IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NO. 11-9900

IN RE: FCC 11-161

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

UNCITED INCUMBENT LOCAL EXCHANGE CARRIER INTERVENORS' BRIEF IN SUPPORT OF PETITIONERS

(DEFERRED APPENDIX APPEAL)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

GLOSSARY iv

STATEMENT OF ISSUES 1

STANDARD OF REVIEW 1

STATEMENT OF INTEREST 2

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. FCC LACKS STATUTORY AUTHORITY TO ESTABLISH ITS SECTION 251(B)(5) FRAMEWORK. 7

A. Assuming *Arguendo* the FCC's Framework is Valid, it Lacks Authority to Impose Mandatory Bill-and-Keep. 7

1. FCC Lacks Authority to Set a Specific Rate for Reciprocal Compensation. 7

2. Mandatory Bill-and-Keep Violates Statutory Provisions. 8

B. Regulating Access Services under §251(b)(5) and Preempting State Commissions over Intrastate Charges is Unlawful. 10

II. THE COMMISSION'S USF REDUCTIONS ARE INCONSISTENT WITH STATUTORY MANDATES. 12

A. The *Order* Fails to Ensure "Sufficient" USF to Preserve and Advance Universal Service. 13

B. The Regression Rule Violates §254's "Predictability" Directive. 15

C. The FCC Failed to Refer Certain Separations Issues to a Federal-State Joint Board. 16

D. Section 254 Does Not Permit Funding of Non-Telecommunications Carriers. 17

III. THE *ORDER* FAILS TO PERMIT ILECS TO RECOVER THEIR USED AND USEFUL COSTS. 19

IV. ELIMINATING SUPPORT TO AREAS WHERE AN UNSUBSIDIZED COMPETITOR OPERATES VIOLATES THE ACT. 22

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

*AT&T Corp. v Iowa Utilities Bd.,*525 U.S. 366, 380, 384 (1999). . 6, 8, 11, 12
Crockett Telephone Co. v. FCC, 963 F.2d 1564, 1571 (D.C. Cir. 1992). 17
Duquesne Light Co. v. Borsch, 488 U.S. 299(1989). 19
FPC v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944). 5, 19
Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374-75 (1986). 11
Petition of Core Communications, 22 FCC Rcd. 14118, ¶20 (2007). 5
Qwest Communications Internat'l v FCC, 398 F.3d 1222 (10th Cir. 2005) 12, 15, 22
Qwest Corp. v. FCC, 258 F.3d 1191, 1200 (10th Cir. 2001). 13
Smith v. Illinois Bell Tel. Co., 282 US 133 (1930). 19, 20
Texas Office of Public Utility Counsel, 183 F.3d 393 (5th Cir. 1999). 13
U.S. Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004). 21
U.S. Telecom Ass'n v. FCC, 400 F.3d 29, 34 (D.C. Cir. 2005). 16
Verizon Comm.'s, Inc. v. FCC, 535 U.S. 467 (2002), *vacated in part*, *Iowa Util. Board v. FCC*, 301 F.3d 957 (8th Cir. 2002). 8

STATUTES

47 U.S.C. §214(e). 4, 23
47 U.S.C. §214(e)(1). 22
47 U.S.C. §214(e)(2). 22
47 U.S.C. §214(e)(3). 22
47 U.S.C. §251(d)(3) 10
47 U.S.C. §251(f)(2). 10
47 U.S.C. §251(g). 12
47 U.S.C. §252(d)(2) 3, 8, 10
47 U.S.C. §252(d)(2)(A). 9
47 U.S.C. §252(d)(2)(A)(i). 8
47 U.S.C. §252(d)(2)(A)(ii). 9
47 U.S.C. §252(d)(2)(B)(i)). 9
47 U.S.C. §252(d)(3). 11
47 U.S.C. §254. .... passim
47 U.S.C. §254(b) 4, 13, 21
47 U.S.C. §254(b)(1). 22
47 U.S.C. §254(b)(3). 22
47 U.S.C. §254(b)(5). 12
47 U.S.C. §254(c)(1). 18

47 U.S.C. §254(e). 13, 18
47 U.S.C. §410(c) 4, 16, 17
Telecommunications Act of 1996, P.L. No. 104-104, 110 Stat. 56 (1996)... 5, 8

