ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1471

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

INTELIQUENT, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of an Order of
the Federal Communications Commission

BRIEF FOR RESPONDENTS

RICHARD A. POWERS
Acting Assistant Attorney General

ROBERT B. NICHOLSON
PATRICK M. KUHLMANN
Attorneys

U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
950 Pennsylvania Ave. NW
Washington, DC 20530

P. MICHELE ELLISON
Acting General Counsel

JACOB M. LEWIS
Associate General Counsel

SARAH E. CITRIN
Counsel

FEDERAL COMMUNICATIONS COMMISSION
45 L Street NE
Washington, DC 20554
(202) 418-1740
fcclitigation@fcc.gov

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

(B) **Rulings Under Review.** The petition for review challenges the following order of the Federal Communications Commission: *8YY Access Charge Reform*, 35 FCC Rcd 11594 (2020), *reprinted at* JA ___–___. The version of this order published in the FCC Record includes corrections that the FCC made in an erratum dated October 30, 2020. Changes from a second erratum, dated November 27, 2020, were limited to an appendix and were separately included in the FCC Record as *8YY Access Charge Reform*, 35 FCC Rcd 13176 (2020), *reprinted at* JA ___–___.

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

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GLOSSARY

APA	Administrative Procedure Act
FCC	Federal Communications Commission

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BRIEF FOR RESPONDENTS

INTRODUCTION

For decades, the Federal Communications Commission has administered a complex system of "intercarrier compensation," under which long-distance telephone companies pay local ones to transmit traditional wireline telephone calls. Since 2011, the Commission has taken numerous actions to modernize this outdated system and curb the harmful

arbitrage that it invites. This Court and others have repeatedly upheld those actions.[1]

In the order under review, the Commission addressed the intercarrier compensation rules governing toll-free calling services.[2] For an interim period, while it considers additional reforms, the Commission adopted a uniform, nationwide rate cap for "tandem switching and transport charges" for toll-free calls: charges for transmitting calls between local and long-distance networks. Petitioner Inteliquent, Inc. contends that the agency should have set this cap at $0.0017 per minute. But the Commission reasonably concluded that a $0.001 per-minute cap will better deter arbitrage and otherwise serve the public interest.

JURISDICTIONAL STATEMENT

The *Order* was released on October 9, 2020. A summary of the *Order* appeared in the Federal Register on November 27, 2020. 85 Fed. Reg. 75,894. Inteliquent timely filed its petition for review within 60 days of that publication, on November 30, 2020. *See* 28 U.S.C. § 2344; 47 U.S.C.

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[1] *E.g.*, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014); *N. Valley Commc'ns, LLC v. FCC*, 717 F.3d 1017 (D.C. Cir. 2013).

[2] *See 8YY Access Charge Reform*, 35 FCC Rcd 11594 (*Order*), *app'x corrected,* 35 FCC Rcd 13176 (2020), *reprinted at* JA ___–___.

§ 405(a). This Court has jurisdiction to review final orders of the FCC under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

QUESTION PRESENTED

Whether, as an interim measure, the FCC reasonably capped the rate that carriers may tariff for toll-free tandem switching and transport charges at $0.001 per minute.

PERTINENT STATUTES AND REGULATIONS

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

STATEMENT OF THE CASE

A. The Communications Act of 1934

Under the Communications Act of 1934, the FCC has a duty to ensure that "[a]ll charges . . . for and in connection with [interstate telecommunications] service" are "just and reasonable." 47 U.S.C. § 201(b). Except where the Commission has directed otherwise, common carriers list their interstate telecommunications services and rates in "schedules of charges"—commonly known as "tariffs"—on file with the agency. *Id.* § 203.

B. Intercarrier Compensation and Toll-Free Calling

Historically, telephone service was provided over copper networks, using a circuit-switched technology known as "time-division multiplexing."

In that context, long-distance calls "originated" on the network of a local telephone company. *See Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC (NARUC)*, 737 F.2d 1095, 1104 (D.C. Cir. 1984). The local carrier would transfer or "switch" the call off its own network and transport it to the network of a long-distance carrier. *See id.* From the long-distance network, the call would then pass back through local switches onto the network of the recipient's local telephone company, which would deliver, or "terminate," the call to the recipient. *See id.* Long-distance carriers reimbursed local ones for this network access, then recovered the cost of those payments from long-distance callers. *See id.* at 1104–05.

For many years, long-distance calls were expensive. *Order* ¶ 5 (JA ___). Toll-free calling, however, allowed "consumers to [reach] businesses and other institutions without worrying about [that] cost." *Id.* Instead of requiring the caller to pay long-distance charges, the called party would pay, and its long-distance carrier would pay the associated charges for access to the caller's local network. *See id.* ¶¶ 9–10 (JA ___).

From 1983 through 1990, the FCC regulated these "access charges" using a "rate-of-return" approach, under which carriers' rates rose or fell with their costs. *See Access Charge Reform*, 15 FCC Rcd 12962, 12966, 12968 ¶¶ 9, 13 (2000), *aff'd in part and rev'd in part*, *Tex. Office of Pub.*

Util. Counsel v. FCC, 265 F.3d 313 (5th Cir. 2001). At the time, most local telephone service was provided by "incumbent" carriers that succeeded to the local operations of the Bell System after its dissolution pursuant to an antitrust settlement. *See Core Commc'ns, Inc. v. FCC*, 592 F.3d 139, 141 (D.C. Cir. 2010).[3]

In 1990, the Commission decided to regulate the interstate rates of the largest incumbent carriers using a "price cap" approach. *Nat'l Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 178 (D.C. Cir. 1993); *see Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786, 6786 ¶ 1 (1990) (*1990 Price Cap Order*). Price cap regulation "severs the direct link between regulated costs and prices." *E.g.*, *Petition of AT&T for Forbearance under 47 U.S.C. § 160 from Enforcement of Certain of the Commission's Cost Assignment Rules*, 23 FCC Rcd 7302, 7306 ¶ 8 (2008) (*AT&T Forbearance Order*) (internal quotation marks omitted). Instead of deriving a rate based on an individual provider's costs, the regulator in a price cap system "sets a maximum price, and the [regulated] firm selects rates at or below the cap." *Nat'l Rural Telecom Ass'n*, 988 F.2d at 178. In this way, "[p]rice cap regulation" aims "to encourage carriers to improve

[3] The Bell System had been the monopoly provider of local and long-distance telecommunications in the United States.

their efficiency . . . , invest efficiently in new plant and facilities, and develop and deploy innovative service offerings" under "price ceilings [set] at reasonable levels." *AT&T Forbearance Order*, 23 FCC Rcd at 7306 ¶ 8.

