

BRIEF FOR RESPONDENTS

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

No. 19-1233 (CONSOLIDATED WITH No. 19-1244)

GREAT LAKES COMMUNICATION CORP., ET AL.,

PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,RESPONDENTS.

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

MAKAN DELRAHIM
ASSISTANT ATTORNEY GENERALMICHAEL F. MURRAY
DEPUTY ASSISTANT ATTORNEY GENERALROBERT B. NICHOLSON
ANDREW N. DELANEY
ATTORNEYSUNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530THOMAS M. JOHNSON, JR.
GENERAL COUNSELASHLEY S. BOIZELLE
DEPUTY GENERAL COUNSELRICHARD K. WELCH
DEPUTY ASSOCIATE GENERAL COUNSELJAMES M. CARR
COUNSELFEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1762

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

The petitioners are Great Lakes Communication Corporation, Northern Valley Communications, LLC, No Cost Conference, Inc., SIPmeeting, LLC, Total Bridge, Inc., Wide Voice, LLC, CarrierX, LLC, and HDPSTN, LLC d/b/a HD Tandem. The respondents are the Federal Communications Commission and the United States of America. The intervenors are AT&T Corporation, AT&T Services, Inc., and Sprint Communications Company L.P. The parties that participated in the agency's rulemaking proceeding are listed in the petitioners' brief.

2. Rulings under review.

Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage, 34 FCC Rcd 9035 (2019) (JA___).

3. Related cases.

This case has not previously been before this Court or any other court. The Commission is aware of one related case pending in this Court: *Northern Valley Communications, LLC v. FCC*, D.C. Cir. No. 20-1287. By order dated October 20, 2020, the Court granted the FCC's motion to hold that case in abeyance until the Court issues a ruling in this case.

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GLOSSARY

APA	Administrative Procedure Act
competitive carriers	providers of local telephone service that compete with incumbent carriers of local telephone service. Incumbent carriers were providing service when the Telecommunications Act of 1996 was enacted; competitive carriers entered the market afterwards.
<i>NPRM</i>	<i>Notice of Proposed Rulemaking</i>
rate-of-return carriers	incumbent local telephone service carriers that are subject to rate-of-return regulation. Typically small, rural carriers, they have different structural and operational characteristics than competitive carriers.
VoIP	Voice over Internet Protocol. A technology that allows users to make voice calls using a broadband internet connection instead of the traditional landline telephone network.

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BRIEF FOR RESPONDENTS

INTRODUCTION

This case concerns the latest chapter in the Federal Communications Commission’s ongoing effort to deter a pernicious practice known as “access stimulation” or “traffic pumping.” This Court has repeatedly upheld actions taken by the Commission over the last decade to disrupt access stimulation schemes. *See All Am. Tel. Co., Inc. v. FCC*, 867 F.3d 81 (D.C. Cir. 2017); *N. Valley Commc’ns, LLC v. FCC*, 717 F.3d 1017 (D.C. Cir. 2013); *Farmers & Merchants Mut. Tel. Co. v. FCC*, 668 F.3d 714 (D.C. Cir. 2011); *see also In re FCC 11-161*, 753 F.3d 1015, 1144-47 (10th Cir. 2014).

Access stimulation occurs when local telephone companies take steps to “artificially inflate” the number and duration of long-distance calls they deliver to their customers. *All Am. Tel.*, 867 F.3d at 85. These local carriers arrange to serve customers that receive high volumes of long-distance calls, “such as a conference calling provider or a provider of sexually explicit chat lines.” *Ibid.* The resulting high volume of incoming call traffic has enabled these carriers to collect substantial per-minute “access charges” from long-distance carriers to complete long-distance calls. *Ibid.*

As this Court has recognized, access stimulation imposes substantial costs on long-distance carriers and their customers. Those carriers “pay significant amounts to” access-stimulating carriers “in the form of artificially inflated and distorted access charges.” *All Am. Tel.*, 867 F.3d at 85.

In 2011, the FCC adopted rules designed to curtail harmful access stimulation. *See Connect America Fund*, 26 FCC Rcd 17663, 17874-90 ¶¶ 656-701 (2011) (*2011 Order*), *aff’d*, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014). Although those rules significantly reduced access stimulation, local carriers developed new access arbitrage schemes to evade the rules. To address these evolving schemes, the Commission amended its rules in 2019. *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, 34 FCC Rcd 9035 (2019) (JA___) (*Order*).

The new access arbitrage rules seek to “reduce the incentive to inefficiently route high-volume, purposely inflated call traffic” by requiring access-stimulating carriers to bear financial responsibility for tandem switching and transport service access charges to deliver long-distance call traffic to their local end offices. *Order* ¶ 4 (JA ___); *see id.* ¶¶ 17-42 (JA ___ - ___). The rules also expand the definition of “access stimulation” to “include situations in which the access-stimulating [carrier] does not have a revenue sharing agreement with a third party.” *Id.* ¶ 43 (JA ___); *see id.* ¶¶ 43-67 (JA ___ - ___). The Commission explained that it adopted two “alternate tests for access stimulation” that do not require revenue sharing agreements “because ... many entities engaged in access stimulation have re-arranged their business to circumvent the existing rules by reducing reliance on direct forms of revenue sharing.” *Id.* ¶ 44 (JA ___) (internal quotation marks omitted).

Petitioners—a group of local carriers and conference calling service providers—have engaged in and profited from access stimulation schemes that the new rules now prohibit. Petitioners challenge the rules on various grounds. None of their arguments has merit. Contrary to petitioners’ claims, the FCC had authority to adopt the rules; substantial evidence supported the agency’s decision to take additional measures to deter access stimulation; and

the alternate tests for access stimulation are reasonably designed to identify arbitrage schemes that the 2011 rules did not prohibit. The Court should deny the petitions for review.

JURISDICTION

The FCC issued the *Order* on September 27, 2019. A summary of the *Order* was published in the Federal Register on October 28, 2019. *See* 84 Fed. Reg. 57629. Petitions for review were timely filed on October 29, 2019 and November 25, 2019, within 60 days of the *Order*'s publication in the Federal Register. *See* 28 U.S.C. § 2344; 47 C.F.R. § 1.4(b)(1). The Court has jurisdiction to review the *Order* under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

QUESTIONS PRESENTED

(1) Whether the FCC had authority to require access-stimulating local carriers to bear financial responsibility for certain access charges associated with delivering long-distance calls to their end offices.

(2) Whether the agency's decision to adopt the new access stimulation rules was supported by substantial evidence.

(3) Whether the alternate tests for access stimulation are reasonable.

STATUTES AND REGULATIONS

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

COUNTERSTATEMENT

A. Regulatory Background

Traditionally, when a provider of long-distance telephone service (also known as an “interexchange” carrier) transmitted a long-distance call to the local telephone carrier serving the call’s recipient, the long-distance carrier paid fees (or “access charges”) to complete the call. *See All Am. Tel.*, 867 F.3d at 84. This intercarrier compensation regime employed “implicit subsidies” to “help ensure that people living in rural America [have] access to affordable telephone service.” *Order* ¶ 1 (JA___). Long-distance carriers paid “inefficiently high” (*i.e.*, above-cost) per-minute access charges to subsidize local carriers that complete long-distance calls in rural areas. *Ibid.* These subsidies enabled local carriers to charge below-cost rates for local telephone service in rural areas (where the cost of providing service is high). *See Rural Cellular Ass’n v. FCC*, 685 F.3d 1083, 1085-86 (D.C. Cir. 2012).

This subsidy system became harder to sustain “as demand for traditional telephone service [fell], with consumers increasingly opting for wireless, VoIP [*i.e.*, Voice over Internet Protocol], texting, email, and other phone alternatives.” *2011 Order*, 26 FCC Rcd at 17873 ¶ 648. “Falling demand” for traditional phone service “led to rising access rates for smaller rural carriers, fueling wasteful arbitrage schemes.” *Ibid.*

One such scheme involved access stimulation or “traffic pumping.” Access-stimulating local carriers would “artificially increase their access charge revenues” by significantly “stimulat[ing] terminating call volumes through arrangements with entities that offer high-volume calling services” (such as conference call service providers). *Order* ¶ 1 (JA___). For example, high-volume customers would pay access-stimulating carriers “nothing for phone service,” and the carriers would “share” with those customers the “increased access revenues” generated by the increased call volume. *N. Valley*, 717 F.3d at 1018. Although such “traffic-pumping arrangements” were “a win-win for the local carrier and its phone-call-generating partner,” they imposed substantial costs on long-distance carriers and their customers, who were forced to pay “artificially inflated and distorted access charges” to complete long-distance calls. *All Am. Tel.*, 867 F.3d at 85 (internal quotation marks omitted).

In 2011, as part of a comprehensive rulemaking to reform the access charge regime, the FCC adopted rules designed to curb access stimulation. *2011 Order*, 26 FCC Rcd at 17874-90 ¶¶ 656-701. Under those rules, each carrier engaged in access stimulation must file revised tariffs reducing its access rates. *Id.* at 17882-89 ¶¶ 679-698. As defined by the 2011 rules, access stimulation occurs when a local carrier (1) has entered into a revenue

sharing agreement with another party collaborating in the scheme (such as a provider of conference calling service), *id.* at 17877-80 ¶¶ 668-674, and (2) has either an interstate terminating-to-originating traffic ratio (*i.e.*, a ratio of incoming to outgoing interstate calls) of at least 3:1 in a calendar month or more than 100 percent growth in interstate minutes in a month compared to the same month in the preceding year, *id.* at 17880-82 ¶¶ 675-678. The United States Court of Appeals for the Tenth Circuit upheld these rules as a reasonable exercise of the FCC’s authority under 47 U.S.C. § 201(b) to prohibit unjust and unreasonable access charges. *In re FCC 11-161*, 753 F.3d at 1144-47.

In the same rulemaking, the Commission adopted “a uniform national bill-and-keep framework” to replace its access charge regime. *2011 Order*, 26 FCC Rcd at 17676 ¶ 34. This means that “local carriers will *bill* their own customers” to originate or terminate long-distance calls “and *keep* that revenue.” *AT&T Corp. v. FCC*, 970 F.3d 344, 347 (D.C. Cir. 2020). When the transition to bill-and-keep is complete, long-distance carriers will no longer pay tariffed access charges to local carriers.