OTHER AUTHORITIES

Comments of U.S. TelePacific *et al.*, at 38-42 (filed Apr. 1, 2011). 10
Reply Comments of NECA, *et al.,* WC Docket No. 10-90 (filed May 23, 2011). 14

RULES

47 C.F.R. §36.621(a)(5). 15, 16, 17
47 C.F.R. §36.631. .... 15, 17
47 C.F.R. Part 36. .... 16, 17

AGENCY DECISIONS

Connect America Fund, 26 FCC Rcd. 17663 (2011) (*Order*). .... passim
Connect America Fund, 26 FCC Rcd. 4554 (2011) (*NPRM*). 14
Federal-State Joint Board on Universal Service (Rural Task Force Order), 16 FCC Rcd. 11244 (2001). 6, 15, 17, 18
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd. 15499 (1996) (*Local Competition Order*). 9, 11
In *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14853 (2005). 18
ISP Remand Order, 16 FCC Rcd. 9151 (2001). 11
Multi-Association Group (MAG) Plan, 16 FCC Rcd. 19613 (2001) (*MAG Order*). 6, 7
Sandwich Isles Communications, Inc, 25 FCC Rcd. 13647 (WCB 2010). .. 21

GLOSSARY

1996 Act	Telecommunications Act of 1996
Access Charges	Fees charged to IXCs by LECs for exchange access, i.e., charged for toll calls that begin and end in different calling areas.
Act, or 1934 Act	Communications Act of 1934, as amended
ARC	Access Recovery Charge
APA	Administrative Procedure Act
COLR	Carrier of Last Resort
ETC	Eligible Telecommunications Carrier
FCC, Commission	Federal Communications Commission
HCLS	High Cost Loop Support
ICC	Intercarrier Compensation
ICC Brief	Uncited Joint Intercarrier Compensation Principal Brief
ILEC	Incumbent Local Exchange Carrier
IXC	Interexchange (or Long Distance) Carrier
Joint Board	Federal-State Joint Board on Separations
Preliminary Brief	Uncited Joint Preliminary Brief of Petitioners
RLEC	Rate-of-Return ILEC
Supplemental USF Brief	Uncited Supplemental Universal Service Fund Brief
USF	Universal Service Fund
USF Brief	Uncited Joint Universal Service Fund Principal Brief

STATEMENT OF ISSUES

The *Order* radically modifies USF and ICC rules in ways that will prevent ILECs from providing necessary supported services to customers in rural and high cost areas. Intervenors note the following issues:

Did imposition of a zero ICC rate contravene the §252(d)(2) pricing standard requiring "mutual recovery" of costs?

Did the FCC's regulation of intrastate access rates under §251(b)(5) violate the plain meaning of the statute and unlawfully preempt state authority?

Did the FCC violate the requirements of §254(b) that USF support be sufficient and predictable?

Did the FCC unlawfully deprive ILECs of the reasonable opportunity to recover their costs when it reduced USF support and ICC revenues?

Did the FCC unlawfully eliminate USF support in high cost areas served by unsubsidized competitors?

STANDARD OF REVIEW

Section I of the brief is governed by the *Chevron* "step one" standard set out at pp. 39-40 of the Preliminary Joint Brief. All sections are also governed by the arbitrary and capricious standard of review set out at pp. 41-42 of that Brief.

STATEMENT OF INTEREST

Intervenors on this brief are either ILECs primarily providing telecommunications services to consumers and businesses in rural and high cost areas, their trade associations, or NECA, which administers interstate access tariffs and revenue pooling arrangements for RLECs pursuant to FCC rules.

SUMMARY OF ARGUMENT

ILECs generally serve as "carriers of last resort," providing regulated telecommunications services to virtually all customers within their service areas upon reasonable request (even if they are uneconomic to serve), in exchange for the government's commitment to provide a reasonable opportunity to recover their costs. This regulatory compact achieved "universal" telecommunications services at affordable rates to customers in rural and other high-cost areas. The FCC has until the *Order* consistently upheld this compact by enabling cost recovery through a combination of ICC mechanisms, and federal USF support, together with states which administer local rates.