C. The Telecommunications Act of 1996 and the Benchmark Rule for Competitive Carriers

In the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, Congress opened local telecommunications markets to competition. In doing so, it obligated local telephone companies—both incumbents and new entrants—"to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). Under that new law, local carriers could no longer collect access charges when originating calls. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16016 ¶ 1042 (1996), *subsequent history omitted*. But the 1996 Act made clear that the existing system of intercarrier compensation would remain in place until such time as the Commission "explicitly superseded" it. 47 U.S.C. § 251(g).

For an initial period after the 1996 Act, the FCC allowed new competitive entrants to set their own access charges largely without constraint. *See Access Charge Reform*, 16 FCC Rcd 9923, 9931 ¶ 21 (2001).

In 2001, however, the Commission concluded that competitive carriers exercised market power over access service to the detriment of consumers. *Id.* at 9938 ¶ 39.[4] To limit that power, the Commission adopted a "benchmark rule," 47 C.F.R. § 61.26, which capped competitive carriers' tariffed access rates at no more than the tariffed rates for equivalent services by the incumbent carrier in the same geographic area, *see Access Charge Reform*, 16 FCC Rcd at 9938–40 ¶¶ 40–44. Competitive carriers remained free to negotiate higher fees from long-distance carriers through voluntary agreements. *Id.* at 9938 ¶ 40.

D. 2011 Intercarrier Compensation Reforms

In the years after Congress enacted the 1996 Act, "[t]he communications marketplace . . . dramatically transformed." *Modernizing Unbundling and Resale Requirements in the Era of Next-Generation Networks and Services*, 35 FCC Rcd 12425, 12434 ¶ 22 (2020). Among other changes, wireless voice services became "vastly more prominent," and consumers increasingly began to purchase wireline voice services from

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[4] The Commission explained that "once an end user decides to take service from a particular [competitive local telephone company], that [carrier] controls an essential component of the system that provides [long-distance] calls, and it becomes [a] bottleneck for [long-distance providers] wishing to complete calls to, or carry calls from, that end user." *Access Charge Reform*, 16 FCC Rcd at 9935 ¶ 30.

companies that use Internet Protocol technologies and fiber lines to transmit calls. *Connect America Fund*, 26 FCC Rcd 4554, 4559 ¶ 8 (2011) (*2011 Notice*).

In this new marketplace, the FCC's traditional intercarrier compensation framework became outdated. Access charges "based on recovering the average cost of [a legacy] network, plus expenses, common costs, overhead, and profits," often "far exceed[ed] the incremental costs of carrying" a given call, *Connect America Fund*, 26 FCC Rcd 17663, 17962 ¶ 857 (JA ___) (2011) (*Transformation Order*), *corrected*, 27 FCC Rcd 4040 (2012); *see id.* ¶¶ 752–753 (JA ___–___). And while traditional local telephone companies benefitted from those payments, many of their new competitors could not. "[W]ireless carriers," for example, "generally [had to] recover all costs from their end users." *Petition of Qwest Corp. for Forbearance*, 25 FCC Rcd 8622, 8681–82 n.339 (2010). And carriers that transmitted calls using Internet Protocol lacked clear guidance as to "whether or what intercarrier compensation payments" they could collect. *2011 Notice*, 26 FCC Rcd at 4710 ¶ 507. Carriers thus continued "to maintain and invest in legacy" networks to ensure their continued ability to collect access charges, impeding innovation and frustrating the FCC's

statutory directive to promote advanced communications services. *Id.* at 4709–10 ¶ 506; *see* 47 U.S.C. § 1302(a).

To make matters worse, the traditional intercarrier compensation framework provided ample opportunities for arbitrage. Some carriers sought to increase their access charge revenue by "artificially inflat[ing] their traffic volumes." *2011 Notice*, 26 FCC Rcd at 4559 ¶ 7. Others tried to avoid intercarrier charges by concealing the source of voice traffic. *Id.* Such practices cost consumers "hundreds of millions of dollars annually." *Id.*

In a landmark 2011 order known as the "*Transformation Order*," the FCC announced a plan to replace its traditional intercarrier compensation rules with a "bill-and-keep" system. *See Transformation Order* ¶ 736 (JA ___). Under bill-and-keep, each carrier "bills" its own subscribers to recover the costs of its network and "keeps" the revenue. *Id.* ¶ 737 (JA ___).

The Commission made clear in the *Transformation Order* that bill-and-keep would be "the default methodology for all intercarrier compensation traffic." *Transformation Order* ¶ 736 (JA ___); *see id.* ¶ 817 (JA ___). But to minimize disruption, it provided for a "gradual" transition. *Id.* ¶ 739 (JA ___). The agency "focus[ed]" its initial reforms on access charges for call termination, which at the time were the source of "the

most pressing [arbitrage] problems." *Id.* And in a further notice of proposed rulemaking, it sought comment on how to transition originating access charges—including for toll-free calls—to bill-and-keep later. *Transformation Further Notice* ¶¶ 1298–1305 (JA ___–___).

E. The Rise of Arbitrage Involving Toll-Free Calling

The Commission's reforms in the *Transformation Order* dramatically reduced arbitrage involving "terminating" access charges. *See Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, 35 FCC Rcd 6223, 6226 ¶ 11 (2020). But with that avenue narrowed, carriers "increasingly exploit[ed] . . . arbitrage opportunit[ies]" inherent in the structure of toll-free access charges. 9/4/18 AT&T Comments 2 (JA ___).

Toll-free calling is susceptible to arbitrage because the party who initiates a call does not pay for it but still selects the local carrier that determines the associated access charges—which the called party's long-distance carrier has no choice but to pay. *See* 10/1/18 GCI Commc'n Corp Reply Comments 5 (JA ___). In this context, there is little incentive for local carriers (or their partners in providing access services) to minimize costs or lower rates. *See* 9/4/18 GCI Commc'n Corp. Comments 7 (JA ___).

The ability to charge access rates above incremental cost has prompted some carriers to "inefficiently route[] traffic long distances" so as

"to inflate the number of miles applied to the per-mile transport charge." 7/31/17 AT&T Comments 14 (JA ___). And regional variation in tandem switching rates under the existing access charge rules has led some carriers to establish themselves as call "aggregators" in regions with high access charges. 2/13/20 AT&T Letter 2 (JA ___). In this way, carriers "inflat[e] their charges relative to what [they] would have been able to charge in the . . . area where the call was actually placed." 9/4/18 AT&T Comments 8 (JA ___); *see Order* ¶¶ 18–19, 54 (JA ___–___, ___).

F. *Order* under Review

Although marketplace developments have now "largely eliminated separate [long-distance] toll charges for consumers," companies continue to regard toll-free calling as an important tool for branding and marketing. *Order* ¶ 5 (JA ___). As the FCC found in the *Order*, arbitrage under the existing toll-free access charge rules has thus caused a "wide variety of harms." *Id.* ¶ 41 (JA __) (quoting 1/13/20 AT&T Letter 3 (JA ___)).

