IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 19-15072

AUTAUGA COUNTY EMERGENCY MANAGEMENT COMMUNICATION DISTRICT, CALHOUN COUNTY 911 DISTRICT, BIRMINGHAM EMERGENCY COMMUNICATIONS DISTRICT, MOBILE COUNTY COMMUNICATIONS DISTRICT,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

RESPONDENTS.

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

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, the Federal Communications Commission is an independent agency of the U.S. government, and the Department of Justice is an executive-branch department of the U.S. government. The trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this matter are listed in Petitioners' Brief.

STATEMENT REGARDING ORAL ARGUMENT

Respondents do not request oral argument because they believe that this case can be fully considered and decided on the record and the parties' briefs.

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GLOSSARY

ETSA	Emergency Telephone Services Act, ALA. CODE § 11-98-1, *et seq*.
IP	Internet Protocol
NET 911 Act	47 U.S.C. § 615a-1
Order	*In the Matter of BellSouth's Petition for Declaratory Ruling Regarding the Commission's Definition of Interconnected VoIP in 47 U.S.C. § 9.3 and the Prohibition on State Imposition of 911Charges on VoIP Customers in 47 U.S.C.§ 615a-1(f)(1); Petition for Declaratory Ruling in Response to Primary Jurisdiction Referral, Autauga County Emergency Management Communication District et al. v. BellSouth Telecommunications, LLC, No. 2:15-cx-00765-SGC (N.D. Ala.)*, Declaratory Ruling, 34 FCC Rcd 10158 (2019) (App. 39, pp. 1-23)
VoIP	Voice over Internet Protocol
VoIP 911 Fee Parity Provision	47 U.S.C. § 615a-1(f)(1)

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUE PRESENTED

Between 2008 and 2013, local regulators of 911 emergency services in Alabama imposed a fee structure that required subscribers of Voice over Internet Protocol ("VoIP") service to pay more in fees for access to 911 emergency services than subscribers of traditional telecommunications, such as wireline or wireless services. A provision of federal law, 47 U.S.C. § 615a-1, prohibits local 911 regulators from imposing and collecting a higher 911 service fee from VoIP

subscribers than from subscribers of traditional telecommunications services (the "VoIP 911 Fee Parity Provision").

Responding to a primary jurisdiction referral from a federal district court in Alabama, the Federal Communications Commission ("Commission" or "FCC") issued the *Order* on review setting forth its interpretation of the VoIP 911 Fee Parity Provision.[1] The Commission found that under the statute, 911 regulators may not "in any manner" assess a "total amount" of 911 fees and charges on a VoIP subscriber that exceeds the total amount of such fees and charges imposed on a subscriber of traditional telecommunications services with the same 911 outbound calling capability. App. 39, p. 6, ¶9.

This case presents the following question: Is the Commission's construction of the VoIP 911 Fee Parity Provision consistent with the text, structure, history, and purpose of the statute?

STATUTES

47 U.S.C. § 615a-1(f)(1) provides:

(f) State authority over fees

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[1] *In the Matter of BellSouth's Petition for Declaratory Ruling Regarding the Commission's Definition of Interconnected VoIP in 47 U.S.C. § 9.3 and the Prohibition on State Imposition of 911 Charges on VoIP Customers in 47 U.S.C. § 615a-1(f)(1); Petition for Declaratory Ruling in Response to Primary Jurisdiction Referral, Autauga County Emergency Management Communication District et al. v. BellSouth Telecommunications, LLC, No. 2:15-cx-00765-SGC (N.D. Ala.)*, Declaratory Ruling, 34 FCC Rcd 10158 (2019) ("*Order*"). App. 39, pp. 1-23.

> **(1) Authority**
> Nothing . . . shall prevent the imposition and collection of a fee or charge applicable to . . . IP-enabled voice services specifically designated by a State, [or] political subdivision thereof . . . for the support or implementation of 9-1-1 or enhanced 9-1-1 services, provided that the fee or charge is obligated or expended only in support of 9-1-1 and enhanced 9-1-1 services, or enhancements of such services, as specified in the provision of State or local law adopting the fee or charge. For each class of subscribers to IP-enabled voice services, the fee or charge may not exceed the amount of any such fee or charge applicable to the same class of subscribers to telecommunications services.

The pertinent statutory provisions are set forth in an addendum to this brief.

COUNTERSTATEMENT

I. Statutory and Regulatory Background

In 1999, Congress directed the Commission to designate the digits "9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance." 47 U.S.C. § 251(e)(3). Since that time, the Commission has issued numerous orders overseeing and regulating the nation's 911 emergency call system, by which calls dialed to 911 are transmitted from the telecommunications service provider's switch to a

single geographically appropriate public safety answering point ("PSAP").[2] With the growing popularity of Internet Protocol ("IP")-based voice communications services, the Commission initiated a rulemaking proceeding to explore the impact that IP and VoIP services—collectively, IP-enabled services—"have had and will continue to have on the United States' communications landscape." *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4864, ¶1 (2004). As relevant here, the Commission specifically sought comment "on the

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[2] *See, e.g.*, *In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 18676, 18678, ¶1 (1996) ("today we are taking several important steps to foster major improvements in the quality and reliability of 911 services" in furtherance of "our longstanding and continuing commitment to manage use of the electromagnetic spectrum in a manner that promotes the safety and welfare of all Americans"); *In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Amendment of Parts 2 and 25 to Implement Global Mobile Personal Communications by Satellite (GMPCS) Memorandum of Understanding and Arrangements; Petition of the National Telecommunications and Information Administration to Amend Part 25 of the Commission's Rules to Establish Emissions Limits for Mobile and Portable Earth Stations Operating in the 1610-1660.5 MHz Band*, Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 25340, 25341, ¶1 (2003) ("we revise the scope of our enhanced 911 rules to clarify which technologies and services will be required to be capable of transmitting enhanced 911 information to public safety answering points"). Basic 911 networks are not capable of processing the caller's location or, in some instances, providing the caller's call back number. In contrast, enhanced 911 ("E911") service routes 911 calls to a geographically appropriate PSAP based on the caller's location, provides the caller's call back number and, in many instances, the caller's location. Throughout this brief, when used alone, "911" refers collectively to basic 911 and E911.

potential applicability of 911, E911, and related critical infrastructure regulation to VoIP and other IP services." *See id.*, 19 FCC Rcd at 4898-99, ¶53.

In 2005, the Commission adopted new rules that required providers of "interconnected VoIP" service to provide E911 capabilities to their subscribers.[3] *In the Matter of IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10246, 10256 (2005) ("*VoIP 911 Order*").