The *Order* abandons this regulatory compact by freezing and then reducing ICC rates, capping and cutting USF support, and imposing new and costly conditions for receiving such support, without affording ILECs a

reasonable opportunity to recover their used and useful costs. The result is reduced investment and service quality and increased pressure to raise local rates to levels that are neither affordable, competitively sustainable, nor reasonably comparable to urban rates.

Petitioners are correct that the *Order*'s ICC-related provisions unlawfully eliminate the statutorily prescribed right to recover costs of transport and termination. By effectively setting ICC "rates" at zero, the FCC overrides a congressionally assigned state duty (§252(d)(2); ignores record evidence of positive termination costs; ignores explicit Congressional instructions limiting bill-and-keep to balanced traffic and voluntary carrier negotiations (§252(d)(2)); and eliminates requirements that carriers recover termination costs from each other. The FCC does so even as it acknowledges that ILECs are unlikely to be able to recover such costs from other sources. Furthermore, the statute does not empower the FCC to regulate access services pursuant to §251(b)(5) and the FCC cannot preempt state authority regarding intrastate exchange access.

The *Order* violates §254's "sufficient" and "predictable" directives by failing to make factual findings that such statutory directives are achieved by the changes made. By capping, reducing or eliminating various USF mechanisms, while simultaneously reducing ICC rates and requiring ILECs

to both maintain existing supported services and fulfill a new broadband services obligation, the FCC has acted unlawfully.

At the same time, the FCC permits such support to flow to non-telecommunications carriers for non-telecommunications services. The Intervenors agree with Petitioners that the explicit language of §§254 and 214(e) does not permit the provision of federal USF support in this manner. However, they note that the FCC has long provided in a lawful manner federal USF support to telecommunications carriers for "multiple use" networks that provide both telecommunications and non-telecommunications services.

Contrary to §410(c), the *Order* also failed to refer rules requiring the separation of costs between federal and state jurisdictions to a Federal-State Joint Board.

Carriers subject to the FCC's Title II rate jurisdiction must be given a reasonable opportunity to recover the costs of their investments. The *Order's* sharp reductions in, and eliminations of, USF support and ICC rates, and the practical inability to make up revenue shortfalls, deprive carriers of this statutory right.

The Commission may not eliminate universal service support to carriers facing an "unsubsidized competitor." Such action harms customers,

runs afoul of §214(e), and violates §254(b)'s affordability and comparability mandates because the unsubsidized competitor is not required to provide service as a COLR at affordable rates.

ARGUMENT

Since 1934, the FCC and state commissions have implemented policies promoting access to quality and affordable telecommunications services by all Americans. Under these policies, certain ILECs were compensated for the higher cost of bringing service to rural and high cost areas through local exchange service revenues, ICC revenues, and USF support. *Petition of Core Communications*, 22 FCC Rcd. 14118, 14130 (2007). During the same time, courts, based on a constitutionally guided interpretation of §201's requirement that telecommunications services rates be "just and reasonable," have consistently required that the interests of ratepayers and shareholders should be balanced. *FPC v. Hope Natural Gas Co.,* 320 U.S. 591, 603 (1944). ILECs are thus afforded a reasonable opportunity to recover their used and useful costs, which, when combined with the carriers' obligation to serve, constitutes a regulatory compact between regulators and regulated carriers to benefit consumers by providing quality and affordable telecommunications services.

Congress codified explicit universal service principles in the Telecommunications Act of 1996, P.L. No. 104-104, 110 Stat. 56 (1996). The 1996 Act also established a "reciprocal compensation" mechanism for exchange of traffic between competing local exchange networks, §251(b)(5), giving the FCC authority to establish a rate methodology, but assigning states responsibility for setting specific rates if private negotiations failed. *AT&T Corp. v Iowa Utilities Bd.,*525 U.S. 366, 380, 384 (1999). In doing so, the 1996 Act also preserved the FCC's pre-existing interstate access charge mechanism until the FCC changed it, and left untouched state authority over intrastate exchange access services. ICC Brief, §I.B.1.

The FCC has repeatedly found that USF support for rural and high cost areas is necessary to ensure telecommunications services for all. *Federal-State Joint Board on Universal Service (Rural Task Force Order)*, 16 FCC Rcd. 11244, 11246, 11249 (2001) (providing "predictable levels of support so that rural carriers can continue to provide affordable service in rural America"); *Multi-Association Group (MAG) Plan*, 16 FCC Rcd. 19613, 19617, 19620 (2001) (the rules adopted "provide certainty and stability for rate-of-return carriers," while the "rate structure modifications" did "not affect overall recovery of interstate access costs.").