Arbitrage has "raised costs for [toll-free] providers and . . . customers alike, ultimately burdening consumers." *Order* ¶ 3 (JA ___). Fraudulent calls have "tied up" phone lines, *id.* ¶ 41 (JA __), "caus[ed] unnecessary network congestion," *id.* ¶ 19 (JA __), and even "disrupt[ed] vital services," *id.* ¶ 3 (JA ___). Opportunities for arbitrage have also tended to "distort[]

network investment," *id.* ¶ 19 (JA ___), including by discouraging carriers from upgrading to Internet Protocol-based facilities and technology, *see id.* ¶¶ 4, 25, 62 (JA ___, ___, ___). In view of these harms, the FCC concluded in the *Order* that there was a "pressing need" for reform. *Id.* ¶ 41 (JA ___); *see id.* ¶¶ 2–4, 6 (JA ___–___).

The Commission reaffirmed its earlier plan to "ultimately transition[]" all originating access charges "to bill-and-keep." *Order* ¶ 74 (JA ___); *see id.* ¶¶ 4, 25, 53, 76 (JA ___, ___–___, ___, ___). And for "originating end office charges," which are fees for transmitting calls over the local network to the point of exchange with the next carrier in the call path, the Commission initiated that shift in the *Order*. *See id.* ¶¶ 26–34 (JA ___–___).

For the tandem switching and transport services at issue here, by contrast, the FCC determined that a full transition to bill-and-keep would be "premature." *Order* ¶¶ 53, 56 (JA ___–___). Long-distance carriers can obtain tandem switching and transport services either from local telephone companies or from third-party "alternative" or "intermediate" providers. *See An Evaluation of the Proposals in the FCC's Intercarrier Compensation Reform Docket Related to Tandem Transit Services*, 61 Fed. Commc'ns L.J. 325, 368–69 (2009). Because intermediate providers "do not

serve end customers" directly, the Commission explained, moving tandem switching and transport services to bill-and-keep in the *Order* would have required the agency to consider "how intermediate providers [would] be compensated" within the new framework. *Order* ¶ 53 (JA ___).

To curb the mounting arbitrage involving these services more quickly, the agency adopted a uniform, nationwide rate cap on an interim basis. *Order* ¶ 54 (JA ___) (internal quotation marks omitted); *see id.* ¶ 56 (JA ___). By this means, the Commission sought to address "the lack of uniformity in [existing] rate structures" and reduce rates to a level that will no longer invite competitive carriers to funnel traffic through "high rate areas" while it considers further reforms. *Id.* ¶ 54 (JA ___) (internal quotation marks omitted).

Long-distance carriers and intermediate providers widely agreed with this approach. *See Order* ¶ 54 (JA ___). But commenters proposed competing numbers for the uniform cap. *See id.* ¶ 63 (JA ___). USTelecom – The Broadband Association, a trade association whose members include both incumbent local telephone companies and long-distance carriers, proposed a "cap of $0.001 per minute." *Id.* ¶ 63 (JA ___). It described that rate as low enough to "address negative incentives" for arbitrage and high enough to "allow[] legitimate cost recovery." *Id.* ¶ 61

(JA ___) (quoting 2/25/20 USTelecom Letter 1 (JA __) and 6/5/20 USTelecom Letter 1 (JA ___)). Inteliquent, by contrast, proposed an alternative "cap of $0.0017 per minute, which it describe[d] as a national average tandem usage rate that it calculated using its own internal traffic data." *Id.* ¶ 63 (JA ___); *see* 12/21/17 Inteliquent Letter 1 (JA ___).

The Commission observed that Inteliquent had derived its proposal from rates that were benchmarked to the tariffed rates of incumbent carriers, "which in turn were based originally on cost studies." *Order* ¶ 63 (JA ___) (quoting 6/1/20 Inteliquent Letter 2 (JA ___)). But because those underlying cost studies were roughly "three decades old," and the "costs of providing telecommunications service" are "generally declining," the Commission concluded that the tariffed rates on which Inteliquent relied "almost certainly overstate[d] carriers' current costs." *Id.*

Without the benefit of reliable cost data from any party, the FCC concluded that adopting USTelecom's proposal for a $0.001 per-minute rate cap was "the most workable interim solution to addressing arbitrage." *Order* ¶ 61 (JA __). In the Commission's predictive judgment, based on a variety of considerations that it identified, a $0.001 per-minute rate cap would be adequately compensatory. *See id.* ¶¶ 61 & n.216, 63, 65 & n.236, 112 & n.375 (JA ___–___, ___). And the Commission was concerned that

continuing to allow carriers to tariff higher rates would "retard the transition to [Internet Protocol networks] by perpetuating" incentives for carriers to continue using legacy networks and circuit-switched technology so as to collect above-cost access charges. *Id.* ¶ 62 (JA ___).

STANDARD OF REVIEW

The "arbitrary-and-capricious standard" of the Administrative Procedure Act (APA) "requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021); *see* 5 U.S.C. § 706(2)(A). "Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency." *Prometheus*, 141 S. Ct. at 1158. A court's role is to "ensure[] that the agency has acted within a zone of reasonableness," including that it "has reasonably considered the relevant issues and reasonably explained the decision." *Id.*

Because "ratemaking is far from an exact science and involves policy determinations in which the [FCC] is acknowledged to have expertise, courts are particularly deferential when reviewing ratemaking orders." *Sw. Bell Tel. Co. v. FCC*, 168 F.3d 1344, 1352 (D.C. Cir. 1999) (internal quotation marks omitted). Courts likewise afford "particular deference to interim regulatory programs involving some exigency." *AT&T, Inc. v. FCC*,

886 F.3d 1236, 1246 (D.C. Cir. 2018). "That added deference reflects the reality that, during a transition period, an agency must make 'predictive judgments' and 'certainty is impossible.'" *Id.* (quoting *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009)).

SUMMARY OF THE ARGUMENT

1. The FCC's statutory duty to ensure "just and reasonable" rates, 47 U.S.C. § 201(b), does not require it to set rates based directly on costs. For the toll-free access services at issue here, the Commission could not have established cost-based rates because the record lacked reliable cost data. Inteliquent and USTelecom derived their competing rate cap proposals from different subsets of rate data, and the Commission explained its reasons for preferring to adopt USTelecom's proposal. This Court should defer to the agency's reasonable, predictive judgment that—until the Commission determines how best to implement a full bill-and-keep system —a $0.001 per-minute rate cap is the best means of deterring arbitrage and promoting technology transitions, while also ensuring that tandem switching and transport providers for toll-free calls receive reasonable compensation.