The Commission concluded that a “bill-and-keep methodology will ensure that consumers pay only for services that they choose and receive, eliminating the existing opaque implicit subsidy system under which

consumers pay to support other carriers' network costs." *2011 Order*, 26 FCC Rcd at 17904 ¶ 738. Specifically, the agency found that bill-and-keep will reduce "arbitrage" (including access stimulation) by "eliminating carriers' ability to shift network costs to competitors and their customers." *Ibid.*; *see also id.* at 17911 ¶ 752 ("a bill-and-keep approach" will "reduc[e] arbitrage incentives").

The transition from the longstanding intercarrier compensation system to bill-and-keep will take years and will proceed in stages. The Commission decided that "terminating switched access rates" would be the first rates to transition to bill-and-keep because those access charges had been "the principal source of arbitrage." *2011 Order*, 26 FCC Rcd at 17676 ¶ 35. The Commission sought comment on transitioning the remaining access charges to bill-and-keep. *See id.* at 18109 ¶ 1297.

B. The Order On Review

Some carriers "adjusted their practices" to circumvent the 2011 access stimulation rules "by interposing intermediate providers of switched access service not subject to [those] rules in the call route, thereby increasing the access charges [long-distance] carriers ... must pay." *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, 33 FCC Rcd 5466, 5467 ¶ 2 (2018) (JA ___, ___) (*NPRM*). To thwart these new

arbitrage schemes, the Commission issued a notice of proposed rulemaking seeking comment on proposed amendments to the access stimulation rules. *See id.* ¶¶ 8-37 (JA ___ - ___).

The FCC’s objective in initiating this rulemaking was “to eliminate financial incentives to engage in access stimulation.” *NPRM* ¶ 3 (JA ___). Among other things, the Commission sought comment on whether it should require access-stimulating carriers to assume financial responsibility for the delivery of long-distance traffic to their end offices. *Id.* ¶¶ 10-12, 21-22 (JA ___, ___). The agency also asked “whether, and if so how,” it should “revise the current definition of access stimulation to more accurately and effectively target harmful access stimulation practices.” *Id.* ¶ 26 (JA ___). Specifically, the Commission requested comment on whether it should “modify the ratios or triggers in the definition” and whether it should “remove the revenue sharing portion of the definition.” *Ibid.*

The record in this rulemaking revealed that terminating end office access charges, which had “transitioned to bill-and-keep” for most local carriers, were “no longer driving access stimulation.” *Order* ¶ 10 (JA ___). Instead, access stimulators developed new “arbitrage schemes” to “take advantage” of tandem switching and transport charges, which “have not yet

transitioned” to bill-and-keep. *Id.* ¶ 11 (JA___).¹ Under the rules adopted in 2011, long-distance carriers paid tandem switching and transport charges to local carriers “and to intermediate access providers chosen by” those carriers to deliver long-distance calls to their end offices. *Id.* ¶ 14 (JA___). To inflate those charges, some local carriers used intermediate access providers to route their long-distance traffic to remote rural locations “where tandem switching and transport charges remain high.” *Id.* ¶ 11 (JA___).

Commenters submitted evidence that access-stimulating carriers, using intermediate access providers, had routed “billions of minutes” of long-distance traffic “through a handful of rural areas, not for any legitimate engineering or business reasons, but solely to allow the collection ... of inflated intercarrier compensation revenues.” *Order* ¶ 14 (JA___) (quoting AT&T Comments at 1 (JA___)). For instance, AT&T reported that twice as many minutes were routed per month to Redfield, South Dakota (population 2,300), as were routed to Verizon’s facilities in New York City (population 8.5 million). AT&T Ex Parte Letter, February 5, 2019, at 4 (JA___); *see*

¹ Tandem switching charges relate to “the functions of the tandem switch.” *NPRM* n.15 (JA___). Tandem switches “operate much like railway switches, directing traffic” between carriers rather than routing calls directly to end users. *Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467, 490 (2002). Tandem switched transport charges are assessed “for hauling tandem-switched traffic between the tandem switch and connecting carriers.” *NPRM* n.15 (JA___).

Order ¶ 15 (JA___). Similarly, Sprint demonstrated that Iowa and South Dakota—two states that contain less than two percent of the nation’s population—account for more than half of Sprint’s total switched access payments nationwide. Sprint Ex Parte Letter, May 16, 2019, at 5 (JA___); *see Order* ¶ 15 (JA___).

Under these new arbitrage schemes, high-volume services such as conference calling are “offered for ‘free’ to the callers, but at an annual cost of \$60 million to \$80 million in access charges” paid by long-distance carriers who deliver the calls to local carriers. *Order* ¶ 20 (JA___). Because this cost is “spread across” the entire customer base of all long-distance carriers, all “long-distance customers are forced to bear the costs of ‘free’ conferencing and other services” used by “only a small proportion of consumers.” *Ibid.* (JA___ - ___).

The record also showed that “access stimulation imposes other harms” on users of telephone service. *Order* ¶ 3 (JA___). The Commission found “evidence that the staggering volume of minutes generated by [access stimulation] schemes can result in call blocking and dropped calls.” *Id.* ¶ 3 (JA___) (citing Sprint Ex Parte Letter, May 16, 2019, at 7-9 (JA___ - ___)). Rural areas are especially vulnerable to this sort of disruption because the “existing network capabilities” in those areas are insufficient to handle the

“artificially high levels of demand” generated by access stimulation. *Id.* ¶ 95 (JA___).

To reduce carriers’ incentive to engage in access stimulation, the FCC in 2019 adopted rules requiring any access-stimulating local carrier “to bear financial responsibility for all interstate and intrastate tandem switching and transport charges for terminating traffic to its own end office(s) or functional equivalent whether terminated directly or indirectly.” *Order* ¶ 17 (JA___). Under these rules, access-stimulating carriers will not collect access charges for tandem switching or transport service from long-distance carriers; and they will have to pay for any services provided by intermediate access providers to bring traffic to their end offices. The agency explained that the new rules “properly align financial incentives by making the access-stimulating [carrier] responsible for paying for the part of the call path that it dictates.” *Ibid.*

The Commission adopted these rules under Section 201(b) of the Communications Act, *Order* ¶ 92 (JA___), which provides that “unjust or unreasonable” charges or practices concerning telecommunications services are “unlawful,” 47 U.S.C. § 201(b). When the FCC first adopted access stimulation rules in 2011, it “found that the high access rates being collected by [local carriers] for access-stimulation traffic were unjust and

unreasonable” under Section 201(b). *Order* ¶ 92 (JA___). “Building on that legal authority” in this proceeding, the FCC found that “requiring [long-distance carriers] to pay the tandem switching and tandem switched transport charges for access-stimulation traffic is an unjust and unreasonable practice” that the agency has “authority to prohibit” pursuant to Section 201(b). *Ibid.*

In addition, the Commission found that it had authority to adopt the rules under Sections 251(b)(5) and 251(g) of the Act to implement the transition to a reciprocal compensation framework based on bill-and-keep.

Order ¶¶ 99-102 (JA___ - ___) (citing 47 U.S.C. §§ 251(b)(5), (g)).²

The Commission also revised its definition of “access stimulation” to account for new arbitrage schemes. The record reflected that some access-stimulating carriers “re-arranged their business to circumvent the existing rules by reducing reliance on direct forms of revenue sharing.” *Order* ¶ 44 (JA___) (quoting AT&T Ex Parte Letter, February 5, 2019, at 2 (JA___)). To

² Section 251(b)(5) imposes on local carriers the “duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.” 47 U.S.C. § 251(b)(5). Section 251(g) provides that carriers must continue to comply with the “restrictions and obligations” of the access charge regime in effect on February 8, 1996 “until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996.” *Id.* § 251(g). The Commission superseded the regulations in effect on February 8, 1996 when it adopted the *2011 Order*. It continued that iterative reform in the *Order* on review.

close this loophole, the agency amended its rules by adding two “alternate tests” for access stimulation “that require no revenue sharing agreement.” *Id.* ¶ 43 (JA___).

Under the first alternate test, competitive local carriers are “defined as engaging in access stimulation” if they have “an interstate terminating-to-originating traffic ratio of at least 6:1 in a calendar month.” *Order* ¶ 43 (JA___); *see* 47 C.F.R. § 61.3(bbb)(1)(ii).³ In the Commission’s judgment, a 6:1 traffic ratio—double the ratio used to define access stimulation in the 2011 rules—would provide “a clear indication” that competitive carriers are engaged in access stimulation “even absent a revenue sharing agreement,” *Order* ¶ 47 (JA___), but would also be high enough to ensure that carriers “that have traffic growth solely due to the development of their communities” are not misidentified as access stimulators, *id.* ¶ 48 (JA___).

Under the second alternate test, rate-of-return local carriers are defined “as engaging in access stimulation” if they have “an interstate terminating-to-originating traffic ratio of at least 10:1 in a three calendar month period” and “500,000 minutes or more of interstate terminating minutes-of-use per month

³ Competitive local carriers (like petitioners Great Lakes, Northern Valley, and Wide Voice) entered the market after 1996. They compete with incumbent local carriers, which generally existed before 1996. *See* 47 U.S.C. § 251(h); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 549 (2007).

in an end office in the same three calendar month period.” *Order* ¶ 43 (JA___); *see* 47 C.F.R. § 61.3(bbb)(1)(iii).⁴

The Commission explained that it adopted a separate test for rate-of-return carriers because “the majority” of them “are small, rural carriers with different characteristics than competitive [carriers].” *Order* ¶ 49 (JA___). It found that “unlike access-stimulating [carriers] that only serve high-volume calling providers,” rate-of-return carriers have served “small communities ... for years” and “would not be able to freely move stimulated traffic to different end offices.” *Ibid.* Given these “structural disincentives,” the Commission concluded that rate-of-return carriers were less likely than competitive carriers “to engage in access stimulation.” *Id.* ¶ 50 (JA___). The agency found no record “evidence that rate-of-return [carriers] are currently engaged in access stimulation.” *Ibid.*⁵

⁴ Rate-of-return carriers—incumbent local carriers subject to rate-of-return regulation—are primarily “small, rural carriers.” *Order* ¶ 49 (JA___).