The *Order* largely discards this precedent that implemented the regulatory compact for universal service. It does so by (1) capping and eliminating existing USF funding for supported services, (2) refocusing USF to support additional broadband services without evaluating the added costs of providing such services; (3) arbitrarily reducing USF below levels that provide sufficient and predictable support; (4) freezing most ICC rates and forcing carriers to transition to a unified end office termination rate of zero, even though the FCC has found that smaller rural carriers are "more sensitive to disruption" of ICC and USF revenue streams, *MAG Order*, at 19741, (4) without reconciling such actions with the ILECs' pre-existing COLR obligations. Though the *Order* permits some replacement ICC recovery, the FCC admits it is not sufficient to permit ILECs to recover existing costs of providing mandated services. *Order*, ¶¶848, 902. The overall effect of eliminating the regulatory compact harms both ILECs and customers and jeopardizes universal service.

I. FCC LACKS STATUTORY AUTHORITY TO ESTABLISH ITS SECTION 251(B)(5) FRAMEWORK.

A. Assuming *Arguendo* the FCC's Framework is Valid, it Lacks Authority to Impose Mandatory Bill-and-Keep.

1. FCC Lacks Authority to Set a Specific Rate for Reciprocal Compensation.

Under the theory of setting a methodology, the *Order* establishes a transition plan that will ultimately base *all* ILEC ICC rates on a bill-and-keep arrangement. *Order,* ¶773. The final effect is that the *Order* establishes an ICC "rate" of zero and, as the Petitioners properly argue, eviscerates §252(d)(2) of the Act. ICC Brief at 31-32.

Section 252(d) explicitly requires that specific §251(b)(5) rates be set by states where private negotiations fail. The Supreme Court held that these provisions allowed the FCC to establish a §251(b)(5) rate methodology, but overturned the FCC's attempt to bind states to specific rate levels. *Iowa Utilities Board*, 525 U.S. at 384. Nonetheless, the *Order* end-runs the statutory directive by adopting a "methodology" that prescribes specific transition rates plus a specific ultimate rate of zero. *Order,* ¶¶740-759. The Supreme Court previously overturned almost exactly the same action. *Verizon Comm.'s, Inc. v. FCC*, 535 U.S. 467 (2002), *vacated in part*, *Iowa Util. Board v. FCC*, 301 F.3d 957 (8th Cir. 2002).

2. Mandatory Bill-and-Keep Violates Statutory Provisions.

As Petitioners explain, a mandatory zero ICC rate is inconsistent with other provisions of the Act. ICC Brief at 46-48. The statute requires that reciprocal compensation arrangements be "just and reasonable" and provide for "mutual and reciprocal recovery" 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." §252(d)(2)(A)(i). Such costs must be determined "on the basis of a reasonable approximation of the additional costs of terminating such calls." §252(d)(2)(A)(ii). A mandatory zero rate cannot comply with these statutory directives.

First, mutually agreed-to bill-and-keep arrangements can allow for "the offsetting of reciprocal obligations" (§252(d)(2)(B)(i)) for "roughly balanced" levels of §251(b) traffic (*Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 16055 (1996)). Mandatory bill-and-keep, however, means that carriers will not pay each other regardless of net traffic imbalances. The practical effect is to foist recovery of transport and termination costs directly upon ILECs and their end-users rather than upon the carriers delivering such traffic. The Act provides that carriers recover transport and termination costs from "reciprocal compensation arrangements" between carriers. §§251(b)(5), 252(d)(2)(A). Consequently, mandatory bill-and-keep is inconsistent with the plain meaning of the statute.

Second, the FCC acts arbitrarily and capriciously by declaring that ILECs will be able to recover the additional costs from end-users and "where necessary, explicit universal service support." *Order* ¶757; *see also,*

id. ¶¶746-47. No provision is made to guarantee the opportunity for such recovery, and the FCC admits that competition prevents carriers from raising end-user rates. *Id.,* ¶864, ¶908 n.1781. This inconsistent reasoning is arbitrary and capricious. *Id*. ¶746.

