

ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1003

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

TRI-COUNTY TELEPHONE ASSOCIATION, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of Orders of
the Federal Communications Commission

BRIEF FOR RESPONDENTS

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**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

(A) **Parties and Amici.** All parties appearing in this Court are listed in the Brief of Petitioner.

(B) **Rulings under Review.** The petition for review challenges the following orders of the Federal Communications Commission: *The Uniendo a Puerto Rico Fund and the Connect USVI Fund*, 33 FCC Rcd 5404 (2018), *reprinted* at JA ____–____, and *The Uniendo a Puerto Rico Fund and the Connect USVI Fund*, 34 FCC Rcd 9109 (2019), *reprinted* at JA ____–____.

(C) **Related Cases.** The orders under review have not previously been before this Court or any other court. Respondents are aware of no other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

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GLOSSARY

APA Administrative Procedure Act

FCC Federal Communications
Commission

PRTC Puerto Rico Telephone
Company

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BRIEF FOR RESPONDENTS

INTRODUCTION

In a span of two weeks in September 2017, Hurricanes Irma and Maria laid waste to Puerto Rico and the U.S. Virgin Islands (collectively, “the Territories”), all but decimating their communications networks. The estimated cost of this damage was \$1.5 billion in Puerto Rico alone. Empowered by statute to promote access to quality, affordable communications services throughout the United States, *see* 47 U.S.C. §§ 151, 254, the Federal Communications Commission (FCC or

Commission) took a series of steps to help rebuild the storm-ravaged networks.

Just weeks after the storms—using the Universal Service Fund’s pool of cash reserves—the Commission authorized carriers operating in the Territories (Territorial carriers) to obtain previously allocated subsidies on an expedited schedule. But months later, a majority of Puerto Ricans and most wireline customers in the U.S. Virgin Islands still lacked dependable services.

In the “*Stage I Order*,” seeking to address this remaining damage expeditiously, the Commission authorized additional emergency subsidies of \$64.2 million, again financed by cash reserves.¹ With this assistance, the Commission anticipated that Territorial carriers could restore pre-hurricane service levels within the coming year. But the Commission also recognized that ensuring the long-term availability of quality voice and broadband services in the Territories would require

¹ *The Uniendo a Puerto Rico Fund and the Connect USVI Fund*, 33 FCC Rcd 5404 (2018) (*Stage I Order*), reprinted at JA ____–____. When citing the notice of proposed rulemaking portion of this document, we identify it as the “*Stage II Notice*.”

more comprehensive measures, and it sought comment on a variety of proposals to that end.

In the *Stage II Order*, the Commission superseded the outdated Universal Service framework that had governed the Territories since 2011.² Under the Commission's new framework, Territorial carriers may request up to \$934 million in Universal Service subsidies, over the next decade, to deploy storm-hardened, broadband-capable networks.

Petitioner Tri-County Telephone Association, Inc. (Tri-County)—which directly or through subsidiaries operates wireline and wireless communications systems, and a cable television system, in Wyoming and Montana—challenges both the *Stage I* and *Stage II Orders*. Some of Tri-County's claims are not properly before the Court; the rest are unavailing. Most significantly, Tri-County unpersuasively challenges the Commission's authority to use the Universal Service Fund to encourage the deployment of storm-hardened, broadband-capable infrastructure. That use of the Fund in the *Orders* was a lawful exercise of the FCC's broad discretion to decide how best to promote universal service.

² *The Uniendo a Puerto Rico Fund and the Connect USVI Fund*, 34 FCC Rcd 9109 (2019) (*Stage II Order*), reprinted at JA ____—____.

JURISDICTIONAL STATEMENT

A summary of the *Stage II Order*—which resolved Tri-County’s petition for agency reconsideration of the *Stage I Order*, see *Stage II Order* ¶¶ 154–161 (JA ____–____)—was published in the Federal Register on November 7, 2019. 84 Fed. Reg. 59,937. Tri-County timely petitioned for review of both *Orders* within 60 days of that publication, on January 3, 2020. See 28 U.S.C. § 2344; 47 U.S.C. § 405(a). Pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1), this Court has jurisdiction to review final FCC orders. But as explained below, see *infra* Part II, Tri-County has not established Article III standing to challenge the *Stage I Order*. The Court thus lacks jurisdiction to review that *Order*.

QUESTIONS PRESENTED

1. Whether the FCC acted within its statutory authority, and otherwise reasonably, in deploying the Universal Service Fund to subsidize storm-hardened, broadband-capable networks in the Territories after Hurricanes Irma and Maria.

2. Whether Tri-County fails to establish Article III standing to challenge the *Stage I Order*, when the subsidies authorized in that *Order* did not increase Tri-County’s required contributions to the Universal Service Fund—the sole injury from the *Orders* that Tri-County claims.

3. If the Court concludes it has jurisdiction to review the *Stage I Order*:

- a. Whether there is good cause to establish the Stage I subsidy fund without notice and comment, given the ongoing emergency in the Territories.
- b. Whether the Commission adequately justified its interim relief determinations.
- c. Whether the Commission adequately explained why establishing the Stage I fund comported with 47 U.S.C. § 254(b)(3).

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the addendum bound with this brief.

COUNTERSTATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The FCC's Universal Service Mandate

Under the Communications Act of 1934 (Communications Act or Act), as amended, 47 U.S.C. § 151 *et seq.*, the FCC is “charged to ensure that everyone in the United States has access to critical telecommunications services,” *AT&T, Inc. v. FCC*, 886 F.3d 1236, 1239

(D.C. Cir. 2018); *see* 47 U.S.C. §§ 151, 254, 1302. In 1996, Congress enacted six non-exhaustive principles to guide the Commission in ensuring “universal service,” including the following four principles most relevant here:

- “Quality services should be available at just, reasonable, and affordable rates.”
- “Access to advanced telecommunications and information services should be provided in all regions of the Nation.”
- “Consumers . . . in . . . insular[] and high cost areas[] should have access to . . . 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.”
- “There should be specific, predictable and sufficient . . . mechanisms to preserve and advance universal service.”

Id. § 254(b)(1)–(3), (5). Congress further provided that, when “necessary and appropriate for the protection of the public interest,” the FCC may adopt additional principles to guide universal service policy. *Id.* § 254(b)(7).

Pursuant to these statutory directives, the Commission oversees a “Universal Service Fund” that subsidizes, among other things, the provision of service in areas of the United States and its territories that

are “insular” or otherwise costly to serve. *Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 56–57 (D.C. Cir. 2011); *see* 47 U.S.C. § 254(b)(3). The initiative subsidizing these costly-to-serve regions is known as the “high-cost program.” *Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d at 56–57.

2. Universal Service Modernization Reforms

Until 2011, the Commission deployed the high-cost program primarily to ensure traditional telephone service over circuit-switched networks. *AT&T*, 886 F.3d at 1239. But by definition, “universal service” means “an evolving level of telecommunications services that the Commission shall establish periodically,” “taking into account advances in telecommunications and information technologies and services.” 47 U.S.C. § 254(c)(1). And over the past two decades, “[t]he telecommunications landscape . . . and the provision of essential services to hard-to-reach places . . . has changed dramatically.” *AT&T*, 886 F.3d at 1239. One major change has been the proliferation of advanced, internet-based data services using technologies commonly known as “broadband.” *See id.* at 1239–40.

In 2011, the Commission recognized that “ensuring universal access to landlines alone” “no longer meaningfully fulfilled” its statutory obligations. *AT&T*, 886 F.3d at 1239–40. It therefore undertook an

“overhaul” of the Universal Service programs, including the high-cost program. *Id.* at 1240.

As part of these reforms, the Commission exercised its authority under Section 254(b)(7) to adopt an additional principle by which to shape universal service policy: “Universal service support should be directed where possible to networks that provide advanced services, as well as voice services.” *Connect America Fund*, 26 FCC Rcd 17663, 17679 ¶ 45 (2011) (*Transformation Order*), *aff’d*, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014). In keeping with that principle, the Commission conditioned the award of most future subsidies on carriers’ deployment of networks capable of providing not only landline or mobile voice telephony, but “modern broadband” services as well. *Transformation Order*, 26 FCC Rcd at 17686 ¶ 65; *see id.* at 17681–82 ¶¶ 51, 53. On review, the Tenth Circuit approved this use of the Universal Service Fund to promote broadband-capable infrastructure. *See In re FCC 11-161*, 753 F.3d at 1042–48.

During a transitional period following the 2011 reforms, not all carriers were subject to the *Transformation Order*’s broadband requirement. Mobile providers were not covered. *Transformation Order*, 26 FCC Rcd at 17682 ¶ 54. Their subsidies during the transition—which

the agency called “frozen” subsidies—were calculated as a percentage of what they had received in 2011. *Stage I Order* ¶ 11 n.27 (JA ____).

