ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR RESPONDENTS

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

NO. 08-1284 CONSOLIDATED WITH NO. 08-1285

RURAL CELLULAR ASSOCIATION, ET AL.,

PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA

RESPONDENTS.

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

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A. Parties

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B. Ruling Under Review

High-Cost Universal Service Support, 23 FCC Rcd 8834 (2008), 73 Fed. Reg. 37,882 (July 2, 2008) (JA 166).

C. Related Cases

The Order on review has not previously been before this Court. Counsel are not aware of any related cases that are pending before this Court or any other court.

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* *Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

Act	Communications Act of 1934
1996 Act	Telecommunications Act of 1996
ETC	Eligible Telecommunications Carrier
ILEC	Incumbent Local Exchange Carrier
JA	Joint Appendix
USF	Federal Universal Service Fund

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BRIEF FOR RESPONDENTS

STATEMENT OF JURISDICTION

The *Order* on review was released on May 1, 2008, and was published in the *Federal Register* on July 2, 2008. *High-Cost Universal Service Support,* 23 FCC Rcd 8834 (2008), 73 Fed. Reg. 37,882 (July 2, 2008) ("*Order*") (JA 166). The Court has jurisdiction to review final Commission rulemaking orders pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are appended to this brief.

STATEMENT OF THE ISSUES

In these consolidated cases, the Rural Cellular Association and several wireless telecommunications carriers (collectively, "Petitioners") challenge the Commission's *Order* adopting a rule setting an interim cap on the amount of high-cost universal service support distributed to competitive eligible telecommunications carriers ("competitive ETCs"). Annual high-cost universal service support had ballooned from $2.6 billion in 2001 to $4.3 billion in 2007 due largely to steadily growing disbursements to competitive ETCs. Faced with these dramatic increases, the Commission concluded that an interim cap was needed to stabilize the program while the Commission considered comprehensive reform proposals.

This case presents the following issues for review:

1. Whether the Court lacks jurisdiction to consider Petitioners' argument that the Commission circumvented the Administrative Procedure Act, 5 U.S.C. § 553, by establishing interim caps on high-cost universal service support to particular competitive ETCs in prior orders not before the Court.

2. Whether the Commission's decision to adopt a rule setting an interim cap on high-cost universal service support to competitive ETCs was the product of reasoned decisionmaking.

3. Whether the Commission reasonably interpreted section 254 of the Communications Act, 47 U.S.C. § 254, to allow it to adopt a rule setting an interim cap on high-cost universal service support to competitive ETCs to ensure sufficient, but not excessive, support pending comprehensive universal service reform.

COUNTERSTATEMENT

I. Statutory Background

The availability of reasonably priced telecommunications services in all parts of the nation, known as "universal service," is a longstanding goal of telephone regulation. *See* 47 U.S.C. § 151 (directing the Commission "to make available, so far as possible, to all the people of the United States … a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges…."). In particular, federal universal service programs have subsidized service in rural and insular areas, which often face higher costs of providing telephone service due to low population density, terrain, and other factors. *See, e.g., Federal-State Joint Board on Universal*

Service, Order on Remand, 18 FCC Rcd 22559, ¶ 25 (2003).[1] State and federal regulators also have provided rate support to low-income consumers who might not be able to afford even basic telephone service without such support.

In 1996, Congress amended the Communications Act[2] to introduce competition into local telephone service, which traditionally was provided through regulated monopolies. *See* 47 U.S.C. §§ 251, 252. At the same time, Congress added a new universal service provision (section 254) to the Act. *See* 47 U.S.C. § 254. That provision codified universal service principles and preserved the Commission's existing policy of providing support for low-income consumers and for consumers in high-cost areas. 47 U.S.C. § 254(b)(3), (e), (j). In addition, section 254 expanded the scope of universal service by creating programs to provide discounted services to schools, libraries, and rural health care providers. 47 U.S.C. § 254(b)(6), (h).