Third, although the FCC concludes that the cost of call termination is "very nearly zero," *Order,* ¶753, it admits that the "additional" costs of termination may be more than nominal (*id*. n.1333), and the record confirms these are not zero. *See, e.g.,* Comments of U.S. TelePacific *et al.*, at 38-42 (filed Apr. 1, 2011) (summarizing record evidence that additional costs exceed $0.0007 per minute). Since under §252(d)(2) ICC charges must recover the carrier's actual additional termination costs, which the FCC admits exist, the FCC's zero termination rate is arbitrary and capricious and inconsistent with prior FCC precedent and the Act. ICC Brief, §II.

B. Regulating Access Services under §251(b)(5) and Preempting State Commissions over Intrastate Charges is Unlawful.

Petitioners are also correct that FCC has no statutory basis to regulate exchange access services pursuant to §251(b)(5). ICC Brief at 7-27.[1] Likewise, §§152(b) and 251(d)(3), bolstered by the directive that any effect

[1] Intervenors also agree that the FCC lacks authority to interfere with state evaluation of requests for §251(f)(2) relief. ICC Brief, §I.E.

on state law must be express (§601(c)(1), 1996 Act (note to §152)), reserve regulation of *intrastate* exchange access to the states. An agency may not justify a statutory interpretation solely on a policy preference. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374-75 (1986). But that is what has occurred since no statutory basis for preemption exists. Nor can the FCC claim a statutory ambiguity to gain *Chevron* deference. Congress provided explicit directives regarding state preemption, and statutes must be interpreted to give all statutory provisions effect. ICC Brief at 9.

Section 251(b)(5) cannot include exchange access because there is nothing reciprocal about provision of exchange access to IXCs. ICC Brief at 26-27. The statutory terms "exchange access" and "telephone toll service" are both well understood in the telecommunications industry and at the FCC in the context of §251(b)(5). *Local Competition Order*, at 16013. ILECs make no payments when providing exchange access to IXCs; rather IXCs pay ILECs for both originating and terminating toll traffic. Thus, the plain language of §251(b)(5) reciprocity obligations cannot include non-reciprocal exchange access payments by an IXC to a LEC.

The *Order*'s discussion of §252(d)(3) does not justify preemption of state authority. No findings were made to support preemption, and neither *Iowa Utilities Bd.* nor the *ISP Remand Order*, 16 FCC Rcd. 9151 (2001),

can alter the conclusion that §251(d)(3) reserves regulation of intrastate access services to the states. ICC Brief at 17-18.

Finally, §251(g) is not a separate grant of FCC authority. S*ee Iowa Utilities Bd.*, 525 U.S. at 383 n.9, 381 n.8. Section 251(g) was enacted primarily to maintain obligations under various consent decrees and equal access requirements, and is limited to pre-1996-Act orders, decisions and policies of the FCC (which involved no preemption). ICC Brief at 23-25.

Accordingly, exchange access traffic cannot be part of the §251(b)(5) reciprocal compensation framework and FCC preemption of state authority cannot be sustained.

II. THE COMMISSION'S USF REDUCTIONS ARE INCONSISTENT WITH STATUTORY MANDATES.

Coupled with reductions in USF payments and ICC revenues, the *Order* requires ILECs receiving USF to provide supported services and requires an additional mandate to start providing certain high-speed broadband Internet access services "on reasonable request" or lose USF funds. *Order,* ¶¶26, 208, 589. The FCC has not reconciled this framework with the statutory directive that USF support mechanisms be "predictable and sufficient." §254(b)(5). The FCC must "take into account the full range of principles." *Qwest Communications Internat'l v FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005) ("*Qwest II*") . *See also Qwest Corp. v. FCC*, 258 F.3d

1191, 1200 (10th Cir. 2001) ("sufficient" and "predictable" are directives, not merely aspirational).

A. The *Order* Fails to Ensure "Sufficient" USF to Preserve and Advance Universal Service.

Petitioners are correct that the *Order* caps, reduces or eliminates high cost support previously afforded ILECs (Preliminary Brief at 26-31), and reduces ICC rates, without defining the significant new costs of complying with the additional broadband requirement.[2] The *Order* establishes an arbitrary overall "budget" for high cost support (*Order,* ¶¶121-27), caps monthly per-line support at $250 (*id.,* ¶¶272-80), eliminates Safety Net Additive recovery for rate-of-return LECs, (*id.,* ¶¶ 248-52), and mandates using "regression formulas" to limit capital and operational expenses for carriers with costs that exceed a certain percentage above the mean. *Id.,* ¶¶210-27.

