it is unable to provide service during this interim transition, it may make that showing. *2015 Order* ¶ 141 n.440 (JA __). Because no such showing was made (or even attempted) here, the agency was reasonable in finding that no party had shown that support will not be sufficient.

D. The FCC adequately accounted for competitive neutrality.

The agency's universal service principle of "competitive neutrality" requires that "universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another…." *First Universal Service Order* ¶ 47. The principle does not prohibit treating different competitors differently; rather, it "only prohibits the Commission from treating competitors differently in 'unfair' ways." *Rural Cellular I*, 588 F.3d at 1105.

[17] AT&T had provided estimated cost data, but based on models that the agency found unreliable for these purposes, and it had provided only estimates of income rather than actual data. *See* above pp. 21 & 27 n.9.

The agency reasonably exercised its discretion to balance universal service principles when it found that maintaining incumbent ETCs' service obligations during the Phase II transition did not violate the principle of competitive neutrality. First, because of the forbearance it had already granted, incumbent ETCs are not obligated to compete in areas where they have been replaced by another ETC that receives the available high-cost support. *2015 Order* ¶ 147 (JA __). And price cap carrier ETCs remain eligible to compete for funding as soon as it available. The agency has also made clear that it "intend[s] to re-examine [high-cost ETC obligations] once we complete implementation of the Phase II framework." *Id.*

To be sure, during the transition to Phase II funding, incumbent price cap carriers must continue to serve in some census blocks where they are not supported, while new entrants can wait to see if they win support in the upcoming auction before seeking to be designated as ETCs. But there is good reason for the different treatment. Allowing new entrants to delay ETC designation would "encourage greater participation in the competitive process by a wider range of entities" and so "improve the overall quality of the process." *Seventh Order* ¶ 43 (JA __). As the agency explained, new entrants may be hesitant to go through the expense of obtaining a designation they may never need; they may be concerned about triggering new ETC

obligations in areas in which they do not eventually receive support; and they may not want to risk making public their bidding strategy by seeking ETC designation in the states where they intend to bid. *Id.*

None of these reasons applies to incumbents. They already have ETC designations and a "long history of providing service in the relevant services areas," *2015 Order* ¶ 149 (JA __). Thus, requiring them to continue that service during the transition is significantly different from demanding that new entrants obtain an ETC designation preemptively and begin building new infrastructure just to participate in the upcoming auction, especially when those new entrants may not prevail at the auction and decide to stop service again soon.

Petitioners nevertheless argue that the agency abused its discretion by denying incumbent ETCs the opportunity to limit their service areas to areas in which they receive support, just as new entrants may do. Br. 49-52. Such an allowance could leave customers without service, as explained above. The agency therefore concluded that "that it does not violate competitive neutrality" to retain obligations "narrowly tailored to advance the Commission's objective of preserving voice service for consumers living in high-cost and extremely high-cost census blocks." *2015 Order* ¶ 148 (JA __);

see id ("the benefits of maintaining voice service outweigh…concerns" about competitive neutrality).

In any case, petitioners do not explain how they will be harmed in their ability to compete against those new entrants. The crux of petitioners' argument is that "first time funding recipients" need not provide service during the Phase II transition. Br. 50. But it follows that incumbents who are serving now presumably are not competing against these entrants in unsupported high-cost areas. If incumbents win support in the auction, they will no longer have service obligations without support. If a new entrant wins support instead, the incumbents should no longer have service obligations, because the agency has forborne from those obligations in areas with a subsidized competitor. *2014 Order* ¶ 51 (JA __). Thus, both during the transition or afterward, incumbents are actually not compelled to serve unsupported census block in competition with ETCs who do not bear that obligation.[18]

[18] By contrast, in 2014 the FCC found that it *would* promote competition to forbear in areas that are low cost or that already have an unsubsidized competitor offering high speed broadband. *2014 Order* ¶ 66 (JA __).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

Respectfully submitted,

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September 2, 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AT&T INC.; CENTURYLINK, INC., PETITIONERS, V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	NOS. 15-1038, 16-1002, & 16-1072

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 13,003 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times Roman font.