⁵ Before it adopted the original access stimulation rules in 2011, the FCC found evidence that some rate-of-return carriers were engaged in revenue sharing schemes to stimulate access. *See 2011 Order*, 26 FCC Rcd at 17883 ¶¶ 681-683 (requiring access-stimulating rate-of-return carriers to file revised access tariffs). In this proceeding, however, the agency found no evidence that rate-of-return carriers (unlike competitive carriers) have engaged in any new arbitrage schemes designed to evade the 2011 rules.

The alternate tests differ in two respects. First, they use different terminating-to-originating traffic ratios to define access stimulation. Competitive carriers meet the definition if they have a 6:1 traffic ratio in a single month; rate-of-return carriers do not meet the definition unless they have a traffic ratio of at least 10:1 over three calendar months. *Order* ¶ 43 (JA___). The FCC applied a higher ratio to rate-of-return carriers to ensure that they would not be misidentified as access stimulators. The record indicated that a “significant number of rate-of-return [carriers] that are apparently not engaged in access stimulation” would nevertheless “trip the 6:1 trigger” applicable to competitive carriers. *Id.* ¶ 50 (JA___).

Second, unlike the alternate test for competitive carriers, the alternate test for rate-of-return carriers requires a traffic volume of at least “500,000 terminating interstate minutes per end office per month averaged over three months.” *Order* ¶ 50 (JA___). The Commission adopted this requirement to “exclud[e] the smallest rate-of-return carriers from the definition” of access stimulation. *Ibid.* It reasoned that those carriers generally lack the capacity to engage in access stimulation, which “involves termination of a large number of minutes per month.” *Ibid.*

C. Procedural History Of This Litigation

Two groups of petitioners filed separate petitions for review of the *Order*. The Court consolidated the petitions (Nos. 19-1233 and 19-1244).

On October 30, 2019, petitioners in No 19-1233 filed a motion to stay the *Order* pending review. The Court denied that motion on November 25, 2019. Less than two months later, on January 9, 2020, CarrierX (one of the petitioners in No. 19-1244) filed another motion to stay the *Order*. The Court denied CarrierX's stay motion on January 29, 2020.

This case was held in abeyance for six months while the FCC considered a petition for administrative reconsideration of the *Order*. On June 11, 2020, the Commission issued an order denying the petition for reconsideration. *Updating the Inter-carrier Compensation Regime to Eliminate Access Arbitrage*, 35 FCC Rcd 6223 (2020) (*Reconsideration Order*). No party petitioned for review of the *Reconsideration Order*.

SUMMARY OF ARGUMENT

History demonstrates that until the transition to bill-and-keep is complete, local carriers will continue to have the incentive and opportunity to try “to get money without earning it” by concocting new “access stimulation” schemes. *All Am. Tel.*, 867 F.3d at 85 (internal quotation marks omitted). Thus far, the FCC's efforts to combat access stimulation have resembled a

game of “Whack-a-Mole.”⁶ Although the FCC’s 2011 rules significantly reduced access stimulation, carriers have devised new arbitrage schemes designed to evade those rules. To thwart these new schemes, the agency amended its rules, revising the definition of “access stimulation” and shifting financial responsibility for terminating access-stimulated calls from long-distance carriers to access-stimulating local carriers. The new rules are reasonably designed to deter access stimulation during the transition from the access charge regime to a bill-and-keep methodology.

Petitioners challenge the new rules on various grounds. Their claims are meritless.

I. The Communications Act authorizes the Commission to combat the harmful practice of access stimulation by requiring access-stimulating local carriers to assume financial responsibility for tandem switching and transport services used to complete calls to those carriers. In the agency’s assessment, it was unlawful under 47 U.S.C. § 201(b) for access-stimulating carriers to saddle long-distance carriers, and ultimately long-distance callers, with tandem switching and transport charges to terminate these calls. The Commission explained that it had “authority to prohibit” this “unjust and

⁶ *Cf. Washington Metro. Area Transit Comm’n v. Reliable Limousine Serv., LLC*, 776 F.3d 1, 2-3 (D.C. Cir. 2015).

unreasonable practice” under Section 201(b). *Order* ¶ 92 (JA ____). It also had authority to adopt the new rules under 47 U.S.C. §§ 251(b)(5) and 251(g) to ensure an efficient transition to bill-and-keep. *Order* ¶¶ 99-102 (JA ____ - ____).

Petitioners argue that “the *Order* exceeds the Commission’s jurisdiction” by creating a “lack of mutuality and reciprocity” between carriers. Br. 57. But none of the statutory provisions cited by petitioners bars the FCC from requiring access-stimulating carriers to bear the cost of terminating access-stimulation traffic. That requirement prevents those carriers from imposing artificially inflated access charges on long-distance carriers—an unjust and unreasonable practice prohibited by Section 201(b).

II. The record in this proceeding supported the FCC’s adoption of revised access stimulation rules to curtail new schemes. The Commission found substantial evidence that carriers had developed new access stimulation strategies to circumvent the 2011 rules, and that these schemes harmed consumers. The record reflected that the new arbitrage schemes impose “an annual cost of \$60 million to \$80 million in access charges” on long-distance carriers, forcing consumers of long-distance service to subsidize “free” conferencing and other services that “only a small proportion of consumers” use. *Order* ¶ 20 (JA ____ - ____). Simply put, most long-distance consumers

pay extra so that a few can make free calls. In addition, the record contained “evidence that the staggering volume of minutes generated by these schemes can result in call blocking and dropped calls,” especially in rural areas where access stimulation flourishes. *Id.* ¶ 3 (JA___). Based on this substantial record evidence, the Commission was justified in adopting rules that reduce carriers’ incentive to engage in access stimulation.

III.A. The Commission provided sufficient notice under the Administrative Procedure Act (APA) that it was considering “whether, and if so how, to revise” the “definition of access stimulation to more accurately and effectively target harmful access stimulation practices.” *NPRM* ¶ 26 (JA___). In the *NPRM*, the agency specifically requested comment on whether it should “modify the ratios or triggers in the definition” and/or “remove the revenue sharing portion of the definition.” *Ibid.* The new access stimulation tests—which do not require revenue sharing, and which apply different traffic ratios to categories of carriers with different structural and operational characteristics—were a logical outgrowth of the *NPRM*.

III.B. In revising its definition of access stimulation, the Commission properly distinguished between competitive local carriers and rate-of-return carriers. Most rate-of-return carriers “are small, rural carriers with different characteristics than competitive [carriers].” *Order* ¶ 49 (JA___). The

administrative record showed that rate-of-return carriers face unique “structural barriers” to “engaging in access stimulation.” *Id.* ¶ 43 (JA___). And the Commission found no “evidence that rate-of-return [carriers] are currently engaged in access stimulation.” *Id.* ¶ 50 (JA___). The record also indicated that rate-of-return carriers sometimes have very high terminating-to-originating traffic ratios for reasons unrelated to arbitrage—*e.g.*, “because their customers have shifted their originating calls to wireless or VoIP technologies,” or because seasonal service fluctuations in certain geographic areas cause “spikes in [incoming] call volume.” *Id.* ¶ 49 (JA___). Based on this record, the Commission reasonably decided to adopt two alternate tests for access stimulation: one for competitive carriers and another for rate-of-return carriers.

III.C. The alternate tests employ reasonable traffic ratios to define access stimulation. The FCC found that a 6:1 terminating-to-originating traffic ratio—twice the ratio required by the original definition of access stimulation—would provide “a clear indication” that competitive carriers are engaged in access stimulation “even absent a revenue sharing agreement,” *Order* ¶ 47 (JA___), but would also be high enough to ensure that carriers “that have traffic growth solely due to the development of their communities” would not be misidentified as access stimulators, *id.* ¶ 48 (JA___). The

Commission applied a higher (10:1) traffic ratio to rate-of-return carriers without revenue sharing agreements to avoid “penalizing innocent [rate-of-return carriers] that may have increased call volumes” for reasons unrelated to access stimulation. *Id.* ¶ 50 (JA___) (internal quotation marks omitted). The agency’s line-drawing in this case fell comfortably “within a zone of reasonableness.” *WorldCom, Inc. v. FCC*, 238 F.3d 449, 462 (D.C. Cir. 2001).

IV. The *Order* does not impair the authority of State commissions to determine the “network edge” under 47 U.S.C. § 252(d). *See Order* ¶ 105 (JA___). State commissions “continue to enjoy authority to arbitrate” and designate “the points ‘at which a carrier must deliver terminating traffic to avail itself of bill-and-keep’” under a reciprocal compensation agreement. *See In re FCC 11-161*, 753 F.3d at 1126 (quoting *2011 Order*, 26 FCC Rcd at 17922 ¶ 776).

V. Insofar as petitioners assert that subsequent events “reveal” the FCC’s disparate application of the rules to similarly situated parties (Br. 44-51), their claim falls outside the scope of this case. Because petitioners are making a facial challenge to the rules, the Court’s review is limited to the record before the agency at the time the rules were adopted. *See Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999). Moreover,

petitioners' claim regarding subsequent events is procedurally barred because it was never presented to the Commission. *See* 47 U.S.C. § 405(a). In any case, the subsequent events cited by petitioners do not reflect disparate treatment of similarly situated parties. Petitioners are not "similarly situated" to Inteliquent. Br. 45-49. Inteliquent obtained a temporary waiver from FCC staff because (among other things) it demonstrated that it was not previously engaged in access stimulation. Petitioners have not even attempted to make such a showing.

STANDARD OF REVIEW

The Court must "uphold the Commission's decision unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *All Am. Tel.*, 867 F.3d at 89 (internal quotation marks omitted); *see* 5 U.S.C. § 706(2)(A). "Under this highly deferential standard of review," the Court "presumes the validity of agency action." *Cellco P'ship v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004) (internal quotation marks omitted). The Court "is not to ask whether [the challenged] regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). To prevail, "[t]he Commission need only articulate a 'rational connection between the facts found and the choice made.'" *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095,

1105 (D.C. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)).