Congress gave a "direct statutory command" in §254(e) that the FCC must provide "sufficient" support to achieve §254(b)'s objectives. *Texas Office of Public Utility Counsel,* 183 F.3d 393, 412 (5th Cir. 1999). Ignoring this command, the FCC failed to make any factual findings that its reduced support levels would be sufficient to meet statutory commands.

[2] Although most ILECs provide broadband service, most have not made the network upgrades necessary to achieve the speed requirements in the *Order*.

Rather, it focused exclusively on whether its new caps avoid "wasteful spending," *Order*, ¶125, without making any factual finding that waste has occurred. The FCC hypothesizes that its new rules provide ILECs with "incentives" to incur expenses "efficiently," *id*., ¶219, and "eliminate[e] inefficiencies and clos[e] gaps in our system [without making] indiscriminate industry-wide reductions." *Id.*, ¶287. But these claims are not factually supported. The FCC cannot side-step the statutory requirement that it assure support is sufficient under the Act, and it cannot meet that command by focusing solely on whether USF support might be excessive. *Id.,* ¶194 n.315. The agency must also ensure that USF provides enough support to "preserve and promote" universal service.

Likewise, the FCC cannot ignore carriers' continuing COLR responsibilities plus the significant added costs of meeting the FCC's new broadband speed mandates. Even the FCC recognizes that in 2010 more than 75% of NTCA's RLEC members provided Internet access service at speeds of only 1.5 to 3.0 Mbps down. *NPRM*, at 4613. Since these services predominantly utilize DSL technology (which cannot reach new mandated speeds of 4 Mbps down and 1 Mbps up over longer rural loops), rural carriers must make significant new investments to satisfy the broadband condition. Reply Comments of NECA, *et al.,* WC Docket No. 10-90, at 47

(filed May 23, 2011). These failures to quantify or justify how its mechanisms preserve and advance universal service render them invalid. *Qwest II*, 398 F.3d at 1235.

B. The Regression Rule Violates §254's "Predictability" Directive.

Section 254(b)(5)'s "predictability" directive is designed to promote investment in networks that provide supported services, *Order*, ¶858, and to ensure consumer access to supported services. The *Order*'s regression rule contravenes this criterion because it is vague and undefined, otherwise unlawfully established, and disregards the Commission's previous conclusions that there are "significant variations among rural carriers." *Rural Task Force Order,* at 11311.

First, the FCC's delegation of authority to its staff, the Wireline Competition Bureau, to adjust interstate cost allocations each year via revised regression formulas is inconsistent with the FCC's own rules reserving to the Commission itself the authority to modify rules. USF Brief, §I.B.

Second, whereas the current formula for determining USF support is specific, 47 C.F.R. §36.631, the new rule states that "[s]tudy area unseparated loop cost may be limited annually pursuant to a schedule

announced by the Wireline Competition Bureau." 47 C.F.R. §36.621(a)(5). No substantive constraints on such "limitations" are provided; the *Order* merely instructs its staff to establish mathematical formulas for maximum allowable costs using percentiles that staff itself will select. The rule results in unpredictable USF because a carrier cannot know from year-to-year which investment or expenses will be supported and how to plan for and develop future business and investment.

Third, the *Order* compounds this unpredictability by allowing the staff to modify its regression computations annually. 47 C.F.R. §36.621(a)(5). That action fails to follow the APA's notice and comment procedures. *U.S. Telecom Ass'n v. FCC,* 400 F.3d 29, 34 (D.C. Cir. 2005).

For all of these reasons, the regression rule violates the "predictability" directive of §254.

C. The FCC Failed to Refer Certain Separations Issues to a Federal-State Joint Board.

The FCC changed its Part 36 rules in violation of §410(c) of the Act. That section requires the Commission to refer to a Federal-State Joint Board proposed rule changes that affect "jurisdictional separation of common carrier property." *Crockett Telephone Co. v. FCC*, 963 F.2d 1564, 1571

(D.C. Cir. 1992). USF Supplemental Brief at 18-20. That did not occur here.