In 2008, Congress codified and broadened those responsibilities in the NET 911 Act, 47 U.S.C. § 615a-1. In doing so, Congress sought "to ensure that consumers using Voice over Internet Protocol (VoIP) service can access enhanced 911 (E-911) emergency services by giving VoIP providers access to the emergency services infrastructure and by extending existing liability protections to VoIP service." H.R. REP. No. 110-442, 110th Cong. (1st Sess. 2007), at 5. The statute thus gives VoIP providers a right to provide 911 and E911 service "on the same

[3] The Commission's rules define "interconnected Voice over Internet protocol (VoIP) service" as "a service that: (i) Enables real-time, two-way voice communications; (ii) Requires a broadband connection from the user's location; (iii) Requires internet protocol-compatible customer premises equipment (CPE); and (iv) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network." 47 C.F.R. § 9.3.

terms, rates and conditions, that are provided to a provider of commercial mobile service." 47 U.S.C. § 615a-1(b).

The NET 911 Act allows a State (or a political subdivision of a State) to "impos[e] and collect[]" a "fee or charge applicable to commercial mobile services or IP-enabled voice services" to support or implement 911 or E911 services, "provided that the fee or charge is obligated or expended only in support of 9-1-1 and enhanced 9-1-1 services." 47 U.S.C. § 615a-1(f)(1). In addition, and central to this case, the statute specified that "[f]or each class of subscribers to IP-enabled voice services," any such "**fee or charge may not exceed the amount of any such fee or charge applicable to the same class of subscribers to telecommunications services.**" *Ibid*. (emphasis added). Thus, "[f]or example," as the House Report explained, "if a State or its political subdivision imposes a 911 fee on wireless or wireline carriers that consists of one rate for residential customers and another rate for business customers, the State or its political

subdivision may collect no more from VoIP providers for the same classes of customers." H.R. REP. NO. 110-442, at 15.[4]

Finally, Congress mandated that the Commission enforce the provisions of the NET 911 Act as if they were "part of the Communications Act of 1934," and further declared that "any violations of this section, or any regulations promulgated under this section, shall be considered to be a violation of the Communications Act of 1934 or a regulation promulgated under that Act, respectively." 47 U.S.C. § 615a-1(e)(2).

II. Factual Background

A. The Districts' Lawsuit Against BellSouth and the Primary Jurisdiction Referral

In 2005, after release of the FCC's *VoIP 911 Order*, the Alabama legislature amended the state's Emergency Telephone Services Act ("ETSA") to impose 911 fees on "VoIP or other similar technology." ALA. CODE § 11-98-5.1(C) (2005). AS amended, the ETSA appeared to require payment of one 911 charge per each telephone service access line, ALA. CODE § 11-98-5(C), but required one 911

[4] The House Report noted that nine of the thirteen states then levying 911 fees on VoIP services "impose fees that are lower than or equal to the lowest fee charged on wireless and wireline services," and so the Congressional Budget Office had "assume[d] that fees in those states would not be affected by the bill's limitation." H.R. REP. NO. 110-442, at 10. In contrast, "[o]ne state currently charges a VoIP 911 fee that is higher than the residential wireline fee but lower than the business wireline fee, and presumably that state's fee on residential consumers of VoIP would be preempted by the bill." *Ibid.*

charge per telephone number provided by "VoIP or other similar service," ALA. CODE § 11-98-5.1(C). Effective October 1, 2013, Alabama amended the ETSA to remove the 911 fee disparity between VoIP and telecommunications services. ALA. CODE § 11-98-1(18) (defining "voice communications service" to include "interconnected VoIP service").

In 2015, three Alabama providers of 911 services—the Autauga County Emergency Management Communication District, the Calhoun County 911 District, and the Birmingham Emergency Communications District ("Districts")—sued BellSouth Telecommunications LLC ("BellSouth") in Alabama state court, alleging that from 2005 until October 1, 2013 (when the statute was amended) "BellSouth failed to properly bill, collect, and remit 911 charges due" the Districts. *See* Complaint, *Autauga County Emergency Mgmt. Commc'n Dist. v. BellSouth Telecomms, LLC*, No. 1-CV-2015-901302.00 (Circuit Court Jefferson County, Ala.) (filed Mar. 31, 2015), ¶20. BellSouth removed the matter to federal district court. *See* Notice of Removal, *Autauga County Emergency Mgmt. Commc'n Dist. v. BellSouth Telecomms, LLC*, No. 15-cv-00765 (N.D. Ala.) (filed May 6, 2015). Among other things, the parties disagreed as to whether the BellSouth services at issue were "VoIP or other similar services," as well as whether ETSA's provisions regarding 911 fees are preempted by federal law." *See* Order, *Autauga County*

Emergency Mgmt. Commc'n Dist. v. BellSouth Telecomms., LLC, No. 15-cv-00765 (N.D. Ala. Mar. 2, 2018) ("Referral Order"), at 7.

On BellSouth's motion, the district court granted a primary jurisdiction referral to the FCC and stayed the case. In doing so, the court emphasized "the FCC's technical expertise in this highly regulated field" as well as "the need for uniformity in VoIP regulation." *See id*. at 13.

B. The Petitions for Declaratory Ruling

Pursuant to the Referral Order, BellSouth petitioned the Commission to issue a declaratory ruling "that 47 U.S.C. § 615a-1(f)(1) prohibits state and local governments from requiring interconnected VoIP customers to pay more in total charges than those state and local governments require customers of comparable non-VoIP services to pay." App. 1, p. 5. Relatedly, BellSouth requested that the Commission "declare that § 615a-1(f)(1) preempts any state statute that requires interconnected VoIP customers to pay a higher total amount in 911 charges than

customers purchasing the same quantity of non-VoIP telephone service." App. 1, p. 27.[5]

The Districts also petitioned the Commission for a declaratory ruling. *See* App. 2, pp. 1-140. Beyond seeking a declaration about the definition of interconnected VoIP under the Commission's rules,[6] the Districts asked the Commission to declare "that the federal district court and not the Commission is the appropriate forum to resolve questions between the parties regarding the meaning and preemptive scope of 47 U.S.C. § 615a-1(f)(1)." App. 2, p. 11. The Districts argued that if the Commission addressed those issues, it should then find (1) with respect to preemption, "that neither [47 U.S.C. § 615a-1(f)(1)] nor any other federal law preempts the ability of states to impose E911 fees on voice

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[5] BellSouth also requested that the Commission: (1) "declare that the transmission of voice traffic in IP format over the last-mile connection to the end-user customer is necessary, although not sufficient, for a voice service to qualify as either interconnected or non-interconnected VoIP"; (2) "declare that, when a customer orders non-IP-enabled voice service . . ., that service continues *not* to be either interconnected or non-interconnected VoIP"; and (3) "declare that, in classifying a service as VoIP or non-VoIP, there is no need to consider the demarcation point specific to the customer ordering the service." App. 1, p. 5.