Similarly, the Commission allowed “price cap” carriers in noncontiguous areas of the United States—including Puerto Rico and the U.S. Virgin Islands—to choose between having their subsidies calculated using the agency’s new cost model for mainland areas or receiving transitional frozen subsidies.³ *See Stage II Order* ¶ 88 n.321 (JA ____); *Connect America Fund*, 33 FCC Rcd 4374, 4374–75 ¶ 3 (2018). The Commission permitted this option because carriers in noncontiguous regions “face different operating conditions and challenges from those faced by carriers in the contiguous 48 states.” *Connect America Fund*, 32 FCC Rcd 7981, 7982 ¶ 5 (2017) (JA ____) (*Immediate Relief Order*); *see Transformation Order*, 26 FCC Rcd at 17737 ¶ 193.

All eligible Territorial carriers elected to receive frozen subsidies. *E.g.*, *Stage I Order* ¶ 11 n.27 (JA ____). Unlike mainland carriers that received subsidies under the agency’s new cost model, these Territorial carriers were not subject to specific broadband performance

³ A price cap carrier is required under the FCC’s rules to set its rates at or below a maximum price that the Commission specifies. *See Nat’l Rural Telecom Ass’n v. FCC*, 988 F.2d 174, 178 (D.C. Cir. 1993).

requirements. *See Stage II Order* ¶ 89 (JA ____); *Connect America Fund*, 29 FCC Rcd 15644, 15662–63 ¶¶ 46–49 (2014).

3. Universal Service Contributions

The Universal Service Fund is financed by fees charged to providers of interstate telecommunications services, which they typically pass through to consumers. *Vt. Pub. Serv. Bd.*, 661 F.3d at 57. The pass-through charge “may not exceed the interstate telecommunications portion of [a] customer’s bill multiplied by” a “contribution factor,” which the Commission defines on a quarterly basis. *Universal Service Contribution Methodology*, 27 FCC Rcd 5357, 5366 ¶ 13 & n.45 (2012) (*Contribution Methodology Notice*). Generally speaking—with one relevant exception discussed below, *see infra* pp. 11–12—“[t]he quarterly contribution factor is based on the ratio of total projected quarterly expenses of the universal service support mechanisms to total projected [collections of] end-user telecommunications revenues.” *Contribution Methodology Notice*, 27 FCC Rcd at 5366 ¶ 13 n.45.

This methodology explains the general trend toward higher contribution factors over the course of the past two decades. *See* Br. 37–38. The Commission has classified broadband internet access service as an “information service,” under Title I of the Communications Act, not a

“telecommunications service” under Title II. *Restoring Internet Freedom*, 33 FCC Rcd 311, 320–21 ¶ 26 (2018), *aff’d in relevant part, Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019), *reh’g en banc denied*, No. 18-1051 (D.C. Cir. Feb. 20, 2020). Revenues collected from end users of data services are thus excluded from the Universal Service Fund’s contribution base. But in recent years, while the overall communications market has grown, *Contribution Methodology Notice*, 27 FCC Rcd at 5369 ¶ 20, consumers have “migrate[d]” away from legacy telecommunications services to broadband data services, *id.* at 5359 ¶ 4. The resulting diminution of telecommunications revenues has substantially reduced the Universal Service contribution base—thus tending to increase the contribution factor over time. *See id.* at 5369–70 ¶ 20.

During a seven-year period after the 2011 Universal Service reforms, however, the Commission modified its historical method of determining required contributions to the high-cost program. From 2012 through 2018, the Commission directed the administrator of the Universal Service Fund to collect at least \$1.125 billion per quarter for the high-cost program, “regardless of the projected quarterly demand, to avoid dramatic shifts in the contribution factor while the [2011 reforms were] implemented.” *Universal Service Contribution Methodology*, 34

FCC Rcd 4143, 4144–45 ¶ 5 (2019); *see Connect America Fund*, FCC 18-29, 2018 WL 1452720, at *21–22 ¶¶69–71 (Mar. 23, 2018) (*March 2018 Extension Order*) (effectively extending this contribution methodology through 2018).

Because actual demand for high-cost subsidies during the transitional period did not reach the budgeted amount, the Commission’s use of this modified contribution methodology generated a pool of excess contributions. *See March 2018 Extension Order* at 3021 ¶ 69. The Commission directed the Universal Service Fund administrator to hold this surplus in a “high-cost cash account.” *See id.* The funds were “kept in reserve” to finance initiatives “focused on supporting different technologies and recipients.” *Universal Service Contribution Methodology*, 34 FCC Rcd at 4145 ¶ 5.

B. Factual Background

Over a span of weeks in September 2017, Hurricanes Irma and Maria devastated Puerto Rico and the U.S. Virgin Islands. *Stage II Order* ¶¶ 1, 4 (JA ____–____). “[O]ne of the strongest and costliest hurricanes on

record in the Atlantic basin,”⁴ Hurricane Irma battered the U.S. Virgin Islands “with sustained 185-mile-an-hour winds, toppling trees and power lines, damaging and destroying structures, and causing island-wide electrical outages.” 10/5/2017 Viya Emergency Pet. 3 (JA ____). In Puerto Rico, Irma inflicted “a near-total loss of electricity and water supply for several days.” See Cangialosi et al., *supra* note 4, at 14. Fast on the heels of this damage, Maria hit Puerto Rico “as a Category 4 storm with 155-mph winds.” *Stage II Order* ¶ 4 (JA ____). In the U.S. Virgin Islands, Maria “unleashed powerful winds and heavy rainfall, tearing off roofs, downing trees,” and triggering flooding and mudslides.⁵ *Immediate Relief Order* ¶ 7 (JA ____) (internal quotation marks omitted).

Hurricanes Irma and Maria devastated the economies of both Territories—with Maria alone estimated to have caused \$90 billion in

⁴ John P. Cangialosi et al., National Hurricane Center Tropical Cyclone Report, Hurricane Irma (AL112017), at 1 (Mar. 9, 2018; updated June 30, 2018), https://www.nyc.noaa.gov/data/tcr/AL112017_Irma.pdf.

⁵ The Commission cited numerous public accounts of this damage. *E.g.*, Richard J. Pasch et al., National Hurricane Center Tropical Cyclone Report, Hurricane Maria (AL152017), at 7 (Apr. 5, 2018; updated Feb. 14, 2019), https://www.nhc.noaa.gov/data/tcr/AL152017_Maria.pdf; Holly Yan et al., *Puerto Rico Governor: Power Could Be Out for Months*, CNN (updated Sept. 21, 2017, 4:33 PM), <https://www.cnn.com/2017/09/20/americas/hurricane-maria-caribbean-islands/index.html>.

damage. *Stage II Order* ¶ 4 (JA ____). And the damage to communications networks was severe. *Immediate Relief Order* ¶ 1 (JA ____). In the storms' immediate aftermath, "88.8 percent of cell sites were out of service in Puerto Rico and 68.9 percent were out of service in the U.S. Virgin Islands." *Id.* There was likewise "extensive destruction" to wireline facilities. *Stage II Order* ¶ 89 (JA ____); *see, e.g.*, 1/24/2018 Puerto Rico Tel. Co. Emergency Pet. 4 (JA ____) (PRTC Pet.) (citing damage to "approximately 48,000 utility poles"); 1/22/2018 Comments of Viya 7 (JA ____) (Viya Comments) ("Hurricane Irma destroyed most of Viya's wireline . . . communications infrastructure on [St. John] and [St. Thomas] . . .").

Widespread power outages—characterized in one news report as "the largest blackout in American history"⁶—were a major problem for both wireline and wireless networks in both Territories. PRTC Pet. 1–2 (JA ____–____). Without reliable access to commercial power, communications networks depended heavily on backup generators, which often "caught fire" or "simply expire[d] through overuse." *Id.* at 2

⁶ James Conca, *Are We Finally Going to Help Puerto Rico Power Up?*, *Forbes*, Dec. 13, 2017, <https://www.forbes.com/sites/jamesconca/2017/12/13/are-we-finally-going-to-help-puerto-rico-power-up/#64916d74556e>.

(JA ____). But procuring materials to restore power to the insular Territories involved logistically difficult and expensive overseas transport. *See id.* at 4, 6, 24 n.49 (JA ____, ____, ____); *Stage II Order* ¶ 157 (JA ____); PRTC Pet. 4 (JA ____); Viya Comments 3–4 (JA ____–____). In addition, the “effects and damage associated with the hurricanes . . . made it difficult . . . to access and repair telecommunications structures located in remote” regions. PRTC Pet. 5 (JA ____).

C. Administrative Proceedings

1. FCC Action in the Storms’ Immediate Aftermath

Recognizing the devastating effects of Hurricanes Irma and Maria on Territorial communications networks, the Commission moved quickly to help. Just weeks after the storms, on October 4, 2017, the Commission allowed Territorial carriers to elect to receive up to seven months’ worth of their ordinary frozen Universal Service subsidy payments “immediately,” to fund network restoration efforts. *Immediate Relief Order* ¶ 3 (JA ____); *see id.* ¶ 15 (JA ____). Carriers electing to do so would receive “a single advance payment,” which the Commission planned to offset against future subsidies. *Id.* ¶ 14 (JA ____). To finance this emergency relief, the Commission spent a portion of the high-cost surplus generated under the 2011 *Transformation Order*. *See id.* ¶ 14 n.32

(JA ____) (“[The Fund’s administrator] should use available funds from the high-cost cash account when it disburses the advance payment.”).