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STATUTORY ADDENDUM

Page

47 U.S.C. § 214

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

§ 214. Extension of lines or discontinuance of service; certificate of public convenience and necessity

(a) Exceptions; temporary or emergency service or discontinuance of service; changes in plant, operation or equipment

No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 of this title: *Provided further*, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term “line” means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however*, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Notification of Secretary of Defense, Secretary of State, and State Governor

Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign

points), and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) Approval or disapproval; injunction

The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) Order of Commission; hearing; penalty

The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the United States $1,200 for each day during which such refusal or neglect continues.

(e) Provision of universal service

(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 of this title 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) of this title, 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.

(3) Designation of eligible telecommunications carriers for unserved areas

If no common carrier will provide the services that are supported by Federal universal service support mechanisms under section 254(c) of this title 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. Any carrier or carriers ordered to provide such service under this paragraph shall meet the requirements of paragraph (1) and shall be designated as an eligible telecommunications carrier for that community or portion thereof.

(4) Relinquishment of universal service

A State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier. An eligible telecommunications carrier that seeks to relinquish its eligible telecommunications carrier designation for an area served by more than one eligible telecommunications carrier shall give advance notice to the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) of such relinquishment. Prior to permitting a telecommunications carrier designated as an eligible telecommunications carrier to cease providing universal service in an area served by more than one eligible telecommunications carrier, the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall require the remaining eligible telecommunications carrier or carriers to ensure that all customers served by the relinquishing carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier. The State commission (or the Commission

in the case of a common carrier designated under paragraph (6)) shall establish a time, not to exceed one year after the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) approves such relinquishment under this paragraph, within which such purchase or construction shall be completed.

(5) “Service area defined”

The term “service area” means a geographic area established by a State commission (or the Commission under paragraph (6)) for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, “service area” means such company's “study area” unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c) of this title, establish a different definition of service area for such company.

(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. Upon request and consistent with the public interest, convenience and necessity, the Commission may, with respect to 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 under this paragraph, 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 Commission shall find that the designation is in the public interest.

47 U.S.C. § 254

UNITED STATES CODE ANNOTATED
TITLE 47. TELECOMMUNICATIONS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART II. DEVELOPMENT OF COMPETITIVE MARKETS

§ 254. Universal service

(a) Procedures to review universal service requirements

(1) Federal-State Joint Board on universal service

Within one month after February 8, 1996, the Commission shall institute and refer to a Federal-State Joint Board under section 410(c) of this title a proceeding to recommend changes to any of its regulations in order to implement sections 214(e) of this title and this section, including the definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for completion of such recommendations. In addition to the members of the Joint Board required under section 410(c) of this title, one member of such Joint Board shall be a State-appointed utility consumer advocate nominated by a national organization of State utility consumer advocates. The Joint Board shall, after notice and opportunity for public comment, make its recommendations to the Commission 9 months after February 8, 1996.

(2) Commission action

The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board required by paragraph (1) and shall complete such proceeding within 15 months after February 8, 1996. The rules established by such proceeding shall include a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation. Thereafter, the Commission shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations.

(b) Universal service principles

The Joint Board 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) of this section.

(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 chapter.

(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) of this section.

(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) of this title shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, 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.

(f) State authority

A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to

preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

(g) Interexchange and interstate services

Within 6 months after February 8, 1996, the Commission shall adopt rules to require that the rates charged by providers of interexchange telecommunications services 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. Such rules shall also require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State.

(h) Telecommunications services for certain providers

(1) In general

(A) Health care providers for rural areas

A telecommunications carrier shall, upon receiving a bona fide request, provide telecommunications services which are necessary for the provision of health care services in a State, including instruction relating to such services, to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State. A telecommunications carrier providing service under this paragraph shall be entitled to have an amount equal to the difference, if any, between the rates for services provided to health care providers for rural areas in a State and the rates for similar services provided to other customers in comparable rural areas in that State treated as a service obligation as a part of its obligation to participate in the mechanisms to preserve and advance universal service.

(B) Educational providers and libraries

All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3) of this section, provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. The discount shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities. A telecommunications carrier providing service under this paragraph shall--

(i) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or

(ii) notwithstanding the provisions of subsection (e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service.

(2) Advanced services

The Commission shall establish competitively neutral rules--

(A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries; and

(B) to define the circumstances under which a telecommunications carrier may be required to connect its network to such public institutional telecommunications users.