For example, previous limitations on USF that affected Part 36 of the rules were adopted by rulemaking after Joint-Board referral under §410(c) of the Act. *Rural Task Force Order*, at 11246. By imposing various new caps on USF support, the Commission has limited expense adjustments, without obtaining the required Joint Board analysis and recommendation. Likewise, new §36.621(a)(5), now permits FCC staff to impose new annual limits on unseparated costs that qualify as expense adjustments, fundamentally affecting the separations formula found in 47 C.F.R. §36.631 and effectively shifting expense differences to the state jurisdiction. The FCC may not alter its separations rules in this manner without following §410(c).

D. Section 254 Does Not Permit Funding of Non-Telecommunications Carriers.

Intervenors agree with Petitioners that the Act prohibits the FCC from funding supported non-telecommunications services provided by non-telecommunications carriers. USF Brief, at 11-19. However, the Act permits support to telecommunications carriers and networks that provide both telecommunications and other services.

Intervenors note that ILECs have long been receiving support for multiple-use facilities over which they provide both supported telecommunications services and non-supported services (e.g., broadband transmission services that are regulated as telecommunications services[3] but not designated as supported services). The FCC considered the status of multiple-use networks and concluded that §254(e) allowed support to such networks. *Rural Task Force Order,* at 11322.

This treatment is consistent with the statute. Whereas the statute does not permit support of ineligible entities, the FCC may provide support to eligible carriers for facilities used to provide supported telecommunications services, even though other services are also provided. If the FCC determines in the future to support broadband services on a stand-alone basis, §§254(c)(1) and (e) provide the statutory framework for doing so. However, it cannot take a "short-cut" that enables non-carriers to obtain support for providing non-telecommunications services. Expanding support to non-covered entities diverts funds from Congress's intended beneficiaries.

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[3] In *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14853 (2005), the FCC gave facilities-based wireline carriers the option to offer broadband transmission services either on a common carrier or non-common carrier basis. Most RLECs have elected common carrier status for the wholesale transmission services they offer to Internet service providers.

III. THE *ORDER* FAILS TO PERMIT ILECS TO RECOVER THEIR USED AND USEFUL COSTS.

Intervenors agree that by eliminating ICC for exchanging traffic, and reducing and/or eliminating USF support, the *Order* unlawfully deprives carriers of the opportunity to recover their prudently incurred costs pursuant to the FCC's used and useful standard. ICC Brief, at 51-57.

Furthermore, telephone exchange property must be apportioned between intrastate and interstate jurisdictions in accordance with Supreme Court precedent. *Smith v. Illinois Bell Tel. Co*., 282 US 133, 151 (1930). Under *Smith*, "there must be some determination by which the federal regulator computes rates based on the carrier's property apportioned to interstate usage and the State regulator conducts ratemaking based on that portion allocated to intrastate usage." *Crockett*, 963 F.2d at 1573.

Courts have long used this framework to analyze the lawfulness of carrier rates. Although carriers are not guaranteed they will recover their prudently incurred costs, *Hope Natural Gas Co.,* 320 U.S. at 603, just and reasonable rates set by the Commission must not deprive them of a reasonable opportunity to do so. *Duquesne Light Co. v. Borsch*, 488 U.S. 299, 307-8 (1989). The FCC has long permitted access rates to be set on the basis of these principles. ICC Brief, at 49-50.

The *Order* abandons this historical regulatory compact without reasonable justification. The rules continue to require rural ILECs to allocate to the interstate jurisdiction a portion of costs in accordance with accounting categories, which historically have been used to establish rates. USF Brief, §V. At the same time, ICC revenues are drastically reduced and USF support is capped, reduced or eliminated.

The FCC admits that carriers are prohibited from fully recovering their costs. *Order*, ¶848. Although the Order analyzes historical declines in minutes and revenues, *id*., ¶894, it never justifies why these historical reductions should ultimately result in no recovery of costs for providing transport and termination services. Instead, the FCC reduces ICC rates reduced precipitously over a nine-year period, while the ARC, which partially offsets these declines, is constrained and capped annually. *Id*., ¶¶852-53. Federal USF support to defray these costs is also sharply limited without regard to actual costs incurred. USF Brief, §II. Thus, even though costs will continue to be allocated to the interstate jurisdiction, rates will be untethered from that allocation, contravening both *Smith* and the right to a reasonable opportunity to recover used and useful costs.