2. Orders under Review

The administrator of the Universal Service Fund ultimately disbursed approximately \$65.8 million under the *Immediate Relief Order*. *Stage I Order* ¶ 7 (JA ____). Those payments did meaningfully assist carriers’ efforts to restore networks in the Territories. *Id.* ¶ 8 & n.16 (JA ____); see Viya Comments 1–2 (JA ____ –____). But ultimately, more help was required. See *Stage I Order* ¶¶ 8–10 (JA ____ –____).

Months after the hurricanes, a “majority of citizens in Puerto Rico” still “lack[ed] access to continuous and reliable telecommunications services.” *Stage I Order* ¶ 24 (JA ____); see *id.* ¶ 10 (JA ____) (“Restoration efforts are still ongoing rather than largely complete”). In the U.S. Virgin Islands, there remained “significant gaps in . . . wireless coverage,” and the lone territory-wide wireline provider had restored “voice, broadband, and cable service” to “only a small percentage of . . . customers.” *Id.* ¶ 24 (JA ____). Recognizing that communications networks in the Territories had not yet fully recovered from the hurricanes, and that achieving service parity with urban areas would require a longer-term subsidy plan with targeted performance metrics,

the Commission issued the *Orders* now under review. *See Stage II Order* ¶ 7 (JA ____).

a. *Stage I Order*

In the *Stage I Order*, the Commission allowed facilities-based providers of voice and broadband service in the Territories to apply for a total of \$64.2 million in new Universal Service high-cost subsidies “to help restore voice and broadband service.” *Stage I Order* ¶ 13 (JA ____); *see id.* ¶¶ 14–15 (JA ____). The Commission predicted that these additional funds—“roughly equal” to earlier disbursements under the *Immediate Relief Order*—would “likely suffic[e] to cover the short-term costs of restoration” during an “interim” one-year period, “while the Commission consider[ed] further reforms and funding over the longer term.” *Id.* Based on various factors—including geographical differences, population size, and historical subsidy streams—the Commission earmarked \$51.2 million of these “Stage I” subsidies for Puerto Rico, and \$13 million for the U.S. Virgin Islands. *Id.* ¶ 15 (JA ____).

In addition, the Commission found that conditions in the Territories had “not improved sufficiently to justify” offsetting its earlier emergency relief payments. *Stage I Order* ¶ 10 (JA ____). The Commission explained that “persistent power outages and other logistical challenges

[had] made the continued operation of restored networks more expensive than some expected.” *Id.* Recognizing that advance payments under the *Immediate Relief Order* had thus not fully achieved their desired effect, the Commission concluded that offsetting them as initially planned “would substantially delay, if not prevent” further efforts required under Section 254 to restore access to pre-hurricane services. *Id.* Accordingly—acknowledging its change of course—the Commission declared those earlier payments “a new, one-time source of high cost support.” *Id.* ¶ 12 (JA ____).

Considering the ongoing emergency in the Territories, the Commission found good cause to adopt the “one-time relief” provided in the *Stage I Order* without notice and comment. *Stage I Order* ¶ 23 (JA ____); *see id.* ¶¶ 24–25 (JA ____–____). Emphasizing that “[v]oice and broadband capable networks . . . serve important public safety goals”—“including allowing the public to quickly notify first responders of emergencies”—the Commission considered it vitally important to ensure that remaining network damage in the Territories was repaired “as rapidly as possible.” *Id.* ¶ 24 (JA ____). The Commission recognized, too, that the impending 2018 hurricane season risked exacerbating existing damage. *See id.* Invoking an exception to the Administrative Procedure

Act's (APA's) ordinary notice-and-comment requirement, 5 U.S.C. § 553(b), the Commission found that notice and comment would be “‘impracticable’ and ‘contrary to the public interest,’” *Stage I Order* ¶ 23 (JA ____) (quoting 5 U.S.C. § 553(b)(B)).

As with the emergency relief provided in the weeks after Hurricanes Irma and Maria, the Commission used the high-cost program's existing cash reserves to finance the Stage I subsidies. *See Wireline Competition Bureau Announces Stage I Restoration Funding for the Uniendo a Puerto Rico Fund and the Connect USVI Fund*, 33 FCC Rcd 8044, 8045 (JA ____) (Wireline Comp. Bur. 2018) (*Stage I Allocation Notice*).

b. *Stage II Order*

The *Stage II Order* arose from the notice-and-comment proceeding that the Commission initiated alongside the *Stage I Order* to consider longer-term Universal Service reforms for the Territories. *See Stage II Notice* ¶¶ 35–36, 81–82 (JA ____–____, ____–____). By this time, communications services there had been “substantially restored” to pre-hurricane levels. *Stage II Order* ¶ 2 (JA ____); *see id.* ¶ 113 (JA ____). The Commission thus designed its Stage II subsidies to “facilitate the improvement and expansion of existing . . . networks.” *Id.* ¶ 3 (JA ____).

This included “provid[ing] for the deployment of new broadband networks” in unserved areas, so that residents of the Territories would “have access to and benefit from the same high-speed broadband services that residents of the mainland United States enjoy.” *Id.* ¶ 3 (JA ____); *see id.* ¶ 8 (JA ____).

In addition, recognizing that “infrastructure in the Territories is particularly vulnerable to catastrophic failure (*e.g.*, due to isolation and topography),” *Stage II Order* ¶ 137 (JA ____), the Commission deemed it “prudent and in the public interest to account for the heightened possibility of future natural disasters in the Territories” when crafting its Stage II policies, *id.* ¶ 27 (JA ____). Among other measures, the Commission adopted a competitive bidding process for awarding subsidies to providers of “fixed” services that would take account of their relative commitment to building resilient and redundant networks to ensure continued operation during and after natural disasters.⁷ *See*

⁷ In the context of the *Orders* here, “fixed services” are the voice and broadband services of communications providers that own at least some of their own facilities to end users primarily at fixed endpoints using stationary equipment. Wireline telephone companies or cable television system providers, for example, are fixed services providers.

Stage II Order ¶¶ 28–33 (JA ____–____). The Commission also required that all recipients of Stage II support create disaster preparation and response plans and participate in a web-based “Disaster Information Reporting System.” *Id.* ¶¶ 134, 138–140 (JA ____–____).

For the coming decade, the Commission budgeted approximately \$934 million in Stage II subsidies to promote the deployment of storm-hardened, broadband-capable communications networks in the Territories: roughly \$680 million over ten years for providers of fixed services, and \$254 million for providers of mobile services during the first three of years of that time. *See Stage II Order* ¶¶ 3, 67, 70, 102 (JA ____, ____, ____). These Stage II subsidies will replace the former transitional framework of frozen subsidies for the Territories, *see Stage II Order* ¶¶ 87–91, 110 (JA ____–____, ____–____), which disbursed approximately \$132 million annually, *see id.* ¶ 112 (JA ____).

In adopting the *Stage II Order*, the Commission rejected Tri-County’s assertion that Section 254 of the Act does not permit the agency to subsidize storm-hardened, broadband-capable networks through the Universal Service high-cost program. *See Stage II Order* ¶¶ 98–99 (JA ____). It also rejected Tri-County’s additional arguments for agency reconsideration of the *Stage I Order*. *See id.* ¶¶ 154–161 (JA ____–____).

STANDARDS OF REVIEW

Judicial review of the Commission's interpretation of the Communications Act is governed by *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, courts “must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842–43. But if “the statute is silent or ambiguous with respect to the specific issue” in dispute, the question for the reviewing court “is whether the agency's answer is based on a permissible construction of the statute.” *Id.* at 843.

The court must “accept” an agency's interpretation of an ambiguous statutory provision “even if the agency's reading differs from what the court believes is the best . . . interpretation.” *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). In disputes concerning “complex and highly technical regulatory program[s]” such as the FCC's Universal Service programs, deference is especially warranted. *Cnty. Care Found. v. Thompson*, 318 F.3d 219, 225 (D.C. Cir. 2003) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)); see also *Farmers Tel. Co., Inc. v. FCC*, 184 F.3d 1241, 1248 (10th Cir. 1999) (recognizing this principle in a Universal Service case regarding the FCC's interpretation of its own regulations).

For Tri-County's substantive claims under the APA, the standard of review is "highly deferential." *Cellco P'ship v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004) (internal quotation marks omitted). Tri-County must show that the *Stage I Order* is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This Court "presumes the validity of [the agency's] action," which it "must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment." *Cellco P'ship*, 357 F.3d at 93–94. "[I]nterim regulatory programs involving some exigency" receive "particular deference." *AT&T*, 886 F.3d at 1246 (internal quotation marks omitted).

This Court reviews legal determinations of good cause to proceed without notice and comment de novo. *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014). The factual findings underlying those determinations receive deference unless arbitrary or capricious. *Id.* at 706 n.3.