(3) Terms and conditions

Telecommunications services and network capacity provided to a public institutional telecommunications user under this subsection may not be sold, resold, or otherwise transferred by such user in consideration for money or any other thing of value.

(4) Eligibility of users

No entity listed in this subsection shall be entitled to preferential rates or treatment as required by this subsection, if such entity operates as a for-profit business, is a school described in paragraph (7)(A) with an endowment of more than $50,000,000, or is a library or library consortium not eligible for assistance from a State library administrative agency under the Library Services and Technology Act [20 U.S.C.A. § 9121 et seq.].

(5) Requirements for certain schools with computers having Internet access

(A) Internet safety

(i) In general

Except as provided in clause (ii), an elementary or secondary school having computers with Internet access may not receive services at discount rates under paragraph (1)(B) unless the school, school board, local educational agency, or other authority with responsibility for administration of the school--

(I) submits to the Commission the certifications described in subparagraphs (B) and (C);

(II) submits to the Commission a certification that an Internet safety policy has been adopted and implemented for the school under subsection (l) of this section; and

(III) ensures the use of such computers in accordance with the certifications.

(ii) Applicability

The prohibition in clause (i) shall not apply with respect to a school that receives services at discount rates under paragraph (1)(B) only for purposes other than the provision of Internet access, Internet service, or internal connections.

(iii) Public notice; hearing

An elementary or secondary school described in clause (i), or the school board, local educational agency, or other authority with responsibility for administration of the school, shall provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy. In the case of an elementary or secondary school other than an elementary or secondary school as defined in section 8801 of Title 20, the notice and hearing required by this clause may be limited to those members of the public with a relationship to the school.

(B) Certification with respect to minors

A certification under this subparagraph is a certification that the school, school board, local educational agency, or other authority with responsibility for administration of the school--

(i) is enforcing a policy of Internet safety for minors that includes monitoring the online activities of minors and the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are--

(I) obscene;

(II) child pornography; or

(III) harmful to minors;

(ii) is enforcing the operation of such technology protection measure during any use of such computers by minors; and

(iii) as part of its Internet safety policy is educating minors about appropriate online behavior, including interacting with other individuals on social networking websites and in chat rooms and cyberbullying awareness and response.

(C) Certification with respect to adults

A certification under this paragraph is a certification that the school, school board, local educational agency, or other authority with responsibility for administration of the school--

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are--

(I) obscene; or

(II) child pornography; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers.

(D) Disabling during adult use
An administrator, supervisor, or other person authorized by the certifying authority under subparagraph (A)(i) may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose.

(E) Timing of implementation

(i) In general
Subject to clause (ii) in the case of any school covered by this paragraph as of the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certification under subparagraphs (B) and (C) shall be made--

(I) with respect to the first program funding year under this subsection following such effective date, not later than 120 days after the beginning of such program funding year; and

(II) with respect to any subsequent program funding year, as part of the application process for such program funding year.

(ii) Process

(I) Schools with Internet safety policy and technology protection measures in place

A school covered by clause (i) that has in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C) shall certify its compliance with subparagraphs (B) and (C) during each annual program application cycle under this subsection, except that with respect to the first program funding year after the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certifications shall be made not later than 120 days after the beginning of such first program funding year.

(II) Schools without Internet safety policy and technology protection measures in place
A school covered by clause (i) that does not have in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C)--

(aa) for the first program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is undertaking such actions, including any necessary procurement procedures, to put in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C); and

(bb) for the second program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is in compliance with subparagraphs (B) and (C).

Any school that is unable to certify compliance with such requirements in such second program year shall be ineligible for services at discount rates or funding in lieu of services at such rates under this subsection for such second year and all subsequent program years under this subsection, until such time as such school comes into compliance with this paragraph.

(III) Waivers

Any school subject to subclause (II) that cannot come into compliance with subparagraphs (B) and (C) in such second year program may seek a waiver of subclause (II)(bb) if State or local procurement rules or regulations or competitive bidding requirements prevent the making of the certification otherwise required by such subclause. A school, school board, local educational agency, or other authority with responsibility for administration of the school shall notify the Commission of the applicability of such subclause to the school. Such notice shall certify that the school in question will be brought into compliance before the start of the third program year after the effective date of this subsection in which the school is applying for funds under this subsection.