2. Inteliquent's criticisms of the *Order* are unavailing.

a. The FCC was not bound to rely on Inteliquent's evidence or adopt its proposed rate cap. Inteliquent calculated that cap using its current benchmarked rates, which are based on decades-old incumbent carrier cost studies. The Commission reasonably concluded that, because telecommunications costs have decreased over time, this connection to old cost studies did not credibly establish carriers' current costs.

b. In adopting USTelecom's proposed rate cap, the Commission did not abdicate its duty of independent judgment. The willingness of USTelecom's members to offer service within the proposed rate cap was only one of several factors that the Commission found persuasive. And in adopting the $0.001 per-minute rate cap, the Commission appropriately considered the methodology by which USTelecom derived it.

c. Inteliquent likewise fails to show that the Commission was required to set its interim rate cap by basing it on the average of a broader subset of carriers' rates. This Court's precedent does not demand that approach, and there was no basis in the record for the Commission to adopt it.

d. The Commission reasonably credited statements of competitive carrier Bandwidth, Inc. as bolstering the case for adopting USTelecom's proposal. Although Bandwidth is not a member of USTelecom, it agreed

that a $0.001 per-minute rate cap would more than cover carriers' costs. And as a company that collects tariffed switching and transport charges for toll-free (and other long-distance) calls, Bandwidth necessarily participates in the transmission of calls that originate or terminate in circuit-switched format.

e. The Commission's rate cap deserves particular deference as an interim measure towards a bill-and-keep regime. Although there remain questions concerning how best to ensure compensation for intermediate providers in a bill-and-keep system, the agency did not need to resolve those questions in this *Order*.

ARGUMENT

To end harmful and growing arbitrage, the FCC adopted a uniform, nationwide cap on tariffed access charges for tandem switching and transport services used to carry toll-free calls. Inteliquent does not disagree with that decision; on the contrary, it urged the agency to adopt just such a uniform cap. Instead, Inteliquent takes issue with the specific limit—$0.001 per minute—that the agency established, contending that a substantially higher limit of $0.0017 would be more appropriate. But as we show, the Commission reasonably determined that, until it can fully implement the planned transition of tandem switching and transport

services for toll-free calls to bill-and-keep, a $0.001 per-minute rate cap will better serve the public interest.

I. THE FCC'S RATE CAP IS REASONABLE.

As Inteliquent concedes (Br. 40), it is well established that the FCC can ensure "just and reasonable" rates, 47 U.S.C. § 201(b), without setting rates based directly on costs. The Commission may depart from cost-based ratemaking if it makes clear why that departure "is necessary and desirable in [the relevant] context." *Competitive Telecomms. Ass'n v. FCC*, 87 F.3d 522, 532 (D.C. Cir. 1996).

Here, the record provided no basis for the FCC to establish a cost-based rate. Notably, neither Inteliquent, its supporting intervenors, nor any of USTelecom's members supplied data concerning their own costs or those of any other carrier. *See Order* ¶¶ 61, 63, 112 n.375 (JA ___, ___, ___). Instead, Inteliquent and USTelecom each proposed that the Commission establish a "just and reasonable" rate cap using one of two sets of rate (not cost) data.

Inteliquent argued for a $0.0017 per-minute rate cap based on calculations that it made using its own "network minutes" and "tariffed rates." 12/21/17 Inteliquent Letter 1 (JA ___); *see id.* at 3 (JA ___). Inteliquent argued that, because its rates "mirror[ed]" those of incumbent

carriers, and because it "owns and operates a national tandem network," its rate structure and traffic mix offered "a reliable basis for calculating national rates." 12/21/17 Inteliquent Letter 1 (JA ___). Inteliquent acknowledged, however, that "[r]ate structures [among] incumbent . . . carriers" vary. *Id.* at 2 (JA ___).

USTelecom, for its part, urged the Commission to adopt a rate cap of $0.001 per minute, which it stated was "a reasonable midpoint" between the tariffed rates of its larger incumbent carrier members. 2/25/20 USTelecom Letter 5 (JA ___). Of those rates, USTelecom explained, the highest was $0.002828, and the lowest was $0.000418. *Id.*

Inteliquent's competing proposal, USTelecom observed, was "based on" inferences from the rates of "the very carriers [that] support[ed] USTelecom's proposal." 2/25/20 USTelecom Letter 5 (JA ___). There accordingly could be "no public policy justification," in USTelecom's view, for using Inteliquent's model to establish a rate cap higher than the $0.001 per-minute level at or below which "those same carriers" were willing to provide service. *Id.*

Confronted with these competing proposals, the FCC sought a rate cap low enough to deter arbitrage but high enough to ensure reasonable compensation for service providers. The Commission reasonably predicted

that USTelecom's proposed rate cap would better serve those dual aims, as well as promote the industry's transition to Internet Protocol-based systems. *See Order* ¶¶ 61–65 (JA ___–___).

In reaching that decision, the Commission relied in part on the willingness of USTelecom's members—and of competitive carrier Bandwidth—to offer service within the proposed $0.001 per-minute cap. *See Order* ¶¶ 61–62 (JA ___–___). The Commission also emphasized that many carriers, including competitive carriers, already provided service at "rates at and below $0.001." *Id.* ¶ 61 (JA ___) (quoting 5/11/2020 USTelecom Letter 1 (JA ___)). Indeed, the record included numerous examples of rates well beneath that limit. *See id.* n.216 (JA ___) (citing rates as low as $0.0001).

In view of this evidence, the Commission concluded that $0.001 per minute would be sufficient to "allow carriers, including intermediate tandem providers, a reasonable level of compensation for providing . . . switching and transport services" for toll-free calls, *Order* ¶ 62 (JA ___), "while [the agency] consider[s] how best to move all intercarrier compensation to a bill-and-keep regime," *id.* ¶ 65 (JA ___). Moreover, the Commission explained, "adopting a higher rate" might not effectively eliminate opportunities for arbitrage, and thus "could retard the transition

to [Internet Protocol-based] networks." *Id.* ¶ 62 (JA ___); *see id.* ¶ 55 (JA ___).

If, contrary to the Commission's prediction, a provider is unable to recover its legitimate costs within the new rate cap, it may request a waiver. *See* 47 C.F.R. § 1.3; *Order* ¶ 112 n.375 (JA ___). And as the Commission made clear, competitive carriers remain free under the *Order* to assess higher rates for tandem switching and transport services under negotiated, non-tariffed agreements with long-distance providers. *Id.* ¶ 25 n.72 (JA ___).

When, as here, an agency's action involves determinations that are "primarily of a judgmental or predictive nature," "complete factual support in the record for the [agency's] judgment or prediction is not possible or required." *E.g.*, *Melcher v. FCC*, 134 F.3d 1143, 1151 (D.C. Cir. 1998) (quoting *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 813–14 (1978)). Courts in such cases defer to the agency's "forecast of the direction in which future public interest lies." *Id.* (internal quotation marks omitted). Especially given the "broad discretion" that this Court affords the FCC "in selecting methods to make and oversee rates," *Sw. Bell*, 168 F.3d at 1352 (cleaned up), and the "particular deference" that it gives "to interim regulatory programs involving some exigency," *AT&T*, 886 F.3d at

1246, the Commission adequately justified its selection of the $0.001 per-minute rate cap.