SUMMARY OF THE ARGUMENT

Although Tri-County focuses its brief on claims (Br. 17–28, 33–35, 41–42, 45) specific to the *Stage I Order*, the only claims that this Court should reach on the merits are the those that also pertain to the *Stage II Order*: Tri-County's challenge to the FCC's authority to use the Universal

Service Fund to promote storm-hardened, broadband-capable networks (Br. 35–40, 42–48), and certain related APA and policy objections (Br. 29–33, 37–39). *See infra* Part I. Because Tri-County has not established Article III standing to challenge the *Stage I Order*, this Court lacks jurisdiction to review it. *See infra* Part II. And even on the merits, Tri-County’s challenges to the *Stage I Order* are unavailing. *See infra* Part III; *see also infra* Part I (overarching claims concerning the Commission’s use of the Universal Service Fund fail equally as to both *Orders*).

1. The Commission’s use of the Universal Service Fund to subsidize storm-hardened, broadband-capable networks was lawful. Even after pre-hurricane service in the Territories was restored, some regions lacked access to broadband, and networks remained vulnerable to future storms. Services in the Territories were thus not comparable to modern, reliable services in mainland urban areas—contrary to Section 254 of the Act, 47 U.S.C. § 254. The Commission’s response to this problem is consistent with FCC precedent and lies well within the agency’s broad discretion in this arena.

2. Tri-County has not established Article III standing to challenge the *Stage I Order*. Its theory of injury is that, by creating new subsidy

streams, the *Orders* under review incrementally increased its required contributions to the Universal Service Fund. But that is not so as to the *Stage I Order*. Because the Commission financed all Stage I subsidies using the high-cost program's preexisting cash reserves, those subsidies did not affect Tri-County's contribution obligation. The Court therefore lacks jurisdiction to review the *Stage I Order*.

3. Should the Court nonetheless find that it has jurisdiction, Tri-County's claims concerning the *Stage I Order* uniformly fail.

a. The Commission had good cause to create the Stage I fund without notice and comment. Months after Hurricanes Irma and Maria, communications networks in the Territories were not yet fully repaired. On the brink of a new hurricane season, residents of the Territories still depended on damaged networks and lacked reliable access to first responders. As Tri-County concedes (Br. 23), a notice-and-comment proceeding to authorize new subsidies would likely have taken months. The Commission thus had good cause to authorize the Stage I interim subsidies without notice and comment.

b. The Commission adequately justified the size of the Stage I subsidy fund. The agency could not know with precision how much it would cost to repair the remaining network damage from Hurricanes

Irma and Maria. But considering the state of restoration work at the time of the *Stage I Order*—which reflected carriers’ considerable, but incomplete, progress using earlier emergency subsidies—the Commission reasonably predicted that a second round of interim relief, roughly equal to the first, would ensure similar gains over the course of the coming year, sufficient to restore pre-hurricane service levels.

c. The apportionment of Stage I subsidies between Puerto Rico and the U.S. Virgin Islands (as distinct from the broader designation of Universal Service funds for these Territories) caused Tri-County no possible harm. Tri-County thus lacks standing to dispute that apportionment, even if the Court concludes it has jurisdiction to review other aspects of the *Stage I Order*. In any event, the Commission justified its chosen approach as better reflecting geographical differences, population size, historical subsidy streams, and other relevant factors.

d. The Commission also reasonably justified its decision not to offset its initial hurricane relief subsidies. The Commission acknowledged that it had originally contemplated an offset. But with Territorial networks still in disrepair, the Commission reasonably departed from that plan, concluding that an offset would detrimentally delay or prevent still-needed restoration work.

e. Tri-County contends that the Commission focused too narrowly on restoring access to quality communications services in the Territories, ignoring the statutory objective of ensuring rates reasonably comparable to those in mainland urban areas. *See* Br. 41–42, 45. But Tri-County does not dispute that communications services in the Territories were not reasonably comparable to those in mainland urban areas. The agency did not need evidence of disparate rates to address the undisputed problem of disparate services.

f. Finally, even if the Court were to conclude that the Commission should have conducted notice and comment, or that the agency did not adequately explain some aspect of the *Stage I Order*, remand (not vacatur) is the appropriate remedy. The Stage I subsidies have all been disbursed, and carriers have relied on them to complete vital network repairs. Vacating the *Stage I Order* would be disruptive, and remand would not prejudice Tri-County.

ARGUMENT

Tri-County's overarching claim in this case (Br. 35–40, 42–48)—although it comes last in the opening brief—is that the *Orders* under review exceed the FCC's statutory authority because subsidies for storm-hardened, broadband-capable infrastructure are not authorized under

Section 254 of the Act, 47 U.S.C. § 254. At a minimum, Tri-County contends that this use of the Universal Service Fund reflects an unexplained departure from past FCC orders (Br. 29–33), and that it is ill-advised as a matter of policy (Br. 37–39). We address these arguments first. *See infra* Part I. Although they pertain to both the *Stage I* and *Stage II Orders*, and they are equally unavailing as to both, our discussion focuses on the *Stage II Order*—the only *Order* this Court has jurisdiction to review.

In Part II, we explain that the Court lacks jurisdiction to review the *Stage I Order* because Tri-County has failed to establish Article III standing to challenge it. If the Court disagrees, we explain in Part III why Tri-County’s claims specific to the *Stage I Order* are unpersuasive in any event.

I. THE COMMISSION’S USE OF UNIVERSAL SERVICE SUBSIDIES TO ASSIST THE TERRITORIES’ REBUILDING AND DEPLOYMENT EFFORTS COMPORTED WITH BOTH THE COMMUNICATIONS ACT AND THE APA.

It is well established that the statutory guarantee of universal service is “dynamic.” *E.g.*, *AT&T*, 886 F.3d at 1241 (citing 47 U.S.C. § 254(c)). The Commission must therefore modify its Universal Service programs from time to time to keep pace “with technological

advancements, need, use, and the public interest.” *Id.* In doing so, the Commission considers Section 254 “as a whole.” *In re FCC 11-161*, 753 F.3d at 1047 (internal quotation marks omitted). This includes the various principles of Section 254(b). 47 U.S.C. § 254(b); *see AT&T*, 886 F.3d at 1242–43.

Several of those principles reflect the aim of promoting access to “quality” services—including “advanced services” and “information services”—throughout all regions of the nation. *See* 47 U.S.C. § 254(b)(1)–(3), (6). And pursuant to Section 254(b)(7), the Commission has determined that, “where possible,” Universal Service subsidies should fund “networks that provide advanced services, as well as voice services.” *Transformation Order*, 26 FCC Rcd at 17679 ¶ 45; *see also* 47 U.S.C. § 1302 (directing the FCC to “encourage the deployment . . . of advanced telecommunications capability to all Americans” and, if that capability is not “being deployed . . . in a reasonable and timely fashion,” to “accelerate deployment”).

Applying these principles—and relying, too, on the Commission’s mandate to fund “the provision, maintenance, and upgrading of facilities,” 47 U.S.C. § 254(e)—the Tenth Circuit has upheld the FCC’s authority to subsidize the deployment of broadband-capable networks

through the Universal Service Fund. *See In re FCC 11-161*, 753 F.3d at 1044–48, 1097; *see also id.* at 1049–54 (recognizing Section 1302 as further support for the agency’s authority). In addition, as Tri-County concedes, the Commission has long recognized that “disaster relief” can be “a purpose for which high-cost support is intended under Section 254(e) of the Communications Act.” Br. 29 (quoting *Federal-State Joint Board on Universal Service*, 20 FCC Rcd 16883, 16912 ¶ 55 (2005) (*Hurricane Katrina Order*)). The *Orders* under review are consistent with the statute and these precedents.

Hurricanes Irma and Maria devastated communications networks in the Territories. At the time of the *Stage I Order*, service was not yet fully restored to pre-hurricane levels. *See Stage I Order* ¶¶ 10, 24 (JA ___, ___). And although pre-hurricane service was largely restored by the time of the *Stage II Order*, many areas of the Territories still lacked broadband service, *Stage II Order* ¶ 8 (JA ___), and networks remained vulnerable to future storms, *id.*; *see id.* ¶ 27 (JA ___); *Stage I Order* ¶ 24 (JA ___).

Under these circumstances, the Commission reasonably concluded that subsidizing storm-hardened, broadband-capable networks in the Territories is faithful to the objectives set forth in Section 254(b). Doing so advances “the principle that ‘[a]ccess to advanced telecommunications

and information services should be provided in all regions of the Nation.” *Stage II Order* ¶ 97 (JA ____) (quoting 47 U.S.C. § 254(b)(2) (alteration in original)); *see id.* ¶ 161 (JA ____); *Stage I Order* ¶ 24 (JA ____). It also helps ensure access in the Territories to services “reasonably comparable to [those] provided in urban areas,” including as to “network reliability.” *Id.* ¶ 97 (JA ____); *see* 47 U.S.C. § 254(b)(1), (3).

Storm hardening additionally furthers the agency’s “obligation to ‘preserv[e]’ universal service.” *Stage II Order* ¶ 97 & n.353 (JA ____) (quoting 47 U.S.C. § 254(b)(5)). And because “a hardened network can help guard against future restoration costs,” *Stage II Order* ¶ 27 (JA ____); *see id.* ¶¶ 88–89 (JA ____), subsidies for storm hardening promote both “affordable rates,” 47 U.S.C. § 254(b)(1), and the future “sufficien[cy]” of the Universal Service Fund, *id.* § 254(b)(5).