[6] The Districts requested that the Commission declare "that all equipment located on or within the building or premises owned or occupied by the customer that transmits, processes, or receives IP packets is presumptively on the customer's side of the network and thus qualifies as IP CPE [customer premises equipment] for purposes of applying 47 C.F.R. § 9.3." App. 2, pp. 10-11; *see also* App. 2, pp. 27-28.

services other than those that meet the Commission's definition of [interconnected]VoIP . . ."; and (2) section 615a-1(f)(1) "only prohibits states from imposing different *rates* on providers of [interconnected] VoIP and local exchange services, not from obtaining higher total revenues from providers of [interconnected] VoIP than from providers of local exchange services." App. 2, p. 11.

C. The *Order* on Review

In response to the Referral Order and the petitions, the Commission issued the *Order* to (1) "clarify that section 6(f)(1) of the NET 911 Act"—which the Commission refers to as "the VoIP 911 Fee Parity Provision"—"prevents state, local, and Tribal 911 entities from imposing on and collecting from a class of subscribers to VoIP services, a higher total 911 fee than is imposed on and collected from the same class of subscribers to traditional telecommunications services having the same 911 calling capacity," and (2) "resolve a controversy that threatens to frustrate Congressional intent and the Commission's goal of facilitating the transition to more advanced, IP-based services that benefit American consumers and businesses." App. 39, p. 2, ¶2. The Commission stated that it would "defer to the District Court, as the finder of fact in this instance, to determine, based on the specifics of the lawsuit and the interpretation . . . herein,

whether the VoIP 911 Fee Parity Provision preempts the Alabama ETSA for purposes of resolving the litigation." App. 39, p. 6, ¶10.[7]

After a "thorough review of the record," the Commission declared "that the VoIP 911 Fee Parity Provision prohibits non-federal governmental entities from imposing 911 fees or charges on VoIP services in any manner that would result in a subscriber to such VoIP services paying a total amount of 911 fees or charges that exceeds the total amount of 911 fees or charges that the same subscriber would pay for a traditional telecommunications service with the same 911 outbound calling capability or same quantity of units upon which 911 fees are based for traditional telecommunications services." App. 39, p. 6, ¶9. The Commission found that "[t]his interpretation best comports with the text of the NET 911 Act as a whole, its legislative history, and with Congress's and the Commission's stated goals of facilitating the transition to next-generation IP networks and services, including for 911 services." App. 39, p. 7, ¶13.

[7] The Commission declined "to rule on the extensive VoIP definitional issues" raised in the petitions. App. 39. p. 6, ¶10. It explained that "[i]f the District Court determines that the ETSA as interpreted by the Alabama 911 Districts violates the VoIP 911 Fee Parity Provision's fee-parity mandate, then the issue of whether BellSouth's voice service offered at the time was VoIP or a traditional . . . telecommunications service is mooted because subscribers should owe total 911 fees or charges to the Districts for the VoIP service at issue that are no higher than those for traditional [telecommunications] services." *Ibid.* (footnote omitted).

In coming to its conclusion, the Commission examined the text of the VoIP 911 Fee Parity Provision against the backdrop of Congress's "clear" intent "to create a 911 regulatory framework that does not disadvantage VoIP service providers or subscribers relative to service providers or customers of traditional telecommunications services." App. 39, p. 8, ¶14. The Commission noted that the language of the VoIP 911 Fee Parity Provision refers to the "imposition and collection" of a "fee or charge" and provides that the referenced "fee or charge may not exceed the *amount* of any such fee or charge applicable to the same class of subscribers to telecommunications services." App. 39, p. 10, ¶19 (quoting 47 U.S.C. § 615a-1(f)(1)) (emphasis added), and that the word "amount" is defined as "total number or quantity: Aggregate," App. 39, p. 11, ¶19 (citing WEBSTER'S NEW COLLEGE DICT. 38 (3d ed. 2008). "In other words," the Commission concluded, "a limitation on the amount collected is best read in this context as a limitation on the aggregate amount—the bottom line—not on the amount of the per-unit fee or charge specified to apply in some intermediate step in the subscriber billing process." *Ibid*.

Conversely, the Commission explained, "interpreting the phrase 'fee or charge' to refer to the rate of the 'fee or charge' . . . would allow states to impose any total amount of 911 fees or charges on VoIP customers, as long as there is a common per-unit rate specified for both VoIP and TDM-based subscribers of the

same class,"[8] which would render the limitation on the "amount" of fees or charges "meaningless." App. 39, p. 11, ¶20. The Commission also found that a contrary interpretation of the VoIP 911 Fee Parity Provision would run "counter" to its "long-standing goal" of facilitating the transition to IP-based communications services, since permitting higher 911 charges for subscribers of VoIP service "could deter subscribers' adoption" of such services. App. 39, p. 12, ¶22.

This petition for review followed.

STANDARD OF REVIEW

The Court may only set aside the Commission's *Order* upon determining that it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this "highly deferential" standard, the Court "cannot substitute [its] judgment for that of the agency so long as the agency's conclusions are rational and reasonably explained." *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps. of Engineers*, 833 F.3d 1274, 1285 (11th Cir. 2016) (citations omitted). The Court's inquiry "is limited by law to whether the

[8] TDM, which stands for "time division multiplexing," is the method by which traditional (non IP-based calls) are transmitted. *See, e.g.*, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17111, ¶213, 17114, ¶220 (2003) (subsequent history omitted).

agency's decision was based on a consideration of the relevant factors and, ultimately, whether it made a clear error of judgment." *Id*.

The Court's review of the Commission's interpretation of the Net 911 Act's VoIP 911 Fee Parity Provision, a statute that Congress has entrusted to the FCC to administer, is governed by the two-part standard set forth in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under this standard, the Court inquires whether Congress has "directly spoken to the precise question at issue," and if not, whether the Commission's construction "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842-43. In making both determinations, courts examine the statute's text, structure, history, and purpose. *Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

SUMMARY OF ARGUMENT

The Commission issued the *Order* to aid the referring district court in making its determination in *Autauga County Emergency Mgmt. Commc'n Dist. v. BellSouth Telecomms., LLC* whether the VoIP 911 Fee Parity Provision preempts Alabama's statute. Prior to 2013, Alabama's ETSA permitted the Districts to impose a higher total 911 service fee on VoIP subscribers than on subscribers of traditional telecommunications services.