II. INTELIQUENT'S CRITICISMS DO NOT UNDERMINE THE REASONABLENESS OF THE RATE CAP.

A. The Commission Did Not Ignore Inteliquent's Submissions in Support of a Higher Rate Cap.

Inteliquent contends (Br. 27) that, because the FCC did not "embrace Inteliquent's model" and its proposed $0.0017 per-minute rate cap, the agency has "unreasonably disregarded the only [relevant] empirical analysis" in the record and failed to "articulate a satisfactory explanation" for the $0.001 per-minute rate cap.

The Commission, however, did not "ignore" (Br. 27) or "refus[e] to consider" (Br. 30) any of the evidence or arguments that Inteliquent offered in support of a $0.0017 per-minute rate cap. *See Order* ¶ 63 (JA ___). In addressing Inteliquent's proposed rate, the Commission correctly characterized it as derived from Inteliquent's "own internal traffic data." *Id.* That data encompasses both Inteliquent's minutes of use and its current tariffed rates, which the Commission recognized were benchmarked to "those charged by the largest [incumbent local exchange carriers]." *Id.*; *see* 3/31/20 Inteliquent Letter 3 (JA ___); 12/21/17 Inteliquent Letter 1 (JA ___).

Having acknowledged this, the Commission reasonably explained why Inteliquent's proposed rate was nonetheless "unlikely to reflect" incumbent carriers' "current costs." *Order* ¶ 63 (JA ___). Although the incumbent rates to which Inteliquent benchmarked "were based originally on cost studies," "those cost studies" were now roughly "three decades old." *Id.*; *see supra* pp. 5–6. Because with technological improvements the cost of providing telecommunications services has historically decreased with time, *see id.*, and given the evidence that many providers currently offer tandem switching and transport services for well less than $0.001, *see id.* ¶¶ 61–63 (JA ___–___), the Commission reasonably concluded that the rates from which Inteliquent derived its proposed rate cap "almost certainly" exceeded "carriers' current costs," *id.* ¶ 63 (JA ___).[5]

Inteliquent responds (Br. 29) that, because the current price cap carrier rates on which it based its model are tariffed, they are "presumed

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[5] Notably, although the agency's price cap formula originally included an annual "productivity" offset, *see Order* ¶ 63 n.226, the Commission has since abandoned this offset, *see Transformation Order* ¶ 881 (JA ___). As a result, for most incumbent carriers, the Commission has not imposed any downward adjustment on the price cap rates relevant here since at least 2004. *See id.*

to be just and reasonable."[6] But when price cap carriers tariff rates that fall within the permitted price caps, they are not required to supply traditional cost-support data. *E.g.*, *Policy and Rules Concerning Rates for Dominant Carriers*, 4 FCC Rcd 2873, 2925 ¶ 107 (1989). Accordingly, contrary to what Inteliquent suggests, the presumption of reasonableness that attaches under the FCC's "streamlined" tariff review process, *see 1990 Price Cap Order*, 5 FCC Rcd at 6788 ¶ 12, does not involve any consideration of costs. And because the premise of price cap regulation is that carriers will reduce their costs to increase their profit within the permitted rate ceiling, *e.g.*, *Verizon Tel. Cos. v. FCC*, 453 F.3d 487, 490 (D.C. Cir. 2006); *see supra* pp. 5–6, the Commission reasonably concluded that carriers' current tariffed rates likely exceed their current costs.

B. The Commission Did Not "Uncritically Rely" on USTelecom's Proposal.

Contrary to Inteliquent's claim (Br. 32), the agency did not fail to analyze the support underlying USTelecom's proposal. The Commission correctly described USTelecom's proposed rate as reflecting an "approximate[] . . . midpoint" between the lowest and highest existing rates of USTelecom's "Regional Bell Operating Company" members. *Order*

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[6] Inteliquent's model excluded "charges for traffic from rate-of-return carrier end offices." 12/21/17 Inteliquent Letter 2 n.3 (JA ___).

¶ 61 (JA __).[7] And in the *Order*, the Commission specifically cited to a portion of USTelecom's proposal that identified the companies with the highest and lowest rates as CenturyLink (with a rate of $0.002828) and Southwestern Bell Telephone Company (with a rate of $0.000418). *See id.* ¶ 61 n.217 (JA ___) (quoting 2/25/20 USTelecom Letter 5 & nn.18 & 19 (JA ___)). That portion of the proposal also included links to those companies' tariffs, which corroborated the stated rates. *See* 2/25/20 USTelecom Letter 5 & nn.18 & 19 (JA ___).

Inteliquent's principal criticism of USTelecom's underlying proposal—that USTelecom "provided no information of its own regarding the *cost* of providing tandem services," Br. 33—applies equally to Inteliquent's proposal. Using data that likely overestimated costs, Inteliquent proposed a comparatively high rate cap not assured to curb arbitrage. *See Order* ¶¶ 62–63 (JA ___–___). USTelecom's proposal, while not mathematically precise, had the backing of a large and varied group of industry stakeholders, and it seemed better calibrated to deter arbitrage

[7] The Regional Bell Operating Companies are former subsidiaries of the integrated Bell System that became independent upon its dissolution. Originally seven in number, after mergers they are now Verizon, AT&T—including its subsidiary Southwestern Bell—and CenturyLink (recently renamed "Lumen").

and promote the use of Internet Protocol-based systems. *See id.* ¶¶ 61–63 (JA ___–___). For these reasons, the Commission rationally, not "uncritically," chose the USTelecom proposal.

C. The Commission Was Not Required to Establish a Rate Cap Using Carriers' Average Rates.

Inteliquent also argues (Br. 35–37) that the Commission's rate cap is unreasonable because it "was not based on an industry-wide average [rate] or even on an average [rate] of all USTelecom members." But in the context of this case, the Commission could not readily have used an averaging approach, and it reasonably did not do so.

To begin with, as Inteliquent itself has elsewhere recognized, carriers' "disparate rate structures" would make it "difficult" to use a broad range of carriers' rates on a single rate element, such as tandem switching, to derive a meaningful average. 12/21/17 Inteliquent Letter 2 (JA ___). For example, some carriers might choose to tariff a lower per-minute rate for tandem switching that they "offset" with higher one-time charges for another component of toll-free access service (such as queries to a toll-free number database), or "vice versa." *Id.* It was on this basis that Inteliquent urged the Commission to rely on a weighted average of its own rate data, which it argued was representative of carriers more generally,

see id. at 1 (JA ___), but which the Commission reasonably recognized as a calculation specific to Inteliquent, *see Order* ¶ 63 (JA ___). No commenter presented the Commission with an averaging analysis for a broader subset of provider rates, and the Commission was not required "to conduct its own empirical . . . stud[y]" where commenters had not. *Prometheus*, 141 S. Ct. at 1160.