Given the breadth and variety of the principles in Section 254(b), this Court has recognized the Commission’s “broad discretion” to balance and prioritize them. *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009). In choosing to subsidize storm-hardened, broadband-capable networks here, the Commission reasonably balanced those principles and explained its choice. *See Stage II Order* ¶¶ 97, 161 & n.522 (JA ____, ____).

A. The Commission Did Not Violate Section 254(b)(3).

Tri-County claims (Br. 42–45) that this use of the Universal Service Fund violates Section 254(b)(3), 47 U.S.C. § 254(b)(3), as the Tenth Circuit interpreted that provision in *Qwest Communications International Inc. v. FCC*, 398 F.3d 1222 (10th Cir. 2005) (*Qwest II*).⁸

Insofar as Tri-County contends (Br. 42) that the Commission should not have expanded its Universal Service programs beyond the “mechanisms existing” when Congress enacted Section 254 in 1996, it clearly is wrong. Universal service is a “dynamic” concept, which the Commission’s policies must evolve to meet. *AT&T*, 886 F.3d at 1241; *see In re FCC 11-161*, 753 F.3d at 1036 (observing that the legislation enacting Section 254 “outlined a process for the FCC to adjust the definition of universal service as new technologies arose” (cleaned up)); *see also Stage II Order* ¶ 161 (JA ___) (referencing the Commission’s mandate to promote an “ever evolving” level of universal service).

⁸ We reserve for Part III.E, *infra*, our response to Tri-County’s related claim (Br. 41–42) that the Commission did not adequately explain why creating the Stage I fund comported with the statutory aim of ensuring that rates throughout the United States are “reasonably comparable to rates charged for similar services in urban areas.” 47 U.S.C. § 254(b)(3). Because that claim is limited to the *Stage I Order*, the Court lacks jurisdiction to address it. *See infra* Part II.

Citing *Qwest II*, Tri-County asserts that preserving universal service “refers to the rate variance arising from the support mechanisms existing in 1996.” Br. 43 (emphasis and internal quotation marks omitted). But the court in *Qwest II* “criticized the Commission for focusing exclusively on the comparability of urban and rural rates in 1996.” *Vt. Pub. Serv. Bd.*, 661 F.3d at 59 (emphasis added); see *Qwest II*, 398 F.3d at 1235. And it recognized that the FCC’s universal service policies appropriately account for “changes in markets and technology.” *Id.* at 1236.

The Tenth Circuit has likewise squarely rejected Tri-County’s suggestion (Br. 44 n.9) that the Commission is limited to using the Universal Service Fund to promote an evolving level of “telecommunications”—as opposed to “information”—services.⁹ See *In re 11-161*, 753 F.3d at 1046–47. Congress has empowered the Commission to “determine and specify precisely how [Universal Service] funds may or must be used.” *Id.* at 1046. That includes the discretion “to encourage the deployment of the types of facilities that will best achieve the principles

⁹ As explained above, see *supra* pp. 10–11, the Commission has classified broadband internet access service as an information service.

set forth in [S]ection 254(b).” *Id.* at 1047 (internal quotation marks omitted). And in any event, subsidizing the deployment of storm-hardened networks promotes the availability of telecommunications (as well as broadband) services.

B. The Commission Did Not Violate Section 254(b)(5).

Contrary to Tri-County’s claim (Br. 45–48), using the Universal Service Fund to promote storm-hardened, broadband-capable networks in the circumstances here is fully consistent with the statutory goal of providing subsidy mechanisms “sufficient” to ensure universal service. 47 U.S.C. § 254(b)(5).¹⁰

Tri-County asserts that the Commission has “diverted a vast amount of funding from the high-cost” program. Br. 46. But although the overall budgets adopted in the *Stage II Order* do increase available high-cost subsidies for the Territories, *e.g.*, *Stage II Order* ¶¶ 67, 112 (JA ____.

¹⁰ Tri-County also asserts that “the Commission’s creation of [Territorial funds] violated Section 254(b)(5)’s predictability . . . requirement.” Br. 48. But Tri-County nowhere explains why that is so. The Commission set ceilings for both the Stage I and Stage II funds and provided for their disbursement over defined periods of time. *See Stage II Order* ¶¶ 67, 70, 111–112 (JA ____, ____, ____); *Stage I Order* ¶¶ 13, 20 (JA ____, ____). The Stage I fund, moreover, was paid for using a preexisting surplus. *See infra* Part II. Both funds are thus fully consistent with the statute’s call for “predictable” mechanisms of disbursements and contributions.

___), these increases are more modest than Tri-County suggests. Under the former framework of frozen subsidies, the Territories received nearly \$53 million annually in high-cost funding for fixed providers, *see Stage I Order* ¶ 11 (JA ___), and nearly \$79 million for mobile providers, *see Stage II Order* ¶ 112 (JA ___). Under the *Stage II Order*, the annual budget for fixed providers has increased by roughly \$16.3 million, *see id.* ¶¶ 67, 70 (JA ___, ___), and the annual budget for mobile providers by approximately \$7 million, *id.* ¶ 112 (JA ___).¹¹ Over the life of the funds, those increases total approximately \$184 million.¹² Tri-County's claim (Br. 46) that the Commission has increased the size of the high-cost program by "almost \$1 billion" is thus grossly exaggerated.

¹¹ The annual increase for fixed providers in Puerto Rico was \$14.1 million. *See Stage II Order* ¶ 67 (JA ___). For fixed providers in the U.S. Virgin Islands, it was approximately \$2.15 million. *Compare id.* ¶ 70 (JA ___) (\$186.5 million ÷ 10 years = \$18.65 million annually) *with Stage I Order* ¶ 11 (JA ___) (former budget of "\$16.5 million annualized").

¹² The life of the subsidy fund for fixed providers is ten years. *Stage II Order* ¶ 3 (JA ___). The subsidies for mobile providers will be disbursed over three years. *Id.* \$184 million = (\$16.3 million x 10) + (\$7 million x 3). It is not possible to calculate actual increases with precision, in part because some carriers may continue to receive frozen subsidies for a limited period. *See id.* ¶¶ 87, 110 (JA ___, ___). On the other side of the ledger, the Commission's competitive bidding process for fixed providers may generate substantial savings. *See id.* ¶ 12 (JA ___-___).

More generally, contrary to Tri-County’s claim (Br. 46), it is clear from the *Orders* that the Commission took heed of its “responsibility to be a prudent guardian of the public’s resources.” *Vt. Pub. Serv. Bd.*, 661 F.3d at 65. At each step of this proceeding, the Commission “adopt[ed] thorough oversight and accountability measures.” *Stage II Order* ¶ 72 (JA ____); *see id.* ¶¶ 73–86, 126–132 (JA ____–____, ____–____); *Stage I Order* ¶¶ 20–21 (JA ____–____).

And among other measures to ensure that Territorial carriers will deploy the subsidies they receive efficiently, the Commission ensured that, if any funds budgeted for Stage II are not ultimately needed for the Commission’s designated purposes, those funds will be conserved. *See Stage II Order* ¶¶ 12–13, 125 (JA ____–____, ____). For providers of fixed services, the Commission adopted a competitive approach to awarding subsidies, which it adapted from a process previously used for mainland carriers that “sav[ed] the [Universal Service] Fund over \$3.5 billion.” *Id.* ¶ 12 (JA ____). Under this approach, if fixed providers can furnish quality services for less than the “maximum budget” of \$691.2 million that the Commission has established, *id.* ¶ 67 (JA ____); *see id.* ¶¶ 67, 70 (JA ____, ____), the actual cost of the Stage II subsidies may not reach the full budgeted amount. And although the Commission did not adopt a

competitive process for mobile providers, it required them to return any subsidies not ultimately applied toward the *Order's* deployment objectives. *Id.* ¶ 125 (JA ____). In both of these ways, the Commission prioritized “responsible spending,” *id.* ¶ 13 (JA ____), consistent with its duty under Section 254(b)(5) to maintain the sufficiency of the Universal Service Fund, *see id.* ¶ 100 (JA ____).

C. The Commission Was Not Required to Consult the Joint Board.

Tri-County appears to contend that the Commission was statutorily required to consult the Federal-State Joint Board on Universal Service before “reformulating the purpose of universal service support.” Br. 30; *see id.* at 30–32.

In Section 254, Congress required the Commission to refer the *initial* implementation of that provision to the Joint Board within “one month after February 8, 1996,” and required the Joint Board to issue recommendations within nine months thereafter. 47 U.S.C. § 254(a)(1). The Commission and the Joint Board complied with those directives. *See Federal-State Joint Board on Universal Service*, 12 FCC Rcd 87 (1996); *Federal-State Joint Board on Universal Service*, 11 FCC Rcd 18092 (1996).

The Commission has discretion to make further Joint Board referrals. *See* 47 U.S.C. § 254(c)(2) (“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.” (emphasis added)). But such referrals are permissive—not mandatory. *Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 328 n.7 (5th Cir. 2001). The Commission had no duty to consult the Joint Board here.