1. The VoIP 911 Fee Parity Provision states that "the fee or charge" imposed on a class of VoIP subscribers for 911 services "may not exceed the amount of any

such fee or charge applicable to the same class of subscribers to telecommunications services." 47 U.S.C. § 615a-1. The text, structure, history, and purpose of the VoIP 911 Fee Parity Provision all demonstrate that the statute is best read to provide that the total amount of 911 fees imposed on subscribers to VoIP services may not exceed that imposed on customers of traditional telecommunications.

The Districts' narrower reading, by which they would be obligated only to set the same "base fee" or rate for both services would, as the Commission explained, "render meaningless the phrase 'may not exceed the amount of' any 911 fee or charge applicable to the same class of subscribers to non-VoIP services." App. 39, p. 11, ¶20. Nothing in the statute's use of the singular form of the terms "fee" or "charge" suggests otherwise, since both terms can refer to the total expense imposed on a service.

The legislative history confirms the natural meaning of the statutory language. The House Report explains that if a State or its political subdivision imposed a 911 fee on wireless or wireline carriers that consists of one rate for residential customers and another rate for business customers, they may collect no more in total from subscribers to VoIP providers than from customers of traditional telecommunications services.

The Commission's interpretation also furthers Congress's statutory goals to promote parity in the regulation of 911 services for VoIP and traditional telecommunications, as well as to encourage the deployment of advanced telecommunications capability for all Americans. By contrast, the Districts' narrower reading would permit States and their subdivisions to impose disparate 911 expenses on VoIP services and traditional telecommunications by keeping the base fee or rate —but not the total charge—the same.

2. The presumption against preemption of matters historically regulated by the States does not serve to preclude or narrow the reasonable meaning of the statute.

The presumption against preemption does not apply where, as here, a federal statute is expressly preemptive. Instead, in such cases, the language of the statute controls. *Puerto Rico v. Franklin California Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016). Nor does the presumption have any force against an agency's interpretation that (as here) best comports with the statute's text, context, and purpose. *Coventry Health Care of Missouri, Inc. v. Nevils*, 137 S.Ct. 1190, 1196-98 (2017). Finally, the presumption does not apply when, as here, regulation of VoIP services in general and VoIP 911 service specifically is an area with a history of significant federal presence. *United States v. Locke*, 529 U.S. 89, 108 (2000).

In any event, even if the presumption were to apply, it could not serve to compel an unreasonable interpretation of the statute, one that, as here, would be at odds with the statute's text, history, and purpose.

3. The Commission's *Order* also is not arbitrary and capricious.

a. The Commission sensibly focused on outbound calling capacity as a relevant factor in determining whether there was fee parity between VoIP and traditional telecommunications subscribers. The Commission rightly held that there is nothing inherent in VoIP technology to justify disparity in 911 fees. In fact, as the Commission noted, numerous states—including Alabama after 2013—have laws that do not impose different fees on VoIP and telecommunications subscribers. And it was entirely reasonable for the agency to leave issues relating to determining comparable calling capacity in specific cases for later resolution.

b. The claim that the Commission failed to consider how its ruling would impact revenue-based 911 fees is not properly before the Court. Because neither the Districts nor any other commenter raised this issue before the Commission in the administrative proceeding, 47 U.S.C. § 405 bars the Districts from raising it for the first time on judicial review. And even if the issue was not precluded, the Districts do not claim that any such percentage-based statute is at issue in their dispute with BellSouth, which led to the primary jurisdiction referral to the Commission.

c. Finally, the Commission reasonably concluded that higher total 911 fees imposed on VoIP subscribers who place the same burdens on 911 networks as subscribers to traditional telecommunications services would interfere with longstanding policy goals and deter the transition to advanced IP-based networks and services. It is a matter of common sense and basic economics that if VoIP services are saddled with higher 911 fees, customers will be less likely to switch from traditional telecommunications services. That important policy consideration further supports the Commission's decision here.

ARGUMENT

The Commission's reading of the VoIP 911 Fee Parity Provision embodies the only reasonable interpretation of the statute's provisions—the one that best comports with the text, legislative history, and Congress's purpose in ensuring parity between VoIP voice communications and traditional phone services. The presumption against preemption does not apply in interpreting an express provision of federal law, but even if it did, it would not require the adoption of an unreasonable interpretation in the face of a manifest contrary congressional intent.

I. The Commission's Reading of the VoIP 911 Fee Parity Provision Is the Only Interpretation That Comports With the Statute's Text, Legislative History, and Underlying Purposes

In setting forth State and local authority to impose and collect fees on carriers for 911 services in the NET 911 Act, the VoIP 911 Fee Parity Provision

provides that "[f]or each class of subscribers to IP-enabled voice services, the fee or charge may not exceed the amount of any such fee or charge applicable to the same class of subscribers to telecommunications services." 47 U.S.C. § 615a-1(f)(1).

Petitioners do not dispute that the VoIP 911 Fee Parity Fee Provision is preemptive. Pet. Br. at 7 (acknowledging that under the statute, "the nominal or base 911 fee . . . cannot be higher for VoIP than for traditional service."). The dispute is over the preemptive *scope* of the statute. Stated differently, what type of fee parity did Congress require?

To calculate 911 services fees to bill a subscriber, a 911 provider typically multiplies a nominal fee per unit (e.g., $1.00) by the number of units (e.g., number of outbound lines or number of telephone numbers assigned to the customer). The product of these two factors is what is billed to and collected from the customer.

The Districts take the position that the statute required parity between VoIP and traditional telecommunications subscribers only in the nominal or base fee, *see* Pet. Br.at 7, 13, even if that fee could be multiplied by a unit of measurement that is set differently for each class of subscribers.

The Commission acknowledged that, on a first reading, the VoIP 911 Fee Parity Provision "could mean" "that the nominal 'fee or charge' may not exceed the nominal fee or charge for the corresponding class of telecommunications

service subscribers that service providers impose for a given unit of measurement." App. 39, pp. 8-9, ¶15. But after an in-depth examination of the statute's text, structure, legislative history, and purpose, the Commission concluded that the "best interpretation" of the statute is that "Congress intended to prevent non-federal governmental entities from imposing a greater total 911 fee or charge on VoIP services than the total 911 fee or charge imposed on traditional telecommunications services providing . . . the same amount of concurrent capability to call 911." App. 39, pp. 9-10, ¶17. The Commission explained that its reading "best comports with the text of the NET 911 Act as a whole, its legislative history, and with Congress's and the Commission's stated goals of facilitating the transition to next-generation IP networks and services." App. 39, p. 7, ¶13. In contrast, the interpretation urged by the Districts—that the statute prohibits merely disparity in the nominal fee—is "contrary to the letter and spirit of the statute, as it would render meaningless the phrase 'may not exceed the amount of' any 911 fee or charge applicable to the same class of subscribers to non-VoIP services." App. 39, p. 11, ¶20.[9]

[9] *See United States ex rel. Hunt v. Cochise Consultancy, Inc.*, 887 F.3d 1081, 1088 (11th Cir. 2018) (quoting *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004)("[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme.").