Contrary to Inteliquent's contention (Br. 46), this Court's decision in *Global Tel*Link v. FCC*, 866 F.3d 397 (D.C. Cir. 2017), does not suggest that the Commission was required to employ a broader data set here. In *Global Tel*, the Court disapproved the FCC's use of weighted averaging to set a rate cap under a statutory provision (not at issue here) that requires the agency to ensure that providers of "inmate telephone service in correctional institutions," 47 U.S.C. § 276(d), are "fairly compensated for each and every completed . . . call," *id.* § 276(b)(1)(A); *see* 866 F.3d at 414. An underlying premise of the agency's averaging approach in *Global Tel* was that "cost discrepancies among providers" arose from considerations of efficiency. *See id.* at 415. The Court held that the Commission had not adequately established that premise, based on data from providers that "represent[ed] less than one percent of the industry," when there was contrary evidence in the record that the agency had not addressed. *Id.*

Here, unlike in *Global Tel*, although Inteliquent argues (Br. 36) that "USTelecom's proposed tandem rate is not indicative of cost-based rates for the rest of the industry," there is no evidence for that proposition that the Commission has failed to address. As we have noted, Inteliquent did not provide any data concerning its own costs (as opposed to rates), and it stops conspicuously short of asserting that the $0.001 rate is below cost. *See, e.g.*, Br. 41–42 (stating only that "other parties" argued before the agency that a $0.001 per-minute rate would not cover their costs). And although amici curiae in support of Inteliquent do assert that the FCC's rate cap is "below[]cost," *e.g.*, Intrado Br. 6, they likewise supply no cost data to substantiate that claim, *see id.* at 6–12.

Inteliquent argues that the Commission's approach did not adequately address arguments that "USTelecom's proposed rate would not cover the costs of a variety of tandem providers, including many rural rate-of-return carriers." Br. 36 (cleaned up). But with respect to the claim of the "ACAM Broadband Coalition" that a rate of $0.001 per minute "would not sufficiently compensate many rural [rate-of-return carriers] for their costs," 5/13/20 ACAM Letter 2 (JA ___), the Commission reasonably explained that the Coalition neither substantiated that claim with any data, nor "reconcile[d]" it with the willingness of USTelecom's rate-of-

return members to accept a $0.001 per-minute cap. *Order* ¶ 65 n.236 (JA ___).[8] And the Commission reasonably regarded the $0.00411 per-minute rate of Aureon as an apparent outlier better addressed in the context of a waiver proceeding. *See id.* ¶¶ 42 n.141, 112 n.375 (JA ___, ___–___).[9]

Insofar as Inteliquent (Br. 35–36) and its supporting amici (Intrado Br. 5–6) contend that USTelecom might have intentionally proposed a below-cost rate for tandem switching and transport services, that theory is not substantiated in the record. The theory goes that, because some of USTelecom's members operate long-distance carriers, those members would reap net savings from below-cost access charges for toll-free calling services. But all of USTelecom's members were willing to provide tandem switching and transport services at the $0.001 per-minute rate, *see* 2/25/20 USTelecom Letter 5 (JA ___), and not all those members operate long-distance carriers. In addition, USTelecom expressly characterized its

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[8] The Commission also noted its expectation that, over the course of the transition to bill-and-keep, "rural carriers will progressively recover more of their revenues through a mixture of" fixed, monthly charges to end-users and explicit subsidies from the FCC's "Connect America Fund." *Id.*

[9] The Commission has repeatedly investigated Aureon's tariffed access rates based on questions concerning the validity of the company's claimed costs. *E.g.*, *Iowa Network Access Division Tariff F.C.C. No. 1*, 34 FCC Rcd 1510, 1510 ¶ 1 (2019).

proposed rate as above cost. *See* 6/5/20 USTelecom Letter 1 (JA ___) ("[Bandwidth] accurately pointed out that a rate of $0.001 allows for potential revenue sharing opportunities, meaning that $0.001 remains an 'above cost' rate."); *see also* 2/25/20 USTelecom Letter 1 (JA ___) (characterizing its proposed rates, including the rate at issue here, as "set efficiently to cover legitimate costs, but not to provide incentive or opportunity for arbitrage").

Because neither Inteliquent nor its supporting amici have shown that the $0.001 per-minute rate is below cost, there is no need for the Court to consider amici's claim that the *Order* has taken "the free out of toll free." Intrado Br. 20; *see id.* at 18–23. But in any event, as the Commission explained, the agency's reforms here "do not alter the fact that the toll portion of [a toll-free] call will still be paid by the called party, not the calling party," which is the animating concept of toll-free calling. *Order* ¶ 47 (JA ___); *see* 47 U.S.C. § 228(c)(7) (addressing charges on the calling party "by virtue of completing the call"); 47 C.F.R. § 64.1504(a) (same).

D. The Commission Did Not Err in Considering Statements from Bandwidth.

Inteliquent also unpersuasively contends (Br. 37–40) that it was unreasonable for the Commission to treat statements from competitive provider Bandwidth as evidence that supported the $0.001 per-minute rate cap.

Bandwidth is not a member of USTelecom. It "operates as an [Internet Protocol] tandem equivalent" and "charges [tariffed] originating access." 5/1/20 Bandwidth Letter 1 (JA ___); Bandwidth.com CLEC, LLC, Interstate Switched Access Services Tariff, FCC No. 1 (base tariff filed Aug. 5, 2020), *available at* https://apps.fcc.gov/etfs/public/search.action. Bandwidth told the Commission that it "generally support[ed] USTelecom's" proposed rate cap. 5/1/20 Bandwidth Letter 1 (JA ___). A $0.001 per-minute rate, it stated, "should be sufficient to recover an [Internet Protocol] tandem provider's costs." *Id.* But it observed that a rate of "$0.001 per minute of use" would still "likely [be] high enough to enable" such providers to share $0.0005–7 per minute of that revenue with "an originator of Toll Free calls." *Id.* Bandwidth therefore expressed concern that, even at $0.001 per minute, "traffic pumping of fraudulent Toll Free calls [would] persist," *id.*, requiring "stronger enforcement actions" or

"additional reforms" by the FCC, *id.* at 2 (JA ___–___). The FCC reasonably interpreted Bandwidth's statements as adding to the body of evidence that supported USTelecom's proposed rate cap. *See Order* ¶ 62 (JA ___).

Inteliquent argues (Br. 39) that the Commission should have disregarded Bandwidth's statements because, Inteliquent contends, Bandwidth does not "exchange[] traffic . . . through traditional non-Internet Protocol networks." *See also* 7/10/20 Inteliquent Letter 2 (JA ___) (characterizing Bandwidth as "a provider of all-[Internet Protocol] services"). But because Bandwidth provides tariffed originating access services, the Commission found that it "by definition" facilitates the delivery of calls that originate or terminate on legacy networks using time-division multiplexing; it is not an "all-[Internet Protocol]" provider. *Order* ¶ 62 n.218 (JA ___) (quoting 7/10/20 Inteliquent Letter 2 (JA ___)); *see also* Intrado Br. 11 (recognizing that "charges for [Internet Protocol] traffic that never touches the [Public Switched Telephone Network] may not be tariffed because such traffic falls outside of the regulated intercarrier compensation regime").