If the FCC had based reductions on specific findings that carriers had imprudently incurred costs, or if it had revised rules to permit a fair

opportunity to recover costs, it might have avoided violating statutory ratemaking principles. ICC Brief, §II. In other contexts, the FCC has indicated that it understands what must be done to eliminate costs that are not "used and useful." *Sandwich Isles Communications, Inc*, 25 FCC Rcd. 13647, 13651-53 (WCB 2010). No FCC finding was made that ILEC investment and expenses contravened this standard.[4] The rules when fully implemented will prevent RLECs from charging carriers *any* ICC rates for many switched access services, block them from increasing other interstate rates to compensate for the loss of ICC revenues, and sharply limit alternative recovery of costs from capped and shrinking universal service mechanisms. Neither cost-cutting nor efficiency gains will permit rate-of-return carriers to recover their costs to remain financially viable as the FCC unreasonably assumes. *See Order,* ¶902. The rules are thus arbitrary and capricious.

[4] Nor is *Order* at ¶294 an answer to rural carriers' objections that carriers believing themselves undercompensated for their legitimate costs can seek waiver. *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 571 (D.C. Cir. 2004) ("[T]he mere existence of a safety valve does not cure an irrational rule.").

IV. ELIMINATING SUPPORT TO AREAS WHERE AN UNSUBSIDIZED COMPETITOR OPERATES VIOLATES THE ACT.

Petitioners are correct that eliminating support to an ILEC where there exists an "unsubsidized competitor" (*i.e.,* an entity which receives no federal USF) violates §254(b) of the Act. USF Brief at 53-56. The FCC's rationale for the rule, that it is inefficient to provide support to such ILECs (*Order*, ¶281), has not been reconciled with the principles in §254(b) that consumers have (1) access to quality services at just, reasonable, and affordable rates (§254(b)(1)), and (2) reasonably comparable telecommunications services and rates to those provided in urban areas (§254(b)(3)). The FCC failed to consider how the unsubsidized competitor rule would "take [ ] into account the full range of principles." *Qwest II*, 398 F.3d at 1234.

Reduced USF support occasioned by the new rule not only will be insufficient to preserve and advance universal service, but also will further jeopardize universal service. USF Brief, at 29-33. The FCC requires ETCs to offer voice telephony service "on a standalone basis, at rates that are reasonably comparable to urban rates." *Order*, ¶81. However, there is no existing obligation, and the *Order* places none, on "unsubsidized competitors" to offer voice services either on a standalone basis, to all at just

reasonable and affordable rates, or on a continuing basis. Thus, this rule is contrary to §254.

Moreover, the FCC's conclusion is inconsistent with §§214(e)(2) and (3), which anticipate that, upon motion or request, every geographic area will have a designated ETC. That ETC, when it is providing service defined as "universal service," must be provided the opportunity to access the very recovery mechanism—the USF—that ensures that the requirements of §254 are met. §214(e)(1). By eliminating the linkage between the obligation to serve under §214(e) and availability of USF support under §254, the *Order* violates the 1996 Act's recognition of the regulatory compact.

CONCLUSION

Intervenors support Petitioners that the *Order* contravenes §§251, 252, and 254 of the Act and accordingly should be vacated in its entirety. Further, where, as discussed herein, the FCC's actions are inconsistent with the statute, those actions are significant enough that the *Order*, if not

reversed as violating the Act, should be vacated in its entirety and remanded to the agency.

Respectively submitted,

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November 20, 2012

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1. This filing complies with the type-volume limitation of the Amended First Briefing Order because it contains 4476 words, excluding the parts of the filing exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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November 20, 2012

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I hereby certify that, on November 20, 2012, per the Court's order of October 17, 2012, I caused the foregoing document to be electronically filed with the Court via e-mail. I also certify this document was furnished through ECF electronic service to all parties in this case through a registered CM/ECF user. This document is available for viewing and downloading on the CM/ECF system.

/s/ Gregory J. Vogt

November 20, 2012