The VoIP 911 Fee Parity Provision has been entrusted by Congress to the Commission's administration—the Commission has the power to issue implementing regulations, 47 U.S.C. § 615a-1(c), and to enforce the statute as if it "was a part of the Communications Act of 1934," *id*. § 615a-1(e)(2). Thus, under settled administrative law principles, the Commission's reasonable interpretation would be entitled to deference. *BBX Capital v. FDIC*, 2020 WL 1684030 (11th Cir. Apr. 7, 2020), at *7; *Cahaba Riverkeeper v. EPA*, 938 F.3d 1157, 1168-69 (11th Cir. 2019). *See generally Chevron*, 467 U.S. at 843-44.[10]

But there is no need to resort to administrative agency deference here—the Commission's reading is by far the better reading of the statute, and the one that

[10] Although it is unnecessary to reach the issue here, *Chevron* deference would apply even when a party invokes the presumption against preemption of state law. As Judge Kravitch explained for this Court in *Teper v. Miller*, 82 F.3d 989 (11th Cir. 1996) (on which the Districts themselves rely, Pet. Br. at 22): "An agency . . . to which Congress has delegated broad discretion in interpreting and administering a complex federal regulatory regime, is entitled to significant latitude when acting within its statutory authority, even in its decisions as to the scope of preemption of state law." 82 F.3d at 998. Thus, "even if a statute is on its face ambiguous, Congress's intent to preempt may be clear when the administrative agency expressly responsible for interpreting and implementing the statute has clarified it." *Ibid*.; *National Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1252 (11th Cir. 2006) ("The presumption against preemption cannot trump [the court's] review of the [agency's] [o]rder under *Chevron*," although it may "guide[] . . . understanding" of the statutory language.); *see also Lindeen v. SEC*, 825 F.3d 646, 656 (D.C. Cir. 2016) (rejecting argument that "wherever a federal agency's exercise of authority will preempt state power, *Chevron* deference is inappropriate").

comports with Congress's manifest intent in ensuring parity between VoIP and traditional telecommunications subscribers to 911 services. *See, e.g.*, *Coventry Health Care*, 137 S. Ct. at 1197 n.3 (no need to consider *Chevron* deference when agency interpretation "best comports with [the statute's] text, context, and purpose.").

A. The Text of the Statute Supports the Commission's Interpretation

The VoIP 911 Fee Parity Provision allows the "imposition or collection" of a "fee or charge" on VoIP services to support 911 services, but provides that such "fee or charge may not exceed the amount of any such fee or charge applicable to the same class of subscribers to telecommunications services." 47 U.S.C. § 615a-1(f)(1). "The required parity," as the Commission explained, "is in the amount that non-federal governmental entities *collect*." App. 39, pp. 10-11, ¶19. From the point of view of the "class of subscribers" who must pay the bill, the Commission observed, "the amount collected for 911 services is the *total amount* of such 'fee or charge' collected by the non-federal governmental entity—not merely the nominal per-unit rate before it is actually applied to the service." App. 39, p. 11, ¶19. Indeed, the Commission pointed out, the dictionary definition of the word "amount" is "the total number or quantity," or "[a]ggregate." *Ibid*. (citing WEBSTER'S NEW COLLEGE DICT. 38 (3d ed. 2008)). *Accord* WEBSTER'S THIRD NEW INT'L DICT. 72 (1986) (unabridged). "In other words," the Commission explained,

"a limitation on the amount collected is best read in this context as a limitation on the aggregate amount—the bottom line—not on the amount of the per-unit fee or charge specified to apply at some intermediate step in the subscriber billing process." App. 39, p. 11, ¶19.

The Districts contend that the "plain language" of the statute supports their interpretation. Pet. Br. at 12-13. In doing so, they argue that the statute's use of the "singular form" of the words "'fee' and 'charge,'" combined with the definition of "fee" as a "fixed charge," supports the conclusion that "'fee' means the base or nominal fee, not the nominal fee multiplied by the number of assessable units." Pet. Br. at 13 (citing www.merriam-webster.com/dictionary/fee).

But the Districts' own dictionary also defines fee to mean "a sum paid or charged for a service." *See* www.merriam-webster.com/dictionary/fee (emphasis added). Even more to the point, the statute speaks of a "fee or charge," and even if a fee can be thought of as a "fixed charge," a "charge" necessarily includes more than a fixed charge. As dictionaries (including the Districts' own) make clear, a "charge" is "the price demanded for something." *See* www.merriam-webster.com/dictionary/charge; AMERICAN HERITAGE DICT. OF THE ENGLISH LANG. 312 (4th ed. 2000) ("the price asked for something"). Under the ordinary meaning of either term, there is nothing to the inference the Districts would draw from the statute's use of the singular rather than the plural form of each word, since either

can refer to the "sum" of the amount charged, and the statute refers to the "amount of any such fee or charge." 47 U.S.C. § 615a-1(f)(1); App. 39, pp. 11, 12-13, ¶20 & n.79.

At bottom, the Districts contend that the VoIP 911 Fee Parity Provision applies only to the "base fee," by which it means the "rate" for VoIP. *See, e.g.*, Pet. Br. at 14, 18. But as the Commission pointed out (App. 39, p. 11, ¶20), even though the NET 911 Act elsewhere contains that term, *see* 47 U.S.C. §§ 615a-1(b), (c)(1)(C), the VoIP 911 Fee Parity Provision does not. It is settled that when Congress chooses to include language in one part of a statute and not in another, its choice is presumed to be intentional. *United States v. Spoor Trustee of Louis Paxton Gallagher Revocable Trust*, 838 F.3d 1197, 1201-02 (11th Cir. 2016); *see generally Russello v. United States*, 464 U.S. 16, 23 (1983). So too here.