In reaching that conclusion, the Commission recognized that Bandwidth, like many independent tandem providers, uses Internet

Protocol technology to provide switching and transport services at "lower costs than carriers that operate legacy . . . networks" based exclusively on circuit-switched technology. *Order* ¶ 62 (JA ___). But because Bandwidth—as its tariff makes clear—does participate in the transmission of calls that traverse legacy networks using time-division multiplexing, the Commission reasonably regarded its views as probative.

Even if the Commission should not have placed any reliance on Bandwidth's statements, however, that would "make no difference to [the] disposition" of this case. *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 939 (D.C. Cir. 2011); *accord NLRB v. CNN Am., Inc.*, 865 F.3d 740, 756 (D.C. Cir. 2017). The Commission found other, ample evidence that providers could offer tandem switching and transport services for legacy, circuit-switched calls at rates much lower than $0.001. *See Order* ¶ 61 & n.216 (JA ___–___) (collecting examples). And all of USTelecom's members—including rural rate-of-return carriers, *id.* ¶ 65 n.236 (JA ___), and "members that own tandem switches," *id.* ¶ 62 (JA ___)—indicated that they were willing to continue providing service within the $0.001 per-minute rate cap, *id.*; *see* 2/25/20 USTelecom Letter 5 (JA ___).

E. The Commission Was Not Required, In This *Order*, To Resolve All Questions Concerning the Eventual Transition to Bill-and-Keep.

Inteliquent contends (Br. 43–46) that even if the *Order*'s rate cap might seem justifiable purely as an interim measure, it should not receive the usual high level of deference for transitional rules because the FCC cannot reasonably anticipate that it will ever be feasible, for intermediate providers with no end-users of their own to bill, to transition tandem switching and transport services for toll-free calls to bill-and-keep.

The Commission acknowledged that it has not yet resolved "how intermediate providers will be compensated" when the transition "to full bill-and-keep" occurs. *Order* ¶ 56 (JA ___). For that reason, it decided that initiating the transition to bill-and-keep for toll-free tandem switching and transport services now would be "premature." *Id.* But that recognition does not imply that a future transition to bill-and-keep for tandem switching and transport services can never be reasonable.

To the contrary, many commenters advocated for bill-and-keep as the end-state for these services. *See, e.g.*, 9/4/18 GCI Comm'n Corp. Comments 1 (JA ___) ("GCI supports the Commission's proposal to transition originating access charges for [toll-free] calls to bill-and-keep."); *see also* 9/4/18 Comcast Comments 2 (JA ___) ("[T]andem switching[] and transport

access charges should be phased down to bill-and-keep whenever the originating service provider controls the call path to the appropriate [long-distance carrier]."). Even AT&T—which Inteliquent identifies as having characterized bill-and-keep as "untenable," Br. 45 (quoting 9/4/18 AT&T Comments 6 (JA ___))—told the Commission that a "bill-and-keep rule for third party tandem charges" will be "workable," 9/4/18 AT&T Letter 7 (JA __), so long as the agency also adopts related reforms "in conjunction with" bill-and-keep, *id.* at 6 (JA ___).

It was well within the agency's discretion, however, to prefer a rate-cap solution for now. Resolving how best to ensure compensation for intermediate providers in a bill-and-keep system would have required "consideration [of] questions" concerning "the network edge." *Order* ¶ 53 (JA ___). The network edge is the point in the call path where financial responsibility shifts from the originating carrier to another provider. *See Parties Asked to Refresh the Record on Intercarrier Compensation Reform Related to the Network Edge, Tandem Switching and Transport and Transit*, 32 FCC Rcd 6856, 6856–57 (2017) (*Network Edge Notice*). In a bill-and-keep system, so long as the tandem switching and transport services that intermediate providers offer remain useful, intermediate providers should be able to negotiate voluntary payment agreements with

other carriers, or perhaps to collect payment from other carriers' end users. But to facilitate arrangements of that kind, the industry will need further guidance on which carriers in the call path are financially responsible for tandem switching and transport services.

Where to establish the network edge involves "complex issues," *Level 3 Commc'ns, LLC, Complainant*, 33 FCC Rcd 2388, 2398 ¶ 23 (2018), which are currently pending in a separate, parallel FCC proceeding, *see Network Edge Notice*, 32 FCC Rcd at 6856–58; 2/25/20; USTelecom Letter 4 (JA ___). Given the need for "immediate[]" action to stop arbitrage involving toll-free access charges, the Commission elected to defer consideration of those issues in favor of an interim solution to combat arbitrage without delay. *Order* ¶ 54 (JA ___) (internal quotation marks omitted); *see id.* ¶ 53 (JA ___).

Contrary to Inteliquent's claim (Br. 44), the Commission's approach was well within the bounds of its discretion to address regulatory problems incrementally. *See, e.g.*, *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 588 (D.C. Cir. 2004) ("The FCC generally has broad discretion . . . to defer consideration of particular issues to future proceedings when it thinks that doing so would be conducive to the efficient dispatch of business and the ends of justice."); *see also Nat'l Ass'n of Broad. v. FCC*, 740 F.2d 1190,

1210–11 (D.C. Cir. 1984) (FCC may "defer resolution of issues raised in a rulemaking even when those issues are 'related' to the main ones being considered"). The Commission was not bound, as Inteliquent would have it, to reform its complex system of toll-free access charges "in one fell regulatory swoop." *E.g.*, *NTCH, Inc. v. FCC*, 950 F.3d 871, 881 (D.C. Cir. 2020).

CONCLUSION

The petition for review should be denied.

Dated: June 16, 2021

Respectfully submitted,

/s/ Sarah E. Citrin

P. MICHELE ELLISON
Acting General Counsel

JACOB M. LEWIS
Associate General Counsel

SARAH E. CITRIN
Counsel

FEDERAL COMMUNICATIONS COMMISSION
45 L Street NE
Washington, DC 20554
(202) 418-1740
fcclitigation@fcc.gov

Counsel for Respondent Federal Communications Commission

RICHARD A. POWERS
Acting Assistant Attorney General

ROBERT B. NICHOLSON
PATRICK M. KUHLMANN
Attorneys

U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
950 Pennsylvania Ave. NW
Washington, DC 20530

Counsel for Respondent United States of America[10]

[10] Filed with consent pursuant to D.C. Circuit Rule 32(a)(2).