The Court must “accept the Commission’s findings of fact so long as they are supported by substantial evidence on the record as a whole.” *PSSI Global Servs., LLC v. FCC*, 2020 WL 7413589, *3 (D.C. Cir. Dec. 18, 2020) (quoting *Neustar, Inc. v. FCC*, 857 F.3d 886, 896 (D.C. Cir. 2017)). “[T]he threshold for such evidentiary sufficiency is not high. Substantial evidence ... is ‘more than a mere scintilla.’” *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court “must uphold the Commission’s factual determinations if on the record as a whole, there is such relevant evidence as a reasonable mind might accept as adequate to support [the agency’s] conclusion.” *Verizon v. FCC*, 740 F.3d 623, 643 (D.C. Cir. 2014) (internal quotation marks omitted).

Insofar as petitioners challenge the FCC’s authority to adopt the new access stimulation rules, the agency’s interpretation of its statutory authority is reviewed under *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). If “Congress has directly spoken to the precise question at issue,” the Court “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, the question” for the Court is whether the agency

has adopted “a permissible construction of the statute.” *Id.* at 843; *see also City of Arlington v. FCC*, 569 U.S. 290, 307 (2013). If the implementing agency’s reading of an ambiguous statute is reasonable, the Court must “accept the agency’s construction of the statute, even if the agency’s reading differs from what the [Court] believes is the best statutory interpretation.” *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

ARGUMENT

I. THE COMMISSION HAD AUTHORITY TO REQUIRE ACCESS-STIMULATING CARRIERS TO BEAR THE COST OF DELIVERING LONG-DISTANCE CALLS TO THEIR END OFFICES

Section 201(b) of the Communications Act empowers the FCC to prohibit “unjust or unreasonable” practices by telecommunications service providers. 47 U.S.C. § 201(b). The Commission reasonably concluded that “the practice of imposing tandem switching and tandem switched transport access charges on [long-distance carriers] for terminating access-stimulation traffic” is “unjust and unreasonable.” *Order* ¶ 92 (JA ___ - ___). The agency had “authority to prohibit” this unjust and unreasonable practice “pursuant to” Section 201(b). *Ibid.* (JA ___). It properly exercised that authority by “shifting financial responsibility” for “intermediate access provider charges” and “tandem switching and tandem switched transport charges” from long-

distance carriers to access-stimulating carriers. *Id.* ¶ 20 (JA___). The Commission took this action to “counter the perverse incentives the [existing] rules create for [local carriers] to choose expensive and inefficient call paths for access-stimulation traffic.” *Id.* ¶ 93 (JA___).

The Commission also found authority to adopt the new rules in Section 251(b)(5) of the Act, which imposes on local carriers a “duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.” 47 U.S.C. § 251(b)(5). In 2011, the Commission had concluded that Section 251(b)(5) authorized adoption of a bill-and-keep framework for reciprocal compensation. *2011 Order*, 26 FCC Rcd at 17914-25 ¶¶ 760-781; *see also In re FCC 11-161*, 753 F.3d at 1115-19 (affirming the FCC’s authority to adopt bill-and-keep under Section 251(b)(5)). Building on that conclusion, the Commission determined that it had authority under Section 251(b)(5) to adopt the new access stimulation rules to continue implementing the transition to a bill-and-keep framework. *Order* ¶ 99 (JA___).

Alternatively, the Commission reasoned that even if its new rules could be “viewed as falling outside the scope” of Section 251(b)(5), it had authority under Section 251(g) to adopt “transitional rules ... pending the completion of comprehensive reform” of the access charge regime. *Order* ¶ 102

(JA___). It recognized that until all access charges were eliminated, access stimulation would persist. The Commission concluded that the new rules were “necessary to address” this “problematic conduct” until the “transition to bill-and-keep” was “finalized.” *Ibid.* The rules sought to promote a smooth and efficient transition by “[e]liminating the implicit subsidies” and “waste generated by access stimulation.” *Id.* ¶ 27 (JA___); *see also id.* ¶ 94 (JA___) (the rules were “crafted to encourage terminating [carriers] to make efficient choices in the context of access stimulation schemes”). As this Court has long recognized, interim rules of this sort, designed to prevent “market disruption pending broader reforms,” are entitled to “substantial deference.” *Rural Cellular Ass’n*, 588 F.3d at 1105-06 (internal quotation marks omitted).⁷

In their brief, petitioners do not challenge the FCC’s determination under Section 201(b) that it is unjust and unreasonable for access-stimulating carriers to collect tandem switching and transport charges from long-distance carriers for terminating access-stimulation traffic. Nonetheless, petitioners argue that the new rules “exceed” the Commission’s “statutory jurisdiction”

⁷ *See also Competitive Telecomms. Ass’n v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002); *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410 (D.C. Cir. 2002); *MCI Telecomms. Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984).

by requiring access-stimulating carriers to bear the cost of terminating access. Br. 54-59.

Petitioners base their challenge to the agency's authority on Sections 252(d)(2)(A)(i) and 252(d)(2)(B)(i) of the Communications Act. Br. 57. Neither of those provisions, however, supports petitioners' argument. Section 252(d)(2)(A)(i) does not even concern the FCC's authority; it governs State commissions' review of incumbent local carriers' reciprocal compensation arrangements for the transport and termination of calls. 47 U.S.C. § 252(d)(2)(A)(i). Section 252(d)(2)(B)(i) bars the Commission from construing Section 252(d)(2) "to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)." *Id.* § 252(d)(2)(B)(i). Consistent with that rule of construction, the Commission has read the statute to authorize bill-and-keep. *See 2011 Order*, 26 FCC Rcd at 17914-25 ¶¶ 760-781.

Petitioners contend that "the *Order* exceeds the Commission's jurisdiction" by creating a "lack of mutuality and reciprocity" between carriers. Br. 57. They complain that while access-stimulating carriers must terminate traffic "without recovering any of their costs through tandem switching or transport charges," other local carriers continue to "recover a

portion of their costs” through such charges. Br. 58. But this disparity is entirely justified. Unlike other local carriers, access-stimulating carriers are engaged in conduct that violates Section 201(b): the unjust and unreasonable practice of requiring long-distance carriers to pay artificially inflated access charges to terminate access-stimulation traffic. The FCC reasonably concluded that it needed to “treat [access-stimulation] traffic differently than non-stimulated traffic” in order “to address the unjust and unreasonable practices” fostered by access stimulation—practices that are unlawful under Section 201(b). *Order* ¶ 104 (JA___); *see also id.* ¶ 92 (JA___ - ___). In view of its statutory duty to prevent such unlawful practices, the Commission rightly rejected the premise that its rules unfairly discriminate against access-stimulating carriers. *Id.* ¶ 103 (JA___).

Petitioners argue that the new rules are inconsistent with the “mutual and reciprocal nature” of bill-and-keep. Br. 57. The *Order*, however, “does not purport to adopt a bill-and-keep regime for access-stimulation traffic.” *Order* ¶ 101 (JA___). It simply “continues the Commission’s efforts to address arbitrage ... on an interim basis pending the completion of comprehensive intercarrier compensation reform.” *Ibid.*

Petitioners complain that access-stimulating carriers “receive no reciprocal benefit” under the new rules. Br. 58. But when the Commission

assesses “whether a new approach to reciprocal compensation is in the public interest, the Act does not require [the agency] to ensure that each carrier receives some benefit from the change relative to the *status quo*.” *Order* ¶ 100 (JA___). Moreover, the Commission found that access-stimulating carriers are hindering an efficient transition to bill-and-keep by collecting millions of dollars in artificially inflated access charges from long-distance carriers. All “long-distance customers are forced to bear” those costs, effectively subsidizing access-stimulating services that “only a small proportion of consumers” use. *Id.* ¶ 20 (JA___ - ___). In addition, the “artificially high levels of demand” generated by access stimulation “can result in call completion problems and dropped calls,” especially “in rural areas” where “existing network capabilities” are insufficient to handle such high call volume. *Id.* ¶ 95 (JA___). To put an end to the unjust and unreasonable practices of access stimulators, and to promote a more efficient transition to bill-and-keep, the Commission properly exercised its authority under Sections 201(b), 251(b)(5), and 251(g) by requiring access-stimulating carriers to assume financial responsibility for tandem switching and transport charges to terminate their traffic. *See id.* ¶¶ 89-105 (JA___ - ___).

II. SUBSTANTIAL EVIDENCE SUPPORTED THE COMMISSION'S DECISION TO AMEND THE ACCESS STIMULATION RULES

The record contained substantial evidence that carriers had modified their access stimulation schemes to evade the 2011 rules. Using “intermediate access providers,” access-stimulating carriers were routing huge volumes of long-distance calls to “areas of the country where tandem switching and transport charges remain high.” *Order* ¶ 11 (JA___). The record established that “billions of minutes of long-distance traffic” were being “routed through a handful of rural areas, not for any legitimate engineering or business reasons, but solely to allow” access-stimulating carriers to collect “inflated intercarrier compensation.” *Id.* ¶ 14 (JA___) (quoting AT&T Comments at 1 (JA___)). AT&T produced evidence that “twice as many minutes were being routed per month to Redfield, South Dakota”—a town of about 2,300 people with a single end office—“as [were] routed to *all* of Verizon’s [90 end offices] in New York City.” *Order* ¶ 15 (JA___) (quoting AT&T Ex Parte Letter, February 5, 2019, at 3 (JA___)). And Sprint submitted data documenting that two sparsely populated states

(Iowa and South Dakota) account for more than half of Sprint's total switched access payments nationwide. *Ibid.*⁸

The Commission also found substantial evidence that the new access stimulation schemes inflict significant harm on providers and consumers of telephone service. The record showed that these schemes are “costing [long-distance carriers] between \$60 million and \$80 million per year in access charges.” *Order* ¶ 24 (JA___).⁹ Those charges “are spread across” all customers of long-distance carriers; consequently, every user of long-distance telephone service is “forced to bear the costs of ‘free’ conferencing” and other access-stimulation services, even though “only a small proportion of consumers” use those services. *Id.* ¶ 20 (JA___ - ___).