The Districts also argue that an annual report the Commission provides to Congress on 911 fees lists the base fee and not the total amount of 911 fees charged by states and localities. Pet. Br. at 14 (citing https://www.fcc.gov/files/10thannual911feesreporttocongresspdf). But that report does not purport to interpret the VoIP 911 Fee Parity Provision; instead, it is intended to "ensure efficiency, transparency and accountability" in state 911 fees, and to detail "the status in each State of the collection and distribution of" 911 fees and charges, including the revenues expended by states and localities "for any purpose other than the purpose

for which any such fees or charges are specified." 47 U.S.C. § 615a-1(f)(2). In any event, Alabama submitted only its base fee for inclusion in the report, and not the information needed to calculate the total amount collected from the subscriber. As the Commission explained, "Alabama's interpretation of the 911 report's instructions has no bearing on the Commission's interpretation of the VoIP 911 Fee Parity Provision herein." App. 39, p. 12, n.78. In listing the nominal or base fee submitted by States, the report does nothing to undermine the Commission's interpretation of "fee or charge" for purposes of the VoIP 911 Fee Parity Provision.

The Districts also attempt to rely on the way in which the terms "fee or charge" are used in Alabama's ETSA, as well as Florida's Communications Number E911 Act, to establish a "common usage" of the term "fee" and "charge" as the "base fee or rate." Pet. Br. at 14-15. But there is no reason to think that Congress meant to incorporate State usage into a provision of federal law intended to limit State authority to impose 911 fees. And, in any event, these isolated instances are insufficient to overcome the common meanings of the terms "fee and charge."

In the end, as the Commission pointed out, the Districts' alleged "plain meaning" interpretation "would allow states to impose any total amount of 911 fees or charges on VoIP customers, as long as there is a common per-unit rate specified" for VoIP and traditional telecommunications subscribers of the same class. App. 39,

p. 11, ¶20. That interpretation, the Commission found, "would render meaningless the phrase 'may not exceed the amount of' any 911 fee or charge applicable to the same class of subscribers to non-VoIP services." *Ibid.*

B. The Legislative History of the Act Supports the Commission's Interpretation

The legislative history of the VoIP 911 Fee Parity Provision confirms the natural import of the statute's text. As the House Report on the NET 911 Act stated, Congress intended to encourage "States and their political subdivisions to apply 911 fees equitably to providers of different types of communication services to the extent possible." H.R. REP. NO. 110-442, at 15. The report thus explained that "[f]or example, if a State or its political subdivision imposes a 911 fee on wireless or wireline carriers that consists of one rate for residential customers and another rate for business customers, [they] may collect no more from VoIP providers for the same classes of customers." *Ibid*. That example supports the Commission's conclusion that States and their political subdivisions may not collect more in total from subscribers to VoIP providers than from customers of traditional telecommunications services.

The Districts argue that the House Report's use of the word "rate" supports their interpretation. Pet. Br. at 27. But the "main thrust" of the Report's statement, as the Commission observed, "is that states and localities may *collect* no more 911 fees from the same class of VoIP and telecommunications service subscribers."

App. 39, p. 12, ¶21; *see also ibid.* ("A House Report on the NET 911 Act confirms Congress's intent to encourage 'States and their political subdivisions to apply 911 fees equitably to providers of different types of communication services to the extent possible.'" (quoting H.R. REP. NO. 110-442, at 15)). It would make no sense to "collect" a "rate"—and thus the Commission reasonably interpreted the use of that term to be an inexact reference to the "total 911 fee or charge." *Ibid.*

C. The Statutory Goals Support the Commission's Interpretation

Lastly, the Commission's interpretation is the only reading that carries out Congress's goals to ensure parity between subscribers to VoIP services and customers of traditional telecommunications services. By contrast, the Districts' reading is at odds with Congress's intent to "level[] the regulatory playing field for VoIP 911 services," App. 39, p. 10, ¶17, because it would permit States and their political subdivisions to charge a greater amount in total to VoIP providers than for providers of traditional telecommunications, *see* App. 39, p. 11, ¶20. It would also be inconsistent with Congress's desire, expressed in the Preamble to the NET 911 Act, to "facilitat[e] the rapid deployment of IP-enabled 911 and E-911 services, [and] encourage the Nation's transition to a national IP-enabled emergency network." Pub. L. 110-283, 122 Stat. 2620. Likewise, Congress in section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302(a), instructed the

Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."

If the Commission were to have interpreted the VoIP 911 Fee Parity Provision to allow States and their political subdivisions "to impose a higher total amount of 911 fees on VoIP service than on telecommunications service placing the same burden on 911 networks," that "could deter consumer adoption of VoIP service," to the detriment of both congressional goals, as well as the Commission's longstanding efforts to facilitate the transition from traditional TDM telephone technology to "IP-based telephone service." App. 39, p. 13, ¶23. In short, the Districts' reading would transform a statute designed to achieve parity into one permitting *dis*parity.

II. The Presumption Against Preemption Does Not Compel the Districts' Reading of the Statute

The Districts argue extensively throughout their brief that the "presumption against preemption" requires the Court to "accept the District's interpretation as binding" and "find either no preemption or a narrow scope of preemption." Pet. Br. at 8. The Districts' reliance on the presumption is unavailing.

There is no dispute that Congress intended the VoIP 911 Fee Parity Provision to have preemptive effect. As the Districts' acknowledge, at the very least, the NET 911 Act "regulates the nominal or base 911 fee," and by such regulation, Congress intended to prohibit "higher" 911 fees "for VoIP than for

traditional service." Pet. Br. at 7; *see also id.* at 18 ("the Net 911 Improvement Act necessarily provides that states cannot adopt a base 911 fee—or rate—for VoIP that exceeds the base 911 fee for traditional telecommunications services"). Because the NET 911 Act plainly is preemptive, there is no warrant to invoke any presumption against preemption. *See Puerto Rico*, 136 S. Ct. at 1946 ("because the statute 'contains an express pre-emption clause,' we do not invoke any presumption against pre-emption but instead 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent'") (citation omitted).

Consistent with *Puerto Rico*, the Supreme Court in *Coventry Health Care* reversed a state supreme court decision that had used the presumption to construe narrowly an express preemption provision in a federal statute. 137 S. Ct. at 1196-98. The Court rejected arguments that it should apply the presumption against preemption and, instead, adopted the government's reading because it "best comports with [the statute's] text, context, and purpose." *Id*. As we have explained, that is the case here. Construing the statute to prohibit disparity in the total amount of 911 fees assessed, as the Commission determined, "best comports with the text

of the NET 911 Act as a whole, its legislative history, and with Congress's and the Commission's stated goals." App. 39, p. 7, ¶13.[11]