(F) Noncompliance

(i) Failure to submit certification

Any school that knowingly fails to comply with the application guidelines regarding the annual submission of certification required by this paragraph shall not be eligible for services at discount rates or funding in lieu of services at such rates under this subsection.

(ii) Failure to comply with certification

Any school that knowingly fails to ensure the use of its computers in accordance with a certification under subparagraphs (B) and (C) shall reimburse any funds and discounts received under this subsection for the period covered by such certification.

(iii) Remedy of noncompliance

(I) Failure to submit

A school that has failed to submit a certification under clause (i) may remedy the failure by submitting the certification to which the failure relates. Upon submittal of such certification, the school shall be eligible for services at discount rates under this subsection.

(II) Failure to comply

A school that has failed to comply with a certification as described in clause (ii) may remedy the failure by ensuring the use of its computers in accordance with such certification. Upon submittal to the Commission of a certification or other appropriate evidence of such remedy, the school shall be eligible for services at discount rates under this subsection.

(6) Requirements for certain libraries with computers having Internet access

(A) Internet safety

(i) In general

Except as provided in clause (ii), a library having one or more computers with Internet access may not receive services at discount rates under paragraph (1)(B) unless the library--

(I) submits to the Commission the certifications described in subparagraphs (B) and (C); and

(II) submits to the Commission a certification that an Internet safety policy has been adopted and implemented for the library under subsection (l) of this section; and

(III) ensures the use of such computers in accordance with the certifications.

(ii) Applicability

The prohibition in clause (i) shall not apply with respect to a library that receives services at discount rates under paragraph (1)(B) only for purposes other than the provision of Internet access, Internet service, or internal connections.

(iii) Public notice; hearing

A library described in clause (i) shall provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy.

(B) Certification with respect to minors

A certification under this subparagraph is a certification that the library--

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are--

(I) obscene;

(II) child pornography; or

(III) harmful to minors; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers by minors.

(C) Certification with respect to adults

A certification under this paragraph is a certification that the library--

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are--

(I) obscene; or

(II) child pornography; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers.

(D) Disabling during adult use

An administrator, supervisor, or other person authorized by the certifying authority under subparagraph (A)(i) may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose.

(E) Timing of implementation

(i) In general

Subject to clause (ii) in the case of any library covered by this paragraph as of the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certification under subparagraphs (B) and (C) shall be made--

(I) with respect to the first program funding year under this subsection following such effective date, not later than 120 days after the beginning of such program funding year; and

(II) with respect to any subsequent program funding year, as part of the application process for such program funding year.

(ii) Process

(I) Libraries with Internet safety policy and technology protection measures in place

A library covered by clause (i) that has in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C) shall certify its compliance with subparagraphs (B) and (C) during each annual program application cycle under this subsection, except that with respect to the first program funding year after the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certifications shall be made not later than 120 days after the beginning of such first program funding year.

(II) Libraries without Internet safety policy and technology protection measures in place

A library covered by clause (i) that does not have in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C)--

(aa) for the first program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is undertaking such actions, including any necessary procurement procedures, to put in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C); and

(bb) for the second program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is in compliance with subparagraphs (B) and (C).

Any library that is unable to certify compliance with such requirements in such second program year shall be ineligible for services at discount rates or funding in lieu of services at such rates under this subsection for such second year and all subsequent program years under this subsection, until such time as such library comes into compliance with this paragraph.

(III) Waivers

Any library subject to subclause (II) that cannot come into compliance with subparagraphs (B) and (C) in such second year may seek a waiver of subclause (II)(bb) if State or local procurement rules or regulations or competitive bidding requirements prevent the making of the certification otherwise required by such subclause. A library, library board, or other authority with responsibility for administration of the library shall notify the Commission of the applicability of such subclause to the library. Such notice shall certify that the library in question will be brought into compliance before the start of the third program year after the effective date of this subsection in which the library is applying for funds under this subsection.

(F) Noncompliance

(i) Failure to submit certification

Any library that knowingly fails to comply with the application guidelines regarding the annual submission of certification required by this paragraph shall not be eligible for services at discount rates or funding in lieu of services at such rates under this subsection.