⁸ Although “Iowa contains less than 1 percent” of the nation’s population, long-distance calls to Iowa “represent 48 percent of Sprint’s total switched access payments across the United States.” Sprint Ex Parte Letter, May 16, 2019, at 5 (JA___). And although only “0.27 percent” of the U.S. population lives in South Dakota, long-distance calls to that state are responsible for “8 percent of Sprint’s terminating switched access traffic payments” nationally. *Ibid.*

⁹ See Inteliquent Ex Parte Letter, April 18, 2019, Attachment at 2 (JA___) (estimating that the new arbitrage schemes cost the telecommunications industry over \$60 million annually); AT&T Ex Parte Letter, February 5, 2019, at 4 (JA___) (estimating that the new arbitrage schemes cost the telecommunications industry at least \$80 million annually).

In addition, the Commission found “evidence that the staggering volume of minutes generated by [access stimulation] schemes can result in call blocking and dropped calls.” *Order* ¶ 3 (JA___). Under one such scheme uncovered by Sprint, “33 phones at a single cell site in Tampa, Florida ... were each placing calls lasting more than 1,000 minutes per day to a known access arbitrage carrier.” *Ibid.* “[T]he calls resulted in a voice block rate of 50 percent and a drop rate of 12.5 percent at that cell site. Because of these [access-stimulating] calls, other customers were unable to make regular calls and may not have been able to reach 911.” Sprint Ex Parte Letter, May 16, 2019, at 8 (JA___).

All of this evidence amply justified the FCC’s decision to “adopt rules making access-stimulating [carriers]—rather than [long-distance carriers]—financially responsible for the tandem switching and transport service access charges associated with” terminating access-stimulation traffic. *Order* ¶ 4 (JA___). The new rules address problems that are well documented in the record. As the Commission explained, the rules “will reduce the incentive” of access-stimulating carriers “to inefficiently route high-volume, purposely inflated, call traffic,” *ibid.*, and “help mitigate call completion problems in rural (and other) areas,” *id.* ¶ 95 (JA___).

Petitioners maintain that the record contained no evidence to support the Commission's conclusions that (1) access stimulation harms consumers (Br. 33-36); (2) reduced access charges benefit consumers (Br. 36-41); and (3) access stimulation harms long-distance carriers (Br. 41-44). These claims regarding the adequacy of the record cannot withstand scrutiny.

Petitioners contend that most long-distance customers do not bear the costs of access stimulation because users of access-stimulating conferencing services "pay their own way." Br. 36. The record, however, undercuts that unsubstantiated assertion. According to Sprint, "less than 0.2 [percent] of its subscribers place calls" to access-stimulating services, "but 56 [percent] of Sprint's access charge payments are paid to access-stimulating [carriers]," forcing all of Sprint's customers to pay "for services that the vast majority will never use." *Order* ¶ 25 (JA ___); see Sprint Ex Parte Letter, May 16, 2019, at 5 (JA ___). Consistent with that evidence, this Court has previously found that access stimulation imposes substantial costs on providers and consumers of long-distance service. See *All Am. Tel.*, 867 F.3d at 85 ("the public and [long-distance] carriers" are "[o]n the losing end" of access stimulation schemes because they must pay "artificially inflated and distorted access charges" to access-stimulating carriers).

Petitioners also assert that there is no evidence that consumers benefit from a reduction in access stimulation. Br. 36-41. They base this claim principally on an economist's report finding no evidence that the decline in access stimulation since 2011 has led to lower rates for long-distance service. *See* Grawe Report at 8-11 (JA ___ - ___). But petitioners do not really dispute that reducing access arbitrage will result in significant cost savings for long-distance carriers. Among other things, as a result of the adopted reforms, long-distance carriers "will no longer have to expend resources in trying to defend against access-stimulation schemes." *Order* ¶ 32 (JA ___). And while the FCC may not be able to "precisely quantify the effects of past reforms (given the many simultaneously occurring technological and marketplace developments)," it is reasonable to expect "as a matter of economic theory" that because "long-distance service is competitive," long-distance carriers will pass through some of their cost savings to their customers if access stimulation is curtailed. *Ibid.* Even if those cost savings are not shared directly with consumers through rate reductions, they will "be available for other, beneficial purposes" that serve the public interest, such as network upgrades to improve service quality. *Ibid.*; *see also* 2011 *Order*, 26 FCC Rcd at 17909 ¶ 748 ("Economic theory suggests that carriers will reduce

consumers' effective price of calling, through reduced charges and/or improved service quality.”).

In any event, even assuming that the new rules will not lead to lower long-distance rates for consumers, the Commission reasonably found that “eliminating the implicit subsidies inherent in inefficiently high access charges that permit arbitrage provides an additional and independent justification” for the new rules. *Order* n.89 (JA___). Efficient pricing matters. In the Commission’s judgment, “[r]educing the costs created by access arbitrage by reducing the incentives that lead carriers to engage in such arbitrage is a sufficient justification for adopting [the] rules, regardless of how [long-distance carriers] elect to use their cost savings.” *Id.* ¶ 32 (JA___).

Consumers will clearly benefit from elimination of the implicit subsidies that fuel access stimulation. Unless access stimulation is curbed, “[c]ompetition ... suffers because access-stimulation revenues subsidize the costs of high-volume calling services, granting providers of those services a competitive advantage over companies that collect such costs directly from their customers.” *Order* ¶ 26 (JA___). “Eliminating the implicit subsidies that allow these ‘free’ services” will “eliminate the waste generated by access stimulation” and increase “efficient utilization of network resources.” *Id.*

¶ 27 (JA___). As a result, “consumers will be provided with more-accurate pricing signals for high-volume calling services.” *Id.* ¶ 32 (JA___).

Petitioners also contest the Commission’s finding that access stimulation harms long-distance carriers. They claim that “available evidence shows” that long-distance carriers “benefit from” access-stimulating services. Br. 41. This claim is not properly before the Court because it was not presented to the Commission in the proceeding below. *See* 47 U.S.C. § 405(a); *Nat’l Lifeline Ass’n v. FCC*, 2020 WL 7511124, *7 (D.C. Cir. Dec. 22, 2020). The “evidence” on which this claim is based was submitted in two other FCC proceedings, *see* Br. 43, but it was not placed in the record in this proceeding. The Commission is not “required to sift through pleadings in other proceedings in search of issues that [petitioners] raised elsewhere and might have raised here had [they] thought to do so.” *Charter Commc’ns, Inc. v. FCC*, 460 F.3d 31, 39 (D.C. Cir. 2006) (quoting *Beehive Tel. Co. v. FCC*, 179 F.3d 941, 945 (D.C. Cir. 1999)).

In any event, there is good reason to doubt petitioner Northern Valley’s “evidence” that “AT&T makes a great deal of money because of access stimulation.” Br. 42. If (as petitioners claim) AT&T has substantially profited from other carriers’ access stimulation schemes, it presumably would

not object to such schemes. Instead, AT&T has devoted considerable time and resources to fighting access stimulation.¹⁰

Furthermore, petitioners are simply wrong when they assert that “there would be no basis” for the new rules if “long-distance carriers are making a net profit from access stimulation.” Br. 41. Even assuming that long-distance carriers profit from access stimulation, the practice harms the public by forcing consumers of long-distance service to subsidize “free” conferencing and other services that “only a small proportion of consumers” use. *Order* ¶ 20 (JA ___ - ___).

In their brief, petitioners effectively concede that nothing in the record refuted the FCC’s findings regarding the harmful effects of access stimulation. They repeatedly complain that “the Commission did not afford” them “a full and fair opportunity to rebut” the record evidence that access stimulation is detrimental to the public interest. Br. 33; *see also* Br. 35, 37, 42. Specifically, they assert that the agency should have required long-

¹⁰ *See, e.g., All Am. Tel. Co. v. AT&T Corp.*, 328 F. Supp. 3d 342 (S.D.N.Y. 2018); *N. Valley Commc’ns, LLC v. AT&T Corp.*, 245 F. Supp. 3d 1120 (D.S.D. 2017); *AT&T Corp. v. Adventure Commc’n Tech., LLC*, 207 F. Supp. 3d 962 (S.D. Iowa 2016). AT&T’s strenuous opposition to access stimulation is consistent with this Court’s finding that long-distance carriers come out “[o]n the losing end” of access stimulation schemes. *All Am. Tel.*, 867 F.3d at 85.

distance carriers to respond to petitioners' self-styled "data and document requests" for information regarding those carriers' revenues and costs. Br. 34. According to petitioners, the Commission "declined to compel the production of these data" and "then used the absence of record evidence to reject [p]etitioners' arguments." Br. 41.¹¹

The Commission rightly rejected petitioners' argument that "not enough data was submitted in the record in this proceeding." *Order* ¶ 66 (JA___). In the *NPRM*, the agency specifically requested data concerning the cost of access arbitrage. *See NPRM* ¶ 35 (JA___). If petitioners "are dissatisfied with the amount of data provided to the Commission, it certainly was not due to the Commission not asking for it." *Order* ¶ 66 (JA___).

¹¹ Among other things, petitioners note that the Commission faulted the Ingberman Report (petitioners' expert report on the purported benefits of access stimulation) for failing to "take into account the cost that access stimulators impose" on long-distance carriers' networks. Br. 41 (quoting *Order* ¶ 31 (JA___)). Petitioners speculate that the evidence that would have been produced in response to their "document requests" would have supported the Ingberman Report's conclusions. But the evidence sought by petitioners would not have addressed a critical deficiency in the Ingberman Report: its failure to corroborate claims that "increased access traffic on a [local carrier's] network would result in lower prices to [the carrier's] end-user customers," *Order* ¶ 30 (JA___), and that "lower consumer prices from siting new traffic on a smaller network are likely to be significant," *id.* ¶ 29 (JA___).

In any event, petitioners have not shown how the information they sought in their “document requests” would have altered the FCC’s conclusions that “today’s access arbitrage schemes use implicit subsidies . . . to warp the economic incentives to provide service in the most efficient manner,” *Order* ¶ 36 (JA ___), and that “the staggering volume of minutes generated by these schemes can result in call blocking and dropped calls,” *id.* ¶ 3 (JA ___). Those conclusions, which rested on substantial record evidence, justified the agency’s decision to adopt new access stimulation rules. The Commission reasonably exercised its broad procedural discretion when it determined that further development of the record was unnecessary. *See FCC v. Schreiber*, 381 U.S. 279, 289 (1965) (the Communications Act vests the FCC with “broad discretion” in conducting its proceedings) (citing 47 U.S.C. § 154(j)). “Someone must decide when enough data is enough. In the first instance that decision must be made by the Commission To allow others to force the Commission to conduct further evidentiary inquiry would be to arm interested parties with a potent instrument for delay.” *United States v. FCC*, 652 F.2d 72, 90-91 (D.C. Cir. 1980) (en banc).