Moreover, the presumption against preemption does not apply "when the State regulates in an area where there has been a history of significant federal presence." *Locke*, 529 U.S. at 108. Congress has authorized the Commission to regulate the provision of 911 services since 1999, *see* Pub. L. No. 106-81, 3(a), 113 Stat. 1286 (1999), and VoIP service has been subject to federal regulation virtually since its inception. The Commission preempted state regulation of VoIP in 2004, *see In the Matter of Vonage Holdings Corp*., 19 FCC Rcd 22404 (2004), *aff'd sub nom. Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007). The FCC thus has "sole regulatory control" over the obligations that may be imposed on VoIP services. *Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm'n*, 564 F.3d 900, 905 (8th Cir. 2009). The VoIP 911 Fee Parity Provision is thus the result of the federal government's longstanding regulation of 911 services

[11] Although the Eleventh Circuit has not yet addressed *Puerto Rico*'s holding on the presumption, at least four other circuits have followed it. *See Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan*, 938 F.3d 246, 258-59 (5th Cir. 2019); *Watson v. Air Methods Corp.*, 870 F.3d 812, 817 (8th Cir. 2017); *EagleMed LLC v. Cox*, 868 F.3d 893, 903-04 (10th Cir. 2017); *Atay v. Cty. of Maui*, 842 F.3d 688, 699 (9th Cir. 2016); *see also Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 762 n.1 (4th Cir. 2018) (finding "the best course is simply to follow as faithfully as we can the wording of the express preemption provision, without applying a presumption one way or the other"). *But see Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 771 n.9 (3d Cir. 2018) (limiting *Puerto Rico* to the bankruptcy context).

and VoIP communications. The fact that the provision applies in an area with a "history of significant federal presence," *Locke*, 529 U.S. at 108, is an additional reason why the presumption against preemption has no application to this case.

Finally, even the pre-*Puerto Rico* decisions upon which the Districts rely (Pet. Br. at 18-20) make clear that "[t]he purpose of Congress" is "'the ultimate touchstone' in every pre-emption case." *See, e.g.*, *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 767 (11th Cir. 1998). Thus, "the assumption that the historic police powers of the States [are] not to be superseded" does not control where the "clear and manifest purpose of Congress" is to the contrary. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (citation omitted). And as this Court has recognized, such a clear and manifest purpose "can be implied from the structure and purpose of a statute even if it is not unambiguously stated in the text." *Teper*, 82 F.3d at 993. Thus, even if a presumption against preemption applied to this case, it would be rebutted by the robust evidence of Congress's intent in the VoIP 911 Fee Parity Provision to "create a 911 regulatory framework that does not disadvantage VoIP service providers or subscribers relative to service providers and customers of traditional telecommunications services." App. 39, p. 8, ¶14.

III. The Order Is Not Arbitrary and Capricious

The Districts also contend that the Commission's *Order* is arbitrary and capricious for four reasons: (1) the agency failed properly to construe the statute in light of the presumption against preemption, Pet. Br. at 29-30; (2) the agency failed to adequately consider "the practical application of its order to all types of VoIP offerings," *id*. at 30-35; (3) the agency failed to consider the impact of its order on "revenue-based 911 fees," *id*. at 35; and (4) the agency based its concern about the potential for deterring the transition to IP-based services on speculation, *id.* at 36-37. The Districts' arguments do not undermine the Commission's *Order*.

1. The Commission's Interpretation. The first of these arguments is, as the Districts appear to recognize (Pet. Br. at 29-30), simply a recapitulation of their attack on the Commission's reading of the VoIP 911 Fee Parity Provision. As we have already shown, *see* pp. 19-29 *supra*, that reading best comports with the statute's language, legislative history, and Congress's manifest purposes.

2. Concurrent Calling Capability. The Districts attack the reasonableness of the *Order*'s requirement that prohibits States and their subdivisions from imposing a greater total 911 fee on VoIP service than that imposed on traditional telecommunications services that "provid[e] a subscriber the same amount of concurrent capability to call 911." App. 39, p. 10, ¶17. As the Commission found, "[t]he record supports the view that simultaneous outbound 911 calling capability

is the most relevant characteristic for evaluating the comparability of different services" for purposes of applying the VoIP 911 Fee Parity Provision, because this characteristic "best represent[s] the 'burden' the public safety system incurs and that 911 fees help offset." App. 39, p. 10, ¶18.

The Districts contend that, because of "technological differences" between VoIP and traditional telecommunications, a comparison of their simultaneous outbound calling capacity "is often not possible." Pet. Br. at 30-31. Thus, the Districts assert, because "VoIP is flexible and highly customizable," VoIP services can offer outbound calling capabilities that traditional telecommunications services cannot, such as "burstable simultaneous call capacity, unlimited simultaneous call capacity, and shared simultaneous call capacity."[12] The Districts assert that, because of these differences, "[t]he very concept of 'discrimination' between VoIP and traditional service is flawed," Pet. Br. at 30, and that in any event, the Commission did not grapple with the "practical problems" that might arise from the *Order*, *id*. at 33.

[12] "Burstable" call capacity allows VoIP customers to exceed their simultaneous calling capacity in the event of an unplanned increase of inbound or outbound calls. Pet. Br. at 31 n.17. "Shareable call capacity allows business customers to share simultaneous call capacity among different locations." *Id.* at 31-32.

But the Commission rightly rejected the idea that the "mere fact that a 911 call is placed using a VoIP service" makes it "more burdensome on the 911 system." App. 39, p. 16, ¶30. "[T]here is nothing inherent in VoIP technology to justify the disparity in the amount of 911 fees charged to VoIP subscribers," because "VoIP service does not introduce any incremental cost in actually providing 911 service." *Ibid.*[13] In fact, the Commission observed, "various states have adopted 911 fee mechanisms that fully comport with the VoIP 911 Fee Parity Provision and impose on VoIP subscribers a 911 fee on the same basis as traditional telecommunications services subscribers." App. 39, p. 17, ¶31. (Indeed, one of these was Alabama, which in 2013—six years before the Commission's *Order*—amended its ETSA "to clearly authorize a single monthly 911 charge on each active voice communications service connection that is able to access a 911 system, without distinguishing between VoIP and non-VoIP services." *Ibid.*)

Nor, as the Commission reasonably determined, do the additional technological capabilities of VoIP services identified by the Districts "justif[y] disparate treatment" of VoIP services "having the same simultaneous outbound calling capacity of any traditional telecommunications service." App. 39, p. 16,

[13] The Commission also pointed out that even if VoIP did introduce additional incremental costs, Congress determined that there should be parity in the fees imposed on VoIP and traditional telecommunications services. App. 39, p. 16, ¶30.

¶30. By the same token, however, the Commission made clear that such additional features would be relevant "to the extent they increase a VoIP subscriber's ability to make simultaneous outbound calls to 911." App. 39, p. 16-17, ¶30. Thus, as the Districts acknowledge (Pet. Br. at 33), under the *Order* a State or a political subdivision "has the discretion to fashion its 911 fee regime to capture the maximum number of outbound calls any subscriber can make at one time, as long as that regime does not impose a higher total 911 fee on a VoIP subscriber than on a traditional telecommunications service whose service permits the same maximum number of outbound calls at one time." App. 39, p. 17, ¶30.