D. Tri-County’s Remaining Claims Not Limited to the Stage I Order Are Unavailing.

1. Tri-County contends that the Commission’s use of the Universal Service Fund to subsidize storm-hardened networks reflects “[a]n unexplained inconsistency” from the Commission’s 2005 *Hurricane Katrina Order* and 2017 *Immediate Relief Order*. Br. 32 (internal quotation marks and alteration omitted). Although the logic of this argument is not entirely clear, Tri-County emphasizes (Br. 29–31) that, in those earlier orders, the Commission expressly addressed the relevance of Section 254(e) of the Act, 47 U.S.C. § 254(e), and waived Section 54.7 of the FCC’s rules, 47 C.F.R. § 54.7. By contrast, according to Tri-County, the Commission “did not declare that carriers could use

high-cost support for disaster relief efforts under Section 254(e) when it created the [Territorial subsidy funds].” Br. 32. “Nor did the FCC find the need to waive Section 54.7” of its rules. *Id.*¹³

Under Section 254(e), “[a] carrier that receives [Universal Service Fund] support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.” 47 U.S.C. § 254(e). Contrary to Tri-County’s claim, the Commission *did* specify in the *Orders* here that using high-cost subsidies for hurricane restoration and storm-hardening efforts was consistent with Section 254(e). *See Stage II Order* ¶ 118 & n.398 (JA ____); *Stage I Order* ¶ 20 (JA ____); *see also Stage II Order* ¶ 72 & n.264 (JA ____) (adopting oversight and accountability measures to ensure compliance with Section 254(e)).

Although it is true that the Commission did not waive Section 54.7 of the agency’s rules in either of the *Orders*, there was no cause to do so. Section 54.7 provides that recipients of Universal Service subsidies “shall

¹³ Tri-County cites the current version of Section 54.7 of the Commission’s rules. For consistency with Tri-County’s brief, we do so as well. Although the current version of Section 54.7 took effect shortly after the release of the *Stage I Order*, the prior version of the rule was identical in relevant part.

use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.” 47 C.F.R. § 54.7(a). There was no need for the Commission to waive that requirement here when the Commission was not, in either of the *Orders*, absolving carriers of any specific performance obligations.¹⁴

2. The remaining arguments (Br. 37–39) not limited to the *Stage I Order* are fruitless policy objections. Tri-County asserts that, “[u]nlike ordinary federal expenditures[,] which must be authorized by Congress and approved by the President,” there is no means “for the public to either approve or object to [Universal Service] expenditure[s].” Br. 37. That is not rightly a criticism of the Commission’s *Orders*; it is an artifact of Congress’s statutory delegation of authority to the agency, which Tri-County does not purport to challenge. See Br. 39. As to a related contention (Br. 38–39), that funding broadband deployment is better accomplished through other government programs, the Commission

¹⁴ At the time of the *Orders*, Territorial carriers were not subject to broadband performance obligations. See *Stage II Order* ¶ 89 (JA ____). Accordingly—as the Commission stated in the *Immediate Relief Order* (at ¶ 13 (JA ____)) and “remind[ed] providers” in the *Stage I Order* (at ¶ 20 (JA ____))—using high-cost subsidies for restoration efforts was fully consistent with Section 54.7.

reasonably explained that, however valuable such programs may be, the FCC has “a role to play,” “consistent with [its] expertise” in communications and “statutory responsibilities” to promote universal service. *Stage II Order* ¶ 100 (JA ____).

II. THE COURT LACKS JURISDICTION TO REVIEW THE *STAGE I ORDER*.

Beyond the claims addressed in Part I, Tri-County confines its challenges in this case (Br. 17–28, 33–35, 41–42, 45) to the *Stage I Order*. But Tri-County has shown no injury from that *Order* and thus has failed to establish Article III standing to petition for the *Order*’s review.

“[T]he ‘irreducible constitutional minimum’ of standing consists of three elements.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). “The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Id.*

The burden of establishing standing falls on the party asserting jurisdiction. *E.g.*, *Spokeo*, 136 S. Ct. at 1547. In cases involving direct appellate review of an agency’s order, “the petitioner’s burden of production . . . is . . . the same as that of a plaintiff moving for summary

judgment in the district court: it must support each element of its claim to standing by affidavit or other evidence, including whatever evidence the administrative record may already contain.” *Util. Workers Union v. FERC*, 896 F.3d 573, 577 (D.C. Cir. 2018) (internal quotation marks omitted). “[B]ecause full development of the arguments for and against standing requires the same tried and true adversarial procedure [used] for the presentation of arguments on the merits, [a] petitioner must make this evidentiary presentation no later than when it files its opening brief.” *Twin Rivers Paper Co. LLC v. SEC*, 934 F.3d 607, 613 (D.C. Cir. 2019).

Tri-County’s theory of standing is that it “suffered an injury-in-fact caused by” the *Orders* under review because, as a contributor to the Universal Service Fund, it “will bear a portion of the nearly \$1 billion in disaster relief granted” to the Territories through “annually assessed [Universal Service] fee[s].” Br. 15. But Tri-County fails to explain how the Commission’s actions in the *Stage I Order*—granting \$64.2 million in subsidies for the Territories, and deciding not to offset the \$65.8 million disbursed immediately after Hurricanes Irma and Maria, *see Stage I Order* ¶¶ 10, 13 (JA ____—____)—had, or will have, any effect on the size of Tri-County’s required contributions to the Fund.

Critically, the Commission paid both the Stage I subsidies and the earlier emergency relief using the high-cost program's existing pool of cash reserves. *See Stage I Allocation Notice* at 8045 (JA ____) (“We direct the Universal Service Administrative Company . . . to disburse the allocated funding to the authorized eligible telecommunications carriers . . . from the high-cost cash account.”); *Immediate Relief Order* ¶ 14 n.32 (JA ____) (“[The Fund administrator] should use available funds from the high-cost cash account when it disburses the advance payment.”); *see also March 2018 Extension Order*, 2018 WL 1452720, at *21 ¶ 69 (defining the “high-cost cash account”); *Wireline Competition Bureau Provides Guidance to the Universal Service Administrative Company Regarding the High-Cost Universal Service Mechanism Budget*, 32 FCC Rcd 9243, 9243 n.2 (Wireline Competition Bur. 2017) (confirming that the pool of reserves in the high-cost cash account at the end of 2017 was “net of” payments made to Territorial carriers in the immediate aftermath of the hurricanes). The *Stage I Order* thus had no effect on carrier contribution obligations; financing for the Commission's actions arose from the agency's 2011 *Transformation Order* (and a subsequent order extending the prescribed period for uniform collections). *See March 2018 Extension*

Order, 2018 WL 1452720, at *21–22 ¶¶ 69–71; *Transformation Order*, 26 FCC Rcd at 17847–48 ¶¶ 559–563.

Because this financing arrangement belies Tri-County’s theory of injury, Tri-County has failed to establish standing to challenge the *Stage I Order*, and this Court thus lacks jurisdiction to address the merits of Tri-County’s Stage I-specific claims. *See, e.g., Bauer v. Marmara*, 774 F.3d 1026, 1031–32 (D.C. Cir. 2014) (standing is “a threshold jurisdictional requirement”). And the law in this Circuit is clear that a petitioner may not “propose a new theory of injury” in its reply brief. *Twin Rivers*, 934 F.3d at 615–16.¹⁵

III. IF THE COURT CONCLUDES THERE IS JURISDICTION TO REVIEW THE *STAGE I ORDER*, TRI-COUNTY’S CHALLENGES TO THAT *ORDER* SHOULD BE REJECTED.

Should the Court determine it has jurisdiction to review the *Stage I Order*, Tri-County’s claims concerning that *Order* fail on the merits. As we have already explained, *see supra* Part I, the Commission’s decision

¹⁵ As explained below, *see infra* Part III.C, Tri-County lacks standing to challenge the apportionment of Stage I subsidies between Puerto Rico and the U.S. Virgin Islands (Br. 27–28) for the additional reason that, even if Tri-County had established standing to challenge the award of funding as a whole (it has not), the division of subsidies between Territories cannot have affected Tri-County.

to use the Universal Service Fund to promote storm-hardened, broadband-capable infrastructure in the Territories was well within the agency's authority and did not, in either of the *Orders* under review, reflect either an unexplained departure from precedent or an unreasonable policy choice. Tri-County's APA claims (Br. 17–28, 33–35, 41–42, 45) limited to the *Stage I Order* likewise fail (and they would not warrant vacatur in any event).

A. There Was Good Cause to Act Without Notice and Comment.

The first of these claims is that the Commission “failed to justify its invocation of the ‘good cause’ exception to the APA’s notice and comment requirements.” Br. 17.

Tri-County argues (Br. 18–20) that, when finding good cause to create the Stage I fund immediately, the Commission should not have relied on the impending 2018 hurricane season. But as the Commission explained in response to Tri-County’s petition for agency reconsideration, the primary basis for the agency’s finding of good cause was not the impending hurricane season, but the “acute and ongoing threat to public safety and the economy” from “two back-to-back natural disasters that [had] already occurred.” *Stage II Order* ¶ 157 (JA ____).