III. THE ALTERNATE TESTS FOR ACCESS STIMULATION ARE REASONABLE

A. The Commission Provided Adequate Notice Of Its Decision To Revise The Definition Of Access Stimulation.

In the *Order*, the FCC amended its rules to expand the definition of access stimulation by adding two “alternate tests”: one for competitive carriers and another for rate-of-return carriers. *See Order* ¶¶ 43-50 (JA ___ - ___). Petitioners maintain that the Commission failed to provide adequate notice that it would adopt different access stimulation tests for different types of carriers. Br. 30-32. That contention is baseless.

To comply with the APA, a notice of proposed rulemaking “need not specify every precise proposal which [the agency] may ultimately adopt as a rule.” *Nuvio Corp. v. FCC*, 473 F.3d 302, 310 (D.C. Cir. 2006) (internal quotation marks omitted). An agency provides adequate notice under the APA if its final rule is “a logical outgrowth” of its notice. *Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013) (internal quotation marks omitted). A notice “satisfies the logical outgrowth test if it expressly ask[s] for comment on a particular issue or otherwise ma[kes] clear that the agency [is] contemplating a particular change.” *United States Telecom Ass’n v. FCC*, 825 F.3d 674, 700 (D.C. Cir. 2016) (internal quotation marks omitted). The *NPRM* in this proceeding did just that.

The *NPRM* expressly stated that the Commission was considering “whether, and if so how, to revise the current definition of access stimulation to more accurately and effectively target harmful access stimulation practices.” *NPRM* ¶ 26 (JA___). Specifically, the agency solicited comment on whether—and if so, how—it should “modify the ratios or triggers in the definition.” *Ibid.* It also asked whether it should “remove the revenue sharing portion of the definition.” *Ibid.*

After reviewing the record, the Commission decided to supplement its “current test for access stimulation” with two “alternate tests that require no revenue sharing agreement.” *Order* ¶ 43 (JA___). The agency explained that the alternate tests distinguish between rate-of-return carriers and competitive carriers because most rate-of-return carriers “are small, rural carriers with different characteristics than competitive [carriers].” *Id.* ¶ 49 (JA___). Although the Commission found no “evidence that rate-of-return [carriers] are currently engaged in access stimulation,” *id.* ¶ 50 (JA___), the record indicated that such carriers “may have traffic ratios that are disproportionately weighted toward terminating traffic” and may experience “spikes in call volume” due to “the unique geographical areas they serve,” *id.* ¶ 49 (JA___). The Commission adopted a separate access stimulation test for rate-of-return carriers (with a higher traffic ratio and a minimum traffic volume

requirement) to ensure that “innocent” rate-of-return carriers would not be misidentified “as access stimulators.” *Ibid.* (quoting NTCA Ex Parte Letter, September 11, 2019, at 1 (JA___)).

The adoption of different access stimulation triggers for categories of carriers with different structural and operational characteristics was reasonably foreseeable after the *NPRM* announced that the FCC was contemplating changes to the definition of access stimulation “to more accurately and effectively target harmful access stimulation practices.” *NPRM* ¶ 26 (JA___). Given the *NPRM*’s questions about whether (and if so, how) to modify the triggers in the definition, “interested parties should have anticipated that the change” the agency ultimately made “was possible.” *Agape Church*, 738 F.3d at 411 (internal quotation marks omitted); *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174-75 (2007) (a rulemaking notice satisfies the “logical outgrowth” test if the final rule was “reasonably foreseeable”). That is all the notice the APA requires.

B. The Commission Reasonably Distinguished Between Competitive Carriers And Rate-Of-Return Carriers.

Petitioners have no basis for claiming that the alternate tests for access stimulation by competitive carriers and rate-of-return carriers treat “similarly situated” carriers differently. Br. 25-27. The record amply justified the

agency's disparate treatment of these different types of carriers. *See Order* ¶¶ 43, 49-50 (JA ___, ___ - ___).

The record established that a number of competitive carriers were actively “involved in access stimulation,” intentionally manipulating their traffic to inflate their access charge revenues. *Order* ¶ 15 (JA ___). By contrast, the record contained no “evidence that rate-of-return [carriers] are currently engaged in access stimulation.” *Id.* ¶ 50 (JA ___); *see also id.* ¶ 9 (JA ___) (the record did not identify any rate-of-return carriers currently “engaging in an access stimulation scheme”).

The FCC attributed the lack of access stimulation by rate-of-return carriers to their unique features. “[T]he majority of those carriers are small, rural carriers with different characteristics than competitive [carriers].” *Order* ¶ 49 (JA ___). Unlike access-stimulating competitive carriers, which “only serve high-volume calling providers,” rate-of-return carriers, “which serve small communities and have done so for years, would not be able to freely move stimulated traffic to different end offices.” *Ibid.* Furthermore, because “access stimulation involves termination of a large number of minutes per month,” the “smallest rate-of-return carriers” generally lack the capacity to handle the tremendous call volume generated by access stimulation. *Id.* ¶ 50 (JA ___). The Commission reasonably concluded that

these “structural barriers” deter rate-of-return carriers from “engaging in access stimulation.” *Id.* ¶ 43 (JA___).

The record also revealed that rate-of-return carriers that do not engage in access stimulation may nonetheless “have larger terminating-to-originating traffic ratios than competitive [carriers].” *Order* ¶ 50 (JA___). For instance, due to “seasonal changes,” small rate-of-return carriers serving “unique geographical areas” can experience “spikes in call volume” that have “a greater impact on traffic ratios than would be experienced by carriers with a larger base of traffic spread over a larger, more populated, geographical area.” *Id.* ¶ 49 (JA___); *see* NTCA Ex Parte Letter, September 11, 2019, at 2 (JA___) (some rate-of-return carriers reported “seasonal upticks in terminating calls”). In addition, rate-of-return carriers “may have traffic ratios that are disproportionately weighted toward terminating traffic because their customers have shifted their originating calls to wireless or VoIP technologies.” *Order* ¶ 49 (JA___).¹²

¹² Some rate-of-return carriers explained that “their terminating-to-originating traffic ratios are increasing” because more of their customers are using wireless and VoIP services to make long-distance calls. NTCA Ex Parte Letter, September 11, 2019, at 3 (JA___). A 2018 report by the FCC’s Wireline Competition Bureau documented this trend. *See Order* ¶ 49 & n.149 (JA___) (citing *Voice Telephone Services: Status as of June 30, 2017*, 2018 WL 6119565, at *2, Fig. 1 (FCC November 2018), available at <https://docs.fcc.gov/public/attachments/DOC-349075A1.pdf>).

In the face of this substantial evidence demonstrating the distinctive features of rate-of-return carriers, petitioners cannot credibly assert that the FCC's "disparate treatment" of those carriers "is not adequately supported by the record." Br. 28. To the contrary, the record fully supported the agency's decision "to adopt different [access stimulation] triggers" for competitive carriers and rate-of-return carriers. *Order* ¶ 43 (JA___).

The Commission determined that competitive carriers are engaged in access stimulation if they have "an interstate terminating-to-originating traffic ratio of at least 6:1 in a calendar month." *Order* ¶ 43 (JA___). The Commission recognized, however, that a 6:1 traffic ratio would not provide an accurate indicator of access stimulation by rate-of-return carriers. The record showed that a "significant set of rate-of-return [carriers] can experience legitimate call patterns that would trip the 6:1 trigger." *Ibid.* To avoid misidentifying those carriers as access stimulators, and to account for the "structural barriers" blocking rate-of-return carriers from "engaging in access stimulation," *ibid.*, the agency adopted a separate test for rate-of-return carriers. Under that test, rate-of-return carriers are engaged in access stimulation if they have "an interstate terminating-to-originating traffic ratio of at least 10:1 in a three calendar month period" and at least 500,000

“interstate terminating minutes-of-use per month in an end office in the same three calendar month period.” *Ibid.*

Petitioners maintain that the alternate tests for access stimulation impede the development of “competition” by imposing “unequal burdens” on similarly situated carriers. Br. 28. To the contrary, as the FCC explained, the new tests properly reflect the fundamental differences between competitive carriers and rate-of-return carriers. *See Order* ¶¶ 49-50 (JA ___ - ___). Thus, the alternate tests do not “prejudice” petitioners or other competitive carriers. Br. 28.¹³

Petitioners also complain that the FCC’s rules do not prohibit access stimulation by entities that are not competitive carriers or rate-of-return carriers (specifically, price cap incumbent local carriers, wireless service providers, and VoIP providers). Br. 26. Those entities, however, had no prior history of access stimulation. Indeed, wireless providers have no incentive to stimulate access because they “generally do not collect access

¹³ Petitioners assert that instead of adopting the alternate tests, the Commission should have adopted one of the proposals made by petitioner Wide Voice: either “add a mileage cap to the existing access stimulation triggers” or “use mileage alone as an access stimulation trigger.” Br. 29-30. The Commission reasonably explained why it rejected those proposals, which were based on the unsubstantiated assumption that “transport charges are the primary driver of access stimulation.” *Order* ¶ 37 (JA ___). Wide Voice failed to “explain how a mileage cap would reduce access arbitrage.” *Ibid.*

charges.” *See Connect America Fund*, 26 FCC Rcd 4554, 4718 n.787 (2011). In the future, if the FCC discovers that other entities are engaging in access stimulation, it stands ready to take appropriate action to respond to new arbitrage schemes. In the *Order*, the Commission reasonably decided to focus on carriers that are engaging or have engaged in access stimulation schemes, “addressing itself to the phase of the problem which seems most acute to the [regulatory] mind.” *Nat’l Ass’n of Broad. v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984) (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955)).