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/s/ Sarah E. Citrin
Counsel for Respondents

STATUTORY ADDENDUM

STATUTORY ADDENDUM CONTENTS

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47 U.S.C. § 201 provides, in pertinent part:

§ 201. Service and charges

***

(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. § 203 provides, in pertinent part:

§ 203. Schedules of charges

(a) Filing; public display

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for

interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

***

47 U.S.C. § 228 provides, in pertinent part:

§ 228. Regulation of carrier offering of pay-per-call services

***

(c) Common carrier obligations

***

(7) Billing for 800 calls

A common carrier shall prohibit by tariff or contract the use of any 800 telephone number, or other telephone number advertised or widely understood to be toll free, in a manner that would result in-

(A) the calling party being assessed, by virtue of completing the call, a charge for the call;

(B) the calling party being connected to a pay-per-call service;

(C) the calling party being charged for information conveyed during the call unless-

(i) the calling party has a written agreement (including an agreement transmitted through electronic medium) that meets the requirements of paragraph (8); or

(ii) the calling party is charged for the information in accordance with paragraph (9);

(D) the calling party being called back collect for the provision of audio information services or simultaneous voice conversation services; or

(E) the calling party being assessed, by virtue of being asked to connect or otherwise transfer to a pay-per-call service, a charge for the call.

***

47 U.S.C. § 251 provides, in pertinent part:

§ 251. Interconnection

***

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

***

(5) Reciprocal compensation

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

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(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.

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47 C.F.R. § 1.3 provides:

§ 1.3 Suspension, amendment, or waiver of rules.

The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.

47 C.F.R. § 61.26 provides:

§ 61.26 Tariffing of competitive interstate switched exchange access services.

(a) *Definitions*. For purposes of this section, the following definitions shall apply:

(1) *CLEC* shall mean a local exchange carrier that provides some or all of the interstate exchange access services used to send traffic to

or from an end user and does not fall within the definition of "incumbent local exchange carrier" in 47 U.S.C. 251(h).

(2) *Competing ILEC* shall mean the incumbent local exchange carrier, as defined in 47 U.S.C. 251(h), that would provide interstate exchange access services, in whole or in part, to the extent those services were not provided by the CLEC.

(3) *Switched exchange access services* shall include:

(i) The functional equivalent of the ILEC interstate exchange access services typically associated with the following rate elements: Carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching;

(ii) The termination of interexchange telecommunications traffic to any end user, either directly or via contractual or other arrangements with an affiliated or unaffiliated provider of interconnected VoIP service, as defined in 47 U.S.C. 153(25), or a non-interconnected VoIP service, as defined in 47 U.S.C. 153(36), that does not itself seek to collect reciprocal compensation charges prescribed by this subpart for that traffic, regardless of the specific functions provided or facilities used.

(4) *Non-rural ILEC* shall mean an incumbent local exchange carrier that is not a rural telephone company under 47 U.S.C. 153(44).

(5) The *rate* for interstate switched exchange access services shall mean the composite, per-minute rate for these services, including all applicable fixed and traffic-sensitive charges.

(6) *Rural CLEC* shall mean a CLEC that does not serve (i.e., terminate traffic to or originate traffic from) any end users located within either:

(i) Any incorporated place of 50,000 inhabitants or more, based on the most recently available population statistics of the Census Bureau or

(ii) An urbanized area, as defined by the Census Bureau.

(b) Except as provided in paragraphs (c), (e), and (g) of this section, a CLEC shall not file a tariff for its interstate switched exchange access services that prices those services above the higher of:

(1) The rate charged for such services by the competing ILEC or

(2) The lower of:

(i) The benchmark rate described in paragraph (c) of this section or

(ii) In the case of interstate switched exchange access service, the lowest rate that the CLEC has tariffed for its interstate exchange access services, within the six months preceding June 20, 2001.

(c) The benchmark rate for a CLEC's switched exchange access services will be the rate charged for similar services by the competing ILEC. If an ILEC to which a CLEC benchmarks its rates, pursuant to this section, lowers the rate to which a CLEC benchmarks, the CLEC must revise its rates to the lower level within 15 days of the effective date of the lowered ILEC rate.

(d) Except as provided in paragraph (g) of this section, and notwithstanding paragraphs (b) and (c) of this section, in the event that, after June 20, 2001, a CLEC begins serving end users in a metropolitan statistical area (MSA) where it has not previously served end users, the CLEC shall not file a tariff for its exchange access services in that MSA that prices those services above the rate charged for such services by the competing ILEC.

(e) Rural exemption. Except as provided in paragraph (g) of this section, and notwithstanding paragraphs (b) through (d) of this section, a rural CLEC competing with a non-rural ILEC shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the NECA access tariff,

assuming the highest rate band for local switching. In addition to that NECA rate, the rural CLEC may assess a presubscribed interexchange carrier charge if, and only to the extent that, the competing ILEC assesses this charge. Beginning July 1, 2013, all CLEC reciprocal compensation rates for intrastate switched exchange access services subject to this subpart also shall be no higher than that NECA rate.

(f) If a CLEC provides some portion of the switched exchange access services used to send traffic to or from an end user not served by that CLEC, the rate for the access services provided may not exceed the rate charged by the competing ILEC for the same access services, except if the CLEC is listed in the database of the Number Portability Administration Center as providing the calling party or dialed number, the CLEC may, to the extent permitted by §51.913(b) of this chapter, assess a rate equal to the rate that would be charged by the competing ILEC for all exchange access services required to deliver interstate traffic to the called number.

(g) Notwithstanding paragraphs (b) through (e) of this section:

(1) A CLEC engaging in access stimulation, as that term is defined in §61.3(bbb), shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the access tariff of the price cap LEC with the lowest switched access rates in the state.

(2) A CLEC engaging in access stimulation, as that term is defined in §61.3(bbb), shall file revised interstate switched access tariffs within forty-five (45) days of commencing access stimulation, as that term is defined in §61.3(bbb), or within forty-five (45) days of [date] if the CLEC on that date is engaged in access stimulation, as that term is defined in §61.3(bbb).

(3) Notwithstanding any other provision of this part, if a CLEC is engaged in Access Stimulation, as defined in §61.3(bbb), it shall:

(i) Within 45 days of commencing Access Stimulation, or within 45 days of November 27, 2019, whichever is later, file tariff revisions

removing from its tariff terminating switched access tandem switching and terminating switched access tandem transport access charges assessable to an Interexchange Carrier for any traffic between the tandem and the local exchange carrier's terminating end office or equivalent; and

(ii) Within 45 days of commencing Access Stimulation, or within 45 days of November 27, 2019, whichever is later, the CLEC shall not file a tariffed rate that is assessable to an Interexchange Carrier for terminating switched access tandem switching or terminating switched access tandem transport access charges for any traffic between the tandem and the local exchange carrier's terminating end office or equivalent.

47 C.F.R. § 64.1504 provides, in pertinent part:

§ 64.1504 Restrictions on the use of toll-free numbers.

A common carrier shall prohibit by tariff or contract the use of any 800 telephone number, or other telephone number advertised or widely understood to be toll-free, in a manner that would result in:

(a) The calling party or the subscriber to the originating line being assessed, by virtue of completing the call, a charge for a call[.]

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