Finally, the Districts complain that the *Order* gives only "cursory responses" to the "practical problems" raised by its decision, Pet. Br. at 33. But the Districts misconceive the nature of the Commission's *Order*, which sought to resolve a dispute over the interpretation of the VoIP 911 Fee Parity Provision, and which expressly left it to the district court to determine, based on the specifics of the lawsuit, whether Alabama's ETSA, as interpreted by the Districts, violates the VoIP 911 Fee Parity Provision's fee parity mandate. App. 39, p. 6, ¶10. In providing general "guidance" to determine whether a State 911 fee or charge might violate the VoIP 911 Fee Parity Provision, the Commission was not obliged to respond to every scenario that might arise in applying the statute, but could reasonably choose to leave the resolution of such disputes to future cases.

3. Revenue-Based 911 Fees. The Districts complain (Pet. Br. at 35) that the Commission failed to consider the impact of its *Order* on "statutes that assess 911 fees based on a percentage of revenue." (citing Vt. Stat. Ann tit. 30, § 7523).

At the outset, this argument is not properly before the Court because neither the Districts nor any other commenter made this claim to the Commission in the record of the administrative proceeding. Under section 405 of the Communications Act, the filing of a petition for agency reconsideration is a "condition precedent to judicial review of any [FCC] order, decision, report, or action, . . . where the party seeking such review … relies on questions of fact or law upon which the Commission … has been afforded no opportunity to pass." 47 U.S.C. § 405 (a). *See, e.g.*, *In re Core Commc'ns*, 455 F.3d 267, 276 (D.C. Cir. 2006). As the Commission was not afforded a fair opportunity to pass on this argument below, the Districts may not raise it for the first time in the Court. In addition, "even when a petitioner has no reason to raise an argument until the FCC issues an order that makes the issue relevant, the petitioner must file 'a petition for reconsideration' with the Commission before it may seek judicial review." *Id*. 455 F.3d at 276-77.

In any event, the Districts do not contend that any such percentage-based statute is at issue in their dispute with BellSouth or would govern the extent of the 911 fees they could impose. And there would have been absolutely no reason for the Commission to address issues arising from State statutes foreign to the dispute

before it that were not brought to the Commission's attention by parties in the primary jurisdiction referral proceeding.

4. Regulatory Goals. Finally, the Districts contend that the Commission's determination of the VoIP 911 Fee Parity Provision was supported by its long-standing goal of facilitating the transition to next-generation IP services was based on the Commission's "unsupported assumption[]," "that regulating only the base 911 fee and not the total amount assessed on a subscriber would cause VoIP to be more expensive and less desirable than traditional service." Pet. Br. at 36-37.

In the first place, the Commission's determination that its interpretation would facilitate the transition to IP-services was only one of several factors, including the text, legislative history, and statutory purposes, that led it to conclude that its reading of the VoIP 911 Fee Parity Provision was the most reasonable reading. Even if that single consideration had been unsupported, it would not render the Commission's reading of the statute infirm.

The Commission's determination is unassailable. There can be no reasonable dispute that "allowing non-federal governmental entities to impose a higher total amount of 911 fees on VoIP service than on telecommunications service placing the same burden on 911 networks, . . . could deter consumer adoption of VoIP service and contradict Congress's directive that the Commission further the deployment of advanced technology such as VoIP service." *See* App.

39, p. 13, ¶23. If VoIP service is saddled with higher fees than traditional telephone service, consumers will be less likely to switch to VoIP—contrary to Congress's and the Commission's goals. This is a matter of common sense and elementary economics, and there was no need, as the Districts insist (Pet. Br. at 36), for the Commission to "rely on a study or empirical evidence" to support the Commission's determination.

CONCLUSION

The Court should deny the petition for review.

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May 8, 2020

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CERTIFICATE OF FILING AND SERVICE

I, Pamela L. Smith, hereby certify that on May 8, 2020, I filed the foregoing Brief for Respondents' with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the electronic 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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STATUTORY ADDENDUM

Communications Act Provisions:
47 U.S.C. § 251(e)(3)
47 U.S.C. § 615a-1(b)
47 U.S.C. § 615a-1(e)(2)
47 U.S.C. § 615a-1(f)(1)

47 U.S.C.

§ 251. Interconnection
(e) Numbering administration
(3) Universal emergency telephone number
The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October 26, 1999.

§ 615a-1. Duty to provide 9-1-1 and enhanced 9-1-1 service
(b) Parity for IP-enabled voice service providers
An IP-enabled voice service provider that seeks capabilities to provide 9-1-1 and enhanced 9-1-1 service from an entity with ownership or control over such capabilities, to comply with its obligations under subsection (a), shall, for the exclusive purpose of complying with such obligations, have a right of access to such capabilities, including interconnection, to provide 9-1-1 and enhanced 9-1-1 service on the same rates, terms, and conditions that are provided to a provider of commercial mobile service (as such term is defined in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d)), subject to such regulations as the Commission prescribes under subsection (c).

§ 615a-1. Duty to provide 9-1-1 and enhanced 9-1-1 service
(e) Implementation
(2) Enforcement
The Commission shall enforce this section as if this section was a part of the Communications Act of 1934. For purposes of this section, any violations of this section, or any regulations promulgated under this section, shall be considered to be a violation of the Communications Act of 1934 or a regulation promulgated under that Act, respectively.

47 U.S.C.

§ 615a-1. Duty to provide 9-1-1 and enhanced 9-1-1 service
(f) State authority over fees
(1) Authority
Nothing in this Act, the Communications Act of 1934 (47 U.S.C. 151 et seq.), the New and Emerging Technologies 911 Improvement Act of 2008, or any Commission regulation or order shall prevent the imposition and collection of a fee or charge applicable to commercial mobile services or IP-enabled voice services specifically designated by a State, political subdivision thereof, Indian tribe, or village or regional corporation serving a region established pursuant to the Alaska Native Claims Settlement Act, as amended (85 Stat. 688) 1 for the support or implementation of 9-1-1 or enhanced 9-1-1 services, provided that the fee or charge is obligated or expended only in support of 9-1-1 and enhanced 9-1-1 services, or enhancements of such services, as specified in the provision of State or local law adopting the fee or charge. For each class of subscribers to IP-enabled voice services, the fee or charge may not exceed the amount of any such fee or charge applicable to the same class of subscribers to telecommunications services.