To be sure, the Commission also expressed concern that the onset of a new hurricane season would bring storms that could exacerbate the existing damage from Hurricanes Irma and Maria. *Stage II Order* ¶ 157 (JA ____); *see Stage I Order* ¶ 23 (JA ____). But acknowledging this threat as a “compound[ing]” factor is a far cry from Tri-County’s suggestion that the agency treated “the annual hurricane season, by itself” as “an extraordinary emergency.” Br. 20 (emphasis omitted).¹⁶

As Tri-County concedes, moreover, “hurricanes regularly strike somewhere in the Caribbean.” Br. 20. And history suggests that the Territories are often disproportionately affected by natural disasters. *See Stage II Order* ¶ 27 (JA ____). This case is thus readily distinguishable from the order under review in *Sorenson*, in which the Court concluded that the Commission had not established more than a “speculative[]” threat from awaiting notice and comment. 755 F.3d at 706.

¹⁶ For similar reasons, there is no merit to Tri-County’s claim (Br. 22–23) that the Commission should have ignored evidence that carriers might “choose cheaper restoration plans” without immediate Stage I subsidies. *Stage I Order* ¶ 25 (JA ____). Whatever the merits of that additional consideration, the Commission’s independent reliance on the urgency of restoring reliable service after Hurricanes Irma and Maria was valid.

Tri-County’s assertion that the Commission “would have had ample time to seek comment on the Stage 1 Funding had it acted at the appropriate time,” Br. 18, overlooks that the Commission *did* respond promptly to the emergency in the Territories after Hurricanes Irma and Maria. In the *Immediate Relief Order*, it made emergency subsidies available to Territorial carriers within weeks after Hurricanes Irma and Maria—acting even more quickly than after Hurricane Katrina. *Compare Immediate Relief Order* ¶ 1 (JA ____) (responding on October 4, 2017, after Maria struck Puerto Rico on September 20, 2017) *with Hurricane Katrina Order*, 20 FCC Rcd at 16884 ¶ 2 (responding on October 14, 2005, after Hurricane Katrina struck the U.S. Gulf Coast on August 29, 2005). But it became apparent, months later, that Territorial communications networks remained damaged despite that earlier emergency relief. *See Stage I Order* ¶ 10 (JA ____). Recognizing that completing the “critical work to restore [damaged] communications networks” would cost more than previously predicted, *id.*, the Commission reasonably concluded that further interim relief to address the ongoing emergency should not await notice and comment, *id.* ¶ 24 (JA ____).

By Tri-County’s estimate, if the Commission had “acted with alacrity,” it could have awarded subsidies informed by public comment

“in a matter of three months or less.” Br. 23. But when, on the cusp of a new hurricane season, Territorial communications networks did not yet reliably connect residents to first responders, the Commission reasonably concluded that a delay of “at least several months” to collect and review public comment would be “impractical and contrary to the public interest.” *Stage I Order* ¶ 23 (JA ____); *see id.* ¶ 24 (JA ____).

B. The Commission Adequately Justified the Size of the Stage I Fund.

Tri-County next contends (Br. 24–27) that the Commission should have done more to demonstrate why the size of the Stage I fund reflected a reasonable prediction of remaining short-term network restoration costs. But notably, Tri-County “has not provided any evidence or data to support its argument that the amount of Stage 1 funding was inappropriate.” *Stage II Order* ¶ 158 (JA ____). Particularly given the considerable deference this Court affords to agency predictive judgments of this kind, there is no basis “to second-guess” the size of the Stage I fund. *EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006).

At the time of the *Stage I Order*, Territorial communications networks had not yet fully recovered from the devastating effects of Hurricanes Irma and Maria. *See Stage I Order* ¶¶ 1, 10, 14, 24 (JA ____,

____–____, ____). The record showed that, “[e]ven after months of recovery efforts, ‘the majority of citizens in Puerto Rico lack[ed] access to continuous and reliable telecommunications services.’” *Id.* ¶ 24 (JA ____)(quoting PTRC Pet. 1 (JA ____)). In the U.S. Virgin Islands, there remained “significant gaps in . . . wireless coverage.” *Id.* (quoting Viya Comments 9 (JA ____)).

The Commission expressed concern that residents of the Territories, dependent on damaged networks, lacked reliable access to first responders. *See Stage I Order* ¶ 24 (JA ____). And while the Commission acknowledged the need for “a longer-term solution . . . to rebuild, improve, and expand service in” the Territories, *Stage II Notice* ¶ 28 (JA ____)—and proposed further initiatives to that end, *see id.* ¶¶ 28–98 (JA ____–____)—public safety called for the repair of pre-hurricane networks “as rapidly as possible” in the meantime, *Stage I Order* ¶ 24 (JA ____).¹⁷

¹⁷ Tri-County’s contention that the Commission failed to state in the *Order* that restoration efforts in the Territories were incomplete (Br. 26–27) plainly is wrong. The Commission expressly observed that new funding was needed to “restore service” and “restore . . . facilities” in the Territories after the devastation of Hurricanes Maria and Irma. *Stage I Order* ¶ 14 (JA ____).

The Commission could not know with precision how much it would cost to repair the remaining hurricane damage. *See Rural Cellular*, 588 F.3d at 1105 (“Where, as here, the FCC must make predictive judgments about the effects of increasing subsidies, certainty is impossible.”). But based on the results of the *Immediate Relief Order*—which had already facilitated meaningful, but incomplete, network repairs, *see Stage I Order* ¶¶ 8 & n.16, 24 (JA ___, ___)—the Commission anticipated that subsidies approximating \$65 million would “likely suffic[e] to cover the short-term costs of restoration.” *See id.* ¶ 15 (JA ___). There is thus no basis to Tri-County’s claim (Br. 24–25) that Commission based the size of the Stage I fund on “frozen high-cost support” that had “no logical or factual correlation” to the likely cost of completing the remaining restoration work.

In creating the Stage I fund, the Commission was careful “[t]o protect against duplicative recovery and guard against waste, fraud, and abuse.” *Stage I Order* ¶ 21 (JA ___). It clearly delineated permissible uses of the subsidies, *see id.* ¶ 20 (JA ___), and expressly proscribed their use “for costs that [were] (or [would] be) reimbursed by other sources of funding,” including “federal or local government aid or insurance reimbursements,” *id.* ¶ 21 (JA ___). The Commission also underscored

that recipients of Stage I funding would be subject to “random compliance audits and other investigations.” *Id.*

This Court has repeatedly “deferred to the Commission’s decision to enact interim rules based on [the agency’s] predictive judgment that such rules were necessary to preserve universal service.” *Rural Cellular*, 588 F.3d at 1106 (citing additional cases); *see, e.g., AT&T*, 886 F.3d at 1246 (noting the necessity of making predictive judgments in the face of uncertainty, and recognizing the agency’s “prerogative to dedicate its resources to its top priority of ensuring that all regions of the nation have access to advanced telecommunications technology” (internal quotation marks omitted)). Similarly here, the Court should defer to the Commission’s reasonable decision to establish a Stage I fund “roughly equal to the previous disbursement” of hurricane relief subsidies “in both amount and timeframe, to support similar restoration activities.” *Stage II Order* ¶ 158 (JA ____).

C. The Commission Adequately Explained the Apportionment of Subsidies Between Territories.

Tri-County additionally contends that the Commission “in no way provided a sufficient justification for the allocation of \$51.2 and \$13 million in Stage 1 Funding between Puerto Rico and the U.S. Virgin

Islands, respectively.” Br. 27. But Tri-County does not suggest, let alone demonstrate, how this allocation of funds (distinct from the Stage I fund itself) injured the company in any way. As the Commission recognized, the distribution of subsidies between Territories had no possible impact on carriers’ contribution obligations to the Universal Service Fund. *See Stage I Order* ¶ 159 (JA ____). Accordingly, even if Tri-County could establish standing to challenge other aspects of the *Stage I Order*, it lacks standing to bring this claim. *See supra* Part II & n.15. In any event, the Commission adequately justified its chosen allocation of subsidies.

During the transitional period after 2011 when Territorial carriers received frozen subsidies, funding for wireless carriers in Puerto Rico was approximately 1000 times greater than for wireless carriers in the U.S. Virgin Islands. *See Stage I Order* ¶¶ 11, 22 (JA ____, ____). That differential was not justified by the Territories’ respective sizes: “Puerto Rico is only 33 times larger [in terms of land mass] than the U.S. Virgin Islands.” *Id.* ¶ 22 (JA ____).

In the *Stage I Order*, the Commission determined that allocating \$51.2 million in Stage I funds to carriers in Puerto Rico, and \$13 million to carriers in the U.S. Virgin Islands (a support ratio of approximately 4:1) better reflected “differences in landmass, geography, topography,

and population between Puerto Rico and the U.S. Virgin Islands,” as well as the respective “financial and operational challenges faced by carriers” there, “and the past and current availability of high-cost support.” *Stage I Order* ¶ 15 (JA ____). The Commission thus identified the grounds for its chosen allocation of Stage I subsidies, and Tri-County has offered no “alternative or any data to show why the Commission’s approach was improper.” *Stage II Order* ¶ 159 (JA ____). That is particularly so given the accountability measures the Commission put in place to guard against waste or abuse of the Stage I subsidies. *See supra* pp. 50–51.