(ii) Failure to comply with certification

Any library that knowingly fails to ensure the use of its computers in accordance with a certification under subparagraphs (B) and (C) shall reimburse all funds and discounts received under this subsection for the period covered by such certification.

(iii) Remedy of noncompliance

(I) Failure to submit

A library that has failed to submit a certification under clause (i) may remedy the failure by submitting the certification to which the failure relates. Upon submittal of such certification, the library shall be eligible for services at discount rates under this subsection.

(II) Failure to comply

A library that has failed to comply with a certification as described in clause (ii) may remedy the failure by ensuring the use of its computers in accordance with such certification. Upon submittal to the Commission of a certification or other appropriate evidence of such remedy, the library shall be eligible for services at discount rates under this subsection.

(7) Definitions

For purposes of this subsection:

(A) Elementary and secondary schools

The term “elementary and secondary schools” means elementary schools and secondary schools, as defined in section 7801 of Title 20.

(B) Health care provider

The term “health care provider” means--

(i) post-secondary educational institutions offering health care instruction, teaching hospitals, and medical schools;

(ii) community health centers or health centers providing health care to migrants;

(iii) local health departments or agencies;

(iv) community mental health centers;

(v) not-for-profit hospitals;

(vi) rural health clinics;

(vii) skilled nursing facilities (as defined in section 1819(a) of the Social Security Act (42 U.S.C. 1395i-3(a))); and

(viii) consortia of health care providers consisting of one or more entities described in clauses (i) through (vii).

(C) Public institutional telecommunications user
The term "public institutional telecommunications user" means an elementary or secondary school, a library, or a health care provider as those terms are defined in this paragraph.

(D) Minor

The term "minor" means any individual who has not attained the age of 17 years.

(E) Obscene

The term "obscene" has the meaning given such term in section 1460 of Title 18.

(F) Child pornography
The term "child pornography" has the meaning given such term in section 2256 of Title 18.

(G) Harmful to minors
The term "harmful to minors" means any picture, image, graphic image file, or other visual depiction that--

(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;

(ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and

(iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

(H) Sexual act; sexual contact
The terms "sexual act" and "sexual contact" have the meanings given such terms in section 2246 of Title 18.

(I) Technology protection measure

The term "technology protection measure" means a specific technology that blocks or filters Internet access to the material covered by a certification under paragraph (5) or (6) to which such certification relates.

(i) Consumer protection

The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.

(j) Lifeline assistance

Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission under regulations set forth in section 69.117 of title 47, Code of Federal Regulations, and other related sections of such title.

(k) Subsidy of competitive services prohibited

A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

(l) Internet safety policy requirement for schools and libraries

(1) In general

In carrying out its responsibilities under subsection (h) of this section, each school or library to which subsection (h) of this section applies shall--

(A) adopt and implement an Internet safety policy that addresses--

(i) access by minors to inappropriate matter on the Internet and World Wide Web;

(ii) the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications;

(iii) unauthorized access, including so-called "hacking", and other unlawful activities by minors online;

(iv) unauthorized disclosure, use, and dissemination of personal identification information regarding minors; and

(v) measures designed to restrict minors' access to materials harmful to minors; and

(B) provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy.

(2) Local determination of content

A determination regarding what matter is inappropriate for minors shall be made by the school board, local educational agency, library, or other authority responsible for making the determination. No agency or instrumentality of the United States Government may--

(A) establish criteria for making such determination;

(B) review the determination made by the certifying school, school board, local educational agency, library, or other authority; or

(C) consider the criteria employed by the certifying school, school board, local educational agency, library, or other authority in the administration of subsection (h)(1)(B) of this section.

(3) Availability for review

Each Internet safety policy adopted under this subsection shall be made available to the Commission, upon request of the Commission, by the school, school board, local educational agency, library, or other authority responsible for adopting such Internet safety policy for purposes of the review of such Internet safety policy by the Commission.

(4) Effective date

This subsection shall apply with respect to schools and libraries on or after the date that is 120 days after December 21, 2000.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AT&T, Inc. Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	**No. 15-1038 (and consolidated cases)**

CERTIFICATE OF SERVICE

I, Matthew J. Dunne, hereby certify that on September 2, 2016, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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