C. The Commission Selected Reasonable Traffic Ratios To Define Access Stimulation.

Petitioners contend that the Commission did not adequately justify the traffic ratios it chose for the alternate access stimulation tests. Br. 27-28. In selecting those ratios, the FCC was “engaging in classic ‘line-drawing,’ making judgments to which” courts “must generally defer.” *Health & Medicine Policy Research Grp. v. FCC*, 807 F.2d 1038, 1045-46 n.10 (D.C. Cir. 1986).

The Commission “has wide discretion to determine where to draw administrative lines.” *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000). This Court is “generally unwilling to review line-drawing performed by the Commission unless [petitioners] can demonstrate that lines drawn ...

are patently unreasonable, having no relationship to the underlying regulatory problem.” *Covad Commc’ns Co. v. FCC*, 450 F.3d 528, 541 (D.C. Cir. 2006) (internal quotation marks omitted). Under this deferential standard of review, petitioners’ challenge to the traffic ratios is unavailing.

In crafting its new access stimulation tests, the FCC was “not required to identify the optimal [traffic ratios] with pinpoint precision.” *WorldCom*, 238 F.3d at 461. “When a line has to be drawn, ... the Commission is authorized to make a rational legislative-type judgment,” and the Court must uphold the Commission’s choice of a particular traffic ratio “[i]f the figure selected by the agency reflects its informed discretion, and is neither patently unreasonable nor a dictate of unbridled whim.” *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1242 (D.C. Cir. 2007) (internal quotation marks omitted). “The relevant question is whether the agency’s numbers are within a zone of reasonableness, not whether its numbers are precisely right.” *WorldCom*, 238 F.3d at 462 (internal quotation marks omitted). In this case, the traffic ratios chosen by the Commission are reasonable.

“[I]n an effort to be conservative and not overbroad,” the Commission established “higher” traffic ratios for the alternate access stimulation tests “than the 3:1 ratio” it had used to define access stimulation in 2011. *Order* ¶ 47 (JA___). It reasonably concluded that a 6:1 traffic ratio—twice the ratio

required by the original definition of access stimulation—would provide “a clear indication” that competitive carriers are engaged in access stimulation “even absent a revenue sharing agreement,” *ibid.*, but would also be high enough to ensure that carriers “that have traffic growth solely due to the development of their communities” would not be misidentified as access stimulators, *id.* ¶ 48 (JA___).

In the Commission’s judgment, an even higher traffic ratio was needed to define access stimulation by rate-of-return carriers. Although there was no “evidence” that any such carriers “are currently engaged in access stimulation,” the record showed that a “significant number” of rate-of-return carriers “would trip the 6:1 trigger” applicable to competitive carriers. *Order* ¶ 50 (JA___). The Commission also determined that there are “structural disincentives for rate-of-return [carriers] to engage in access stimulation.” *Ibid.* For these reasons, the agency concluded that it would be “reasonable” to use a 10:1 traffic ratio to define access stimulation by rate-of-return carriers under the second alternate test. *Ibid.*

The Commission selected the traffic ratios for its alternate tests based on “its informed discretion.” *Vonage*, 489 F.3d at 1242 (internal quotation marks omitted). Those ratios fall well “within a zone of reasonableness.” *WorldCom*, 238 F.3d at 462 (internal quotation marks omitted).

IV. THE *ORDER* DOES NOT INFRINGE ON THE AUTHORITY OF STATE COMMISSIONS UNDER SECTION 252 TO DETERMINE THE “NETWORK EDGE”

When the Tenth Circuit affirmed the FCC’s authority under Section 251(b)(5) to adopt a bill-and-keep methodology, it rejected arguments that bill-and-keep would intrude on the authority of State commissions under Section 252(d)(2) “to arbitrate ‘terms and conditions’ in reciprocal compensation” agreements between carriers. *In re FCC 11-161*, 753 F.3d at 1126 (quoting 47 U.S.C. § 252(d)(2)). The court found that “even under bill-and-keep arrangements, states must arbitrate the ‘edge’” of a carrier’s network—*i.e.*, “the points [on a network] ‘at which a carrier must deliver terminating traffic to avail itself of bill-and-keep.’” *Ibid.* (quoting *2011 Order*, 26 FCC Rcd at 17922 ¶ 776).

As the Tenth Circuit recognized, a reciprocal compensation regime that “shifts the recovery of costs from carriers to end users” does not impair “a state’s ability to determine [the network] edge” under Section 252. *Order* ¶ 105 (JA ___). Likewise, the FCC’s decision to shift “the financial responsibility” for delivering traffic “to an access-stimulating [carrier’s] end office” from long-distance carriers to the access-stimulating carrier “does not interfere with” the authority of State commissions under Section 252 to arbitrate the terms and conditions of reciprocal compensation agreements

between carriers, including the designation of the network edge. *Ibid.*

Consistent with the FCC's statements regarding the "network edge" in the *2011 Order*, "states continue to enjoy authority to arbitrate" and designate "the points 'at which a carrier must deliver terminating traffic to avail itself of bill-and-keep'" under a reciprocal compensation agreement. *In re FCC 11-161*, 753 F.3d at 1126 (quoting *2011 Order*, 26 FCC Rcd at 17922 ¶ 776). Thus, there is no merit to petitioners' assertion that the *Order* "effectively redefines" the network edge "without regard to prior Commission policy."

Br. 51.¹⁴

¹⁴ Petitioners also argue that the Commission "fixed Northern Valley's Network Edge" by rejecting Northern Valley's revised tariff in a separate proceeding. Br. 53 (citing *N. Valley Commc'ns, LLC*, 35 FCC Rcd 6198 (2020), *pet. for review pending*, *N. Valley Commc'ns, LLC v. FCC* (D.C. Cir. No. 20-1287)). That is incorrect. In ruling that Northern Valley's tariff was unlawful under Section 201(b), the FCC neither fixed Northern Valley's network edge nor precluded State commissions from setting the edge when arbitrating the terms of agreements negotiated by Northern Valley under Section 252. Instead, the FCC rightly rejected Northern Valley's attempt to use the tariffing process to set its network edge unilaterally. *See N. Valley*, 35 FCC Rcd at 6207-15 ¶¶ 23-37. That reasonable decision was not based on any improper bias against rural competitive carriers, as petitioners wrongly suggest (Br. 50).

V. EVENTS THAT OCCURRED AFTER THE RULES WERE ADOPTED FALL OUTSIDE THE SCOPE OF THIS CASE; IN ANY EVENT, THEY DO NOT SHOW ERROR

Petitioners argue that the FCC's conduct after issuing the *Order* demonstrates that the *Order* is arbitrary and capricious. Specifically, they contend that the Commission's handling of subsequent waiver requests shows that the rules treat similarly situated parties differently. Br. 44-51. This argument falls outside the scope of this case (a pre-enforcement facial challenge to FCC rules) because it concerns events that occurred after the agency adopted the *Order*. In addition, the argument was not preserved for appeal because it was not first presented to the Commission. *See* 47 U.S.C. § 405(a). In any event, the argument fails on the merits.

1. It is well settled that “the focal point for judicial review” of agency action under the APA “should be the administrative record already in existence, not some new record made initially in the reviewing court.” *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam); *see also Baptist Mem'l Hosp.-Golden Triangle v. Sebelius*, 566 F.3d 226, 229-30 (D.C. Cir. 2009). This Court “normally” does “not take into account ... non-record

information” that becomes available “subsequent to the promulgation of [a] rule.” *COMPTTEL v. FCC*, 978 F.3d 1325, 1334 (D.C. Cir. 2020).¹⁵

Petitioners ask the Court to deviate from its normal practice in this case by considering waiver orders issued by the Commission’s staff months after the FCC promulgated the new rules. In support of their extraordinary request, petitioners cite *Amoco Oil Co. v. EPA*, 501 F.2d 722, 729 (D.C. Cir. 1974). In that case, however, the Court warned that “[a] reviewing court must tread cautiously in considering events occurring subsequent to promulgation of a rule” because “such events did not inform the agency decision-making which is the subject of review.” *Id.* at 729 n.10.

Moreover, the Court in *Amoco Oil* considered post-rulemaking events for the limited purpose of assessing “the truth or falsity of agency predictions.” *Amoco Oil*, 501 F.2d at 729 n.10. As the Court later emphasized, “[t]he exception made in *Amoco Oil* was quite narrow.” *Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 920 (D.C. Cir. 2008). Petitioners’ claim does not fall within that narrow exception because it does not involve a

¹⁵ The waiver orders and other documents appended to petitioners’ brief are not part of the record because they postdate the *Order*. The FCC agreed that petitioners could include these post-*Order* documents in an addendum to their brief. *See* Br. 45 n.5. But the Commission has not stipulated that these documents are part of the administrative record.

challenge to the accuracy of FCC predictions. Accordingly, the Court is “bound on review to the record that was before the agency at the time it made its decision.” *Id.* at 919; *see also Rural Cellular Ass’n*, 588 F.3d at 1107; *Fresno Mobile Radio*, 165 F.3d at 971.

In arguing that subsequent events justify reversal of the *Order*, petitioners ignore the distinction between a pre-enforcement facial challenge to FCC rules and a challenge to the agency’s application of those rules. *See Cellco P’ship v. FCC*, 700 F.3d 534, 549 (D.C. Cir. 2012); *Am. Family Ass’n v. FCC*, 365 F.3d 1156, 1168 (D.C. Cir. 2004). This case involves a facial challenge to the new access stimulation rules. If petitioners wish to challenge the Commission’s enforcement of those rules (including the grant or denial of waiver requests), they can petition for review of future FCC orders applying (or waiving) the rules.

There is an additional reason for the Court to decline to consider petitioners’ argument regarding subsequent events. That argument was never presented to the Commission in the proceeding below. Consequently, petitioners are precluded from raising the issue here. *See* 47 U.S.C. § 405(a); *Nat’l Lifeline Ass’n*, 2020 WL 7511124, *7 (the Court “will not review arguments that have not first been presented to the Commission”).

2. In any case, the subsequent events cited by petitioners do not support their contention that the rules treat similarly situated parties differently. When the FCC's Wireline Competition Bureau granted Inteliquent's request for a waiver of the rules, it refused to grant a blanket waiver to all carriers serving conference calling platforms (including petitioners). Petitioners assert that the Commission acted arbitrarily by waiving the rules for Inteliquent but not for them. This argument rests on the false premise that petitioners are "similarly situated" to Inteliquent. Br. 45-49.