D. The Commission Reasonably Did Not Offset the Earlier Emergency Subsidies.

Tri-County also argues (Br. 33–35) that the Commission improperly departed, without adequate explanation, from the agency’s earlier plan to offset the subsidies made available under the *Immediate Relief Order*. Contrary to what Tri-County suggests (Br. 34), the Commission did not state in the *Immediate Relief Order* that it would never authorize a new stream of high-cost subsidies to promote network restoration efforts after Hurricanes Irma and Maria. The Commission said only that it did “not authorize additional” subsidies “[a]t this time.” *Immediate Relief Order* ¶ 14 (JA ____).

In the *Stage I Order*, the Commission determined that offsetting the earlier subsidies as “previously anticipated” would no longer serve the public interest. *Stage I Order* ¶ 10 (JA ____). In reaching that decision, the Commission acknowledged its change of course. *See id.*; *see also id.* ¶ 12 (JA ____) (recognizing that the earlier payments should now “be considered a new, one-time source of high-cost support”). At the time of the *Stage I Order*, network “[r]estoration efforts” in the Territories were “still ongoing, rather than largely complete.” *Id.* ¶ 10 (JA ____). Given the remaining network damage, the Commission reasonably concluded that “requiring the offset of advance payments would substantially delay, if not prevent, further restoration efforts.” *Id.*

Because the Commission “display[ed] awareness that it [was] changing position,” and identified “good reasons for the new policy,” this aspect of the *Stage I Order* readily satisfies the APA. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). “Judicial review of a change in agency policy is no stricter than . . . review of an initial agency action.” *Hermes Consol., LLC v. EPA*, 787 F.3d 568, 576 (D.C. Cir. 2015) (internal quotation marks omitted).

E. The Commission's Focus on Restoring Pre-Hurricane Services Was Reasonable.

Finally, Tri-County contends (Br. 41–42) that the Commission improperly focused on ensuring that residents of the Territories would have access to quality, reliable communications services, without explaining how the Stage I fund also served the statutory aim of ensuring reasonably comparable rates. *See* 47 U.S.C. § 254(b)(3); *see also* Br. 45 (“Since the Commission in the . . . *Stage 1 Order* focuses solely on . . . increas[ing] the level of service in Puerto Rico and the U.S. Virgin Islands—without giving consideration to ensuring reasonably comparable rates and services—the FCC has failed to explain how the creation of the disaster relief fund furthers the goals of Section 254(b)(3).”).

It is well established (and Tri-County does not dispute) that there are “unique costs and circumstances [associated with] serving non-contiguous areas” such as Puerto Rico and the U.S. Virgin Islands. *Connect America Fund*, 29 FCC Rcd 3964, 4028 ¶ 150 (Wireline Competition Bur. 2014); *see also Stage II Order* ¶ 27 & n.91 (JA ___) (enumerating costs and challenges); *id.* ¶ 50 (JA ___) (“The Commission has already recognized the unique logistical and financial challenges of

deploying networks in these insular areas, and the record here illustrates how these challenges are only exacerbated by the risk of experiencing natural disasters.”). That is why Territorial carriers have long received high-cost subsidies, and why, after 2011, the Commission allowed them to continue receiving subsidies at preexisting levels instead of having their subsidies calculated using the new cost model for mainland carriers. *See Connect America Fund*, 29 FCC Rcd at 4029 ¶ 152.

With the benefit of these historical subsidies, where service was available in the Territories at the time of the *Orders*, rates were reasonably comparable to mainland urban rates. *See Stage II Order* ¶ 143 (JA ____). But as Tri-County concedes as to the *Stage II Order* (Br. 41), that does not mean the Commission ignored the principle that universal service policies should promote “reasonably comparable rates.” *Stage II Order* ¶ 143 (JA ____); *see id.* ¶¶ 27, 119, 124 (JA ____, ____, ____). Rather, because the record did not suggest any problem with rates, *see Stage II Notice* ¶ 62 (JA ____), the Commission focused on improving access to quality services—which the record showed was *not* comparable in the Territories to access in mainland urban areas. *See, e.g., Stage I Order* ¶ 24 (JA ____) (describing continued accessibility problems months after

Hurricanes Irma and Maria). That focus was reasonable and fully comported with Section 254(b)(3).

It is not clear from Tri-County's brief what more it believes the Commission was required to do. Before the agency, Tri-County argued that the Commission needed to make an evidentiary finding "that consumers in Puerto Rico and the [U.S. Virgin Islands] have experienced higher rates for service than other parts of the country as a result of Hurricanes Maria and Irma." 7/26/2018 Tri-County Comments 6 (JA ____). The Commission reasonably rejected that claim as demanding that the agency "ignore all of [S]ection 254 other than the 'reasonably comparable rates' clause of [S]ection 254(b)(3), contrary to [the] duty to account for all statutory direction." *Stage II Order* ¶ 99 (JA ____).

F. The Alleged APA Errors Do Not Warrant Vacatur.

Tri-County petitions this Court to "reverse and vacate" the *Orders* under review. Br. 48. But even were the Court to determine that the *Stage I Order* violates the APA in one or more of the ways that Tri-County has alleged (and it does not), none of those deficiencies would warrant vacatur.

As this Court has explained, the "the decision whether to vacate" an agency order under the APA "depends on the seriousness of the order's

deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.” *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002) (alteration and internal quotation marks omitted). When an agency omits required notice-and-comment procedures, the Court may remand the deficient order without vacating it. *E.g., id.* (citing *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) and *Am. Med. Ass’n v. Reno*, 57 F.3d 1129 (D.C. Cir. 1995)); *see, e.g., Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 11 (D.C. Cir. 2011) (citing the “obvious” importance of maintaining “airport security operations without interruption” when declining to vacate an order as to which the agency “ha[d] not justified its failure to initiate notice-and-comment rulemaking”). Likewise, absent “rare circumstances,” the Court will not vacate orders in which an agency has not adequately explained its reasoning but might be able to provide a better explanation on remand. *Cty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1023 (D.C. Cir. 1999); *accord Banner Health v. Price*, 867 F.3d 1323, 1356–57 (D.C. Cir. 2017) (per curiam).

The subsidies authorized under the *Stage I Order* were disbursed roughly 18 months ago. *See Stage I Allocation Notice* at 8045 (JA ____).

Carriers have already used that money for network repairs. *E.g.*, *Stage II Order* ¶ 157 & n.505 (JA ____). And there can be little doubt that those repairs were important to the public interest. *See Stage I Order* ¶ 24 (JA ____). Accordingly, even if the Court were to find that omitting notice and comment was not justified, or that aspects of the *Stage I Order* were not adequately explained, requiring the Commission to claw back the Stage I subsidies would be unnecessarily disruptive. Indeed, Tri-County stops short of asking the Court to do so, limiting its requested relief (in relevant part) to vacatur. *See* Br. 48.

Remanding the *Stage I Order* would not prejudice Tri-County. It would be consistent with the narrow scope of the requested relief; the use of preexisting cash reserves to finance the Stage I subsidies, *see supra* Part II; and the relatively small scale of those one-time payments considering the high-cost program's overall budget of some \$4.5 billion annually, *see* Br. 46. By contrast, the "consequences of vacating" the *Order* would be "disruptive," and "the Commission may be able to justify" its decisions on remand. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 151 (D.C. Cir. 1993). Accordingly, if the Court were to grant any of Tri-County's APA challenges to the *Stage I Order*, the appropriate remedy would be remand, not vacatur.

CONCLUSION

The petition for review should be dismissed as to the *Stage I Order* and otherwise denied.

Dated: June 4, 2020

Respectfully submitted,

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STATUTORY ADDENDUM

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47 C.F.R. § 54.7	ADD. 9

47 U.S.C. § 151 provides:

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the “Federal Communications Commission”, which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

47 U.S.C. § 254 provides, in relevant part:

§ 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).

(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).

(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.

(i) Consumer protection

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

47 U.S.C. § 1302 provides:

§ 1302. Advanced telecommunications incentives

(a) In general

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

(b) Inquiry

The Commission shall, within 30 months after February 8, 1996, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is

being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

(c) Demographic information for unserved areas

As part of the inquiry required by subsection (b), the Commission shall compile a list of geographical areas that are not served by any provider of advanced telecommunications capability (as defined by subsection (d)(1)) and to the extent that data from the Census Bureau is available, determine, for each such unserved area--

- (1) the population;
- (2) the population density; and
- (3) the average per capita income.

(d) Definitions

For purposes of this subsection:

(1) Advanced telecommunications capability

The term “advanced telecommunications capability” is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

(2) Elementary and secondary schools

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

47 C.F.R. § 54.7 provides, in pertinent part:

§ 54.7. Intended use of federal universal service support

(a) A carrier that receives federal universal service support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.

(b) The use of federal universal service support that is authorized by paragraph (a) of this section shall include investments in plant that can, either as built or with the addition of plant elements, when available, provide access to advanced telecommunications and information services.

CERTIFICATE OF FILING AND SERVICE

I, Sarah E. Citrin, hereby certify that on June 4, 2020, I filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the District of Columbia 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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