In the *Order*, the FCC stated that if a local carrier "*not engaged in arbitrage*" experiences "a change in its traffic mix" such that "its traffic will exceed a prescribed terminating-to-originating traffic ratio" under the new rules, the carrier "may request a waiver." *Order* ¶ 53 (JA ___ - ___) (emphasis added). Inteliquent met these waiver criteria. Petitioners have not even attempted to show that they do.

In March 2020, Inteliquent requested a temporary waiver because it was experiencing a surge in terminating traffic to its teleconferencing customers and a decline in originating traffic from its business customers due to the COVID-19 pandemic. With millions of people working and attending school from home, Inteliquent anticipated that the massive shift in call traffic

patterns would cause its traffic ratio to trip the access stimulation trigger under the new rules. *Petition of Onvoy d/b/a Inteliquent, Inc. for Temporary Waiver of Section 61.3(bbb)(1)(ii) of the Commission's Rules*, 35 FCC Rcd 2934, 2935-36 ¶¶ 6-8 (Wireline Comp. Bur. 2020) (*Waiver Order*). In its waiver petition, Inteliquent documented that its traffic ratios before March 2020 “were sufficiently balanced so that it did not meet the definition of an access-stimulating ... carrier.” *Id.* at 2938 ¶ 14.

The Wireline Competition Bureau granted Inteliquent's petition for a temporary waiver after determining (among other things) that Inteliquent showed good cause for the waiver and that it was “not stimulating traffic,” was “not engaged in access arbitrage,” and had “not previously been identified as an access-stimulating local exchange carrier.” *Waiver Order*, 35 FCC Rcd at 2938 ¶¶ 14-15.¹⁶

¹⁶ The Bureau limited the waiver “to Inteliquent's preexisting customers” to “ensure that the waiver is tied to the unexpected market conditions and does not provide an opportunity for Inteliquent to avoid the financial consequences of adding any access-stimulating customers.” *Waiver Order*, 35 FCC Rcd at 2938 ¶ 14. Although the original waiver expired on June 1, 2020, the Bureau stated that Inteliquent could seek renewal of the waiver “for additional, temporary intervals if Inteliquent's terminating-to-originating traffic ratio continues to exceed 6:1 due to the public health crisis.” *Id.* at 2939 ¶ 17. Inteliquent has requested and obtained several waiver renewals. See *Petition of Onvoy d/b/a Inteliquent, Inc. for Temporary Waiver of Section 61.3(bbb)(1)(ii) of the Commission's Rules*, DA 20-1486, ¶¶ 2-3 (Wireline Comp. Bur. Dec. 16, 2020).

In its order granting Inteliquent’s temporary waiver request, the Bureau rejected petitioner “Free Conferencing’s suggestion” that a blanket waiver should be granted for “all conferencing traffic” during the pandemic. *Waiver Order*, 35 FCC Rcd at 2939 ¶ 16. As the Bureau explained, not all carriers serving conference calling platforms are “similarly situated” to Inteliquent; some of them have a history of engaging in access stimulation. *Ibid.* A blanket waiver would allow access-stimulating carriers “to continue the schemes the Commission sought to disrupt by adopting” the *Order*. *Ibid.* The Bureau said that “in considering future waiver requests” during the pandemic, it would “remain vigilant” to ensure that access-stimulating carriers do not “take advantage of this national emergency to avoid obligations the Commission’s rules place on their business practices.” *Ibid.*¹⁷

Petitioners claim that the FCC’s treatment of waiver requests “reveals that the *Order* was intended solely to target a disfavored group” of rural

¹⁷ Shortly after the Bureau granted Inteliquent’s waiver request, petitioner CarrierX (also known as Free Conferencing) filed a petition for waiver. A copy of that petition is included in the addendum to petitioners’ brief. CarrierX asserted that it should receive a waiver “for the same reasons” that the Bureau granted a waiver to Inteliquent. Free Conferencing Waiver Petition, April 1, 2020, at 1. It also argued that pandemic-related waiver requests should not be denied “based on whether a [carrier] was an ‘access stimulator’ before the COVID-19 crisis.” *Id.* at 3. The Commission has not yet acted on CarrierX’s waiver petition.

competitive carriers and conference calling providers. Br. 48. This argument badly mischaracterizes the Commission's new rules. The new access stimulation test for competitive carriers applies uniformly to all such carriers, regardless of "the content or type of traffic" or "the size or location of the access-stimulating carrier." *Order* ¶ 101 (JA___). That test is reasonably designed to identify carriers that engage in the harmful practice of access stimulation. There is nothing improper about "targeting" such carriers. The new rules target access-stimulating carriers in the same way that laws against tax evasion target tax cheats.

CONCLUSION

The Court should deny the petitions for review.

MAKAN DELRAHIM
ASSISTANT ATTORNEY GENERAL

MICHAEL F. MURRAY
DEPUTY ASSISTANT ATTORNEY
GENERAL

ROBERT B. NICHOLSON
ANDREW N. DELANEY
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

December 28, 2020

Respectfully submitted,

THOMAS M. JOHNSON, JR.
GENERAL COUNSEL

ASHLEY S. BOIZELLE
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH
DEPUTY ASSOCIATE GENERAL
COUNSEL

/s/ James M. Carr

JAMES M. CARR
COUNSEL

FEDERAL COMMUNICATIONS
COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1762

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s/ James M. Carr

James M. Carr
Counsel

Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740

CERTIFICATE OF FILING AND SERVICE

I, James M. Carr, hereby certify that on December 28, 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.

s/ James M. Carr

James M. Carr
Counsel

Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740

Statutory Addendum

47 U.S.C. § 201	2
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47 C.F.R. § 61.3(bbb)	15

47 U.S.C. § 201
§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C. § 251
§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty--

- (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and
- (2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty--

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier

demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether--

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(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.

(f) Exemptions, suspensions, and modifications**(1) Exemption for certain rural telephone companies****(A) Exemption**

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--

(A) is necessary--

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996, under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996, and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) "Incumbent local exchange carrier" defined

(1) Definition

For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that--

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if--

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

47 U.S.C. § 252

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--

- (i) the unresolved issues;
- (ii) the position of each of the parties with respect to those issues; and
- (iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

- (1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;
- (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
- (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section--

(A) shall be--

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and

termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed--

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject--

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that--

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a), or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b), the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply

with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission--

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) and each statement approved under subsection (f) available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) “Incumbent local exchange carrier” defined

For purposes of this section, the term “incumbent local exchange carrier” has the meaning provided in section 251(h) of this title.

47 U.S.C. § 405(a)

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

- (a)** After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original

taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

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47 C.F.R. § 61.3(bbb)

§ 61.3 Definitions.

* * *

(bbb) Access Stimulation.

(1) A Competitive Local Exchange Carrier serving end user(s) engages in Access Stimulation when it satisfies either paragraph (bbb)(1)(i) or (ii) of this section; and a rate-of-return local exchange carrier serving end user(s) engages in Access Stimulation when it satisfies either paragraph (bbb)(1)(i) or (iii) of this section.

(i) The rate-of-return local exchange carrier or a Competitive Local Exchange Carrier:

(A) Has an access revenue sharing agreement, whether express, implied, written or oral, that, over the course of the agreement, would directly or indirectly result in a net payment to the other party (including affiliates) to the agreement, in which payment by the rate-of-return local exchange carrier or Competitive Local Exchange Carrier is based on the billing or collection of access charges from interexchange carriers or wireless carriers. When determining whether there is a net payment under this part, all payments, discounts, credits, services, features, functions, and other items of value, regardless of form, provided by the rate-of-return local exchange carrier or Competitive Local Exchange Carrier to the other party to the agreement shall be taken into account; and

(B) Has either an interstate terminating-to-originating traffic ratio of at least 3:1 in a calendar month, or has had more than a 100 percent growth in interstate originating and/or terminating switched access minutes of use in a month compared to the same month in the preceding year.

(ii) A Competitive Local Exchange Carrier has an interstate terminating-to-originating traffic ratio of at least 6:1 in an end office in a calendar month.

(iii) A rate-of-return local exchange carrier has an interstate terminating-to-originating traffic ratio of at least 10:1 in an end office in a three calendar month period and has

500,000 minutes or more of interstate terminating minutes-of-use per month in the same end office in the same three calendar month period. These factors will be measured as an average over the three calendar month period.

(2) A Competitive Local Exchange Carrier will continue to be engaging in Access Stimulation until: For a carrier engaging in Access Stimulation as defined in paragraph (bbb)(1)(i) of this section, it terminates all revenue sharing agreements covered in paragraph (bbb)(1)(i) of this section and does not engage in Access Stimulation as defined in paragraph (bbb)(1)(ii) of this section; and for a carrier engaging in Access Stimulation as defined in paragraph (bbb)(1)(ii) of this section, its interstate terminating-to-originating traffic ratio falls below 6:1 for six consecutive months, and it does not engage in Access Stimulation as defined in paragraph (bbb)(1)(i) of this section.

(3) A rate-of-return local exchange carrier will continue to be engaging in Access Stimulation until: For a carrier engaging in Access Stimulation as defined in paragraph (bbb)(1)(i) of this section, it terminates all revenue sharing agreements covered in paragraph (bbb)(1)(i) of this section and does not engage in Access Stimulation as defined in paragraph (bbb)(1)(iii) of this section; and for a carrier engaging in Access Stimulation as defined in paragraph (bbb)(1)(iii) of this section, its interstate terminating-to-originating traffic ratio falls below 10:1 for six consecutive months and its monthly interstate terminating minutes-of-use in an end office falls below 500,000 for six consecutive months, and it does not engage in Access Stimulation as defined in paragraph (bbb)(1)(i) of this section.

(4) A local exchange carrier engaging in Access Stimulation is subject to revised interstate switched access charge rules under § 61.26(g) (for Competitive Local Exchange Carriers) or § 61.38 and § 69.3€(12) of this chapter (for rate-of-return local exchange carriers).

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