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[1] Under the Commission's rules, whether a local exchange carrier ("LEC") is "rural" or "non-rural" depends primarily on its size and does not necessarily reflect the geographic nature of the territory it serves. *See* 47 C.F.R. §§ 51.5 (definition of "rural telephone company"), 54.5 (cross-referencing, for universal service purposes, section 51.5 definition of "rural telephone company"). The definition of "rural telephone company" that the Commission adopted, for universal service purposes, mirrors the definition of "rural telephone company" found in section 3(37) of the Act. *See* 47 U.S.C. § 153(37); *Federal-State Board on Universal Service*, First Report and Order, 12 FCC Rcd 8776, ¶ 310 (1997) ("*Universal Service First Report and Order*").

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act") (codified at various sections of Title 47 of the United States Code).

Congress recognized that the introduction of competition into local telecommunications markets would necessarily threaten the implicit subsidy system that had traditionally supported universal service: new competitors would inevitably "cherry pick" the incumbents' customers in lower-cost areas by undercutting above-cost rates that incumbents relied upon to support affordable rates in higher-cost areas. Congress therefore required the Commission to "replace the [existing] patchwork of explicit and implicit subsidies with 'specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.'" *Texas Office of Public Utility Counsel v. FCC,* 183 F.3d 393, 406 (5th Cir. 1999) ("*TOPUC*") (*quoting* 47 U.S.C. § 254(b)(5)). To accomplish this task, Congress delegated to the Commission broad discretion to balance the "difficult policy choices" associated with implementing the new universal service provisions. *Id.* at 411.

Section 254(b) of the Act directs the Federal-State Joint Board on Universal Service (the "Joint Board")[3] and the Commission to base policies for the preservation and advancement of universal service on six enumerated principles,

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[3] The Act directs the Commission to establish a Federal-State Joint Board comprised of state and federal regulators to "coordinate federal and state regulatory interests" related to universal service. *TOPUC,* 183 F.3d at 406. The Joint Board makes recommendations to assist the Commission when it adopts rules governing universal service.

plus such "other" principles as the Joint Board and the Commission may establish. 47 U.S.C. § 254(b)(1)-(7). Among other things, the principles listed in section 254(b) state that: there should be specific, predictable, and sufficient federal and state universal service mechanisms (47 U.S.C. § 254(b)(5)); quality services should be available at just, reasonable, and affordable rates (47 U.S.C. § 254(b)(1)); and consumers in all regions of the nation should have access to telecommunications and information services that are reasonably comparable in rates and quality to those provided in urban areas (47 U.S.C. § 254(b)(3)). In addition, the Commission adopted the principle of "competitive neutrality" pursuant to its authority under section 254(b)(7) to adopt "other" universal service principles in the public interest. *Universal Service First Report and Order,* ¶ 46. In the context of section 254(b)(7), "competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another." *Id.* ¶ 47.

Another universal service provision, 47 U.S.C. § 254(e), requires that federal universal service support be "explicit and sufficient to achieve statutory purposes." *TOPUC,* 183 F.3d at 411-12 (*citing* § 254(e)). Section 254(e) provides that "a carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is

intended." 47 U.S.C. § 254(e). Further, section 254(e) restricts high-cost universal service support to an entity designated as an "eligible telecommunications carrier." *Id*. An ETC, which may be designated by a state commission or the FCC, *see* 47 U.S.C. § 214(e)(2), (6), must offer the services supported by the federal universal service mechanisms and advertise the availability of those services in media of general distribution within the service area for which it has received ETC designation. *See* 47 U.S.C. § 214(e)(1).

II. Initial Implementation of the New Universal Service Provisions Created by the 1996 Act

The Commission first implemented the new universal service provisions of the Act in its May 1997 *Universal Service First Report and Order*. *See TOPUC*, 183 F.3d at 406. That Order defined a set of "core" services that are eligible for universal service support, delineated a mechanism to support those services, and established a specific timetable for implementation.

The federal Universal Service Fund ("USF") is the explicit support mechanism that the Commission established to fund the universal service subsidy programs required by the Act. The USF is financed by assessments paid by providers of interstate telecommunications services and certain other providers of interstate telecommunications. *See* 47 C.F.R. § 54.706. Such contributions are to be made on "an equitable and nondiscriminatory basis" to support "the specific,

predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." 47 U.S.C. § 254(d). Fund assessments paid by contributors are determined by applying a quarterly "contribution factor" to the contributors' interstate revenues. *Order* ¶ 6 n.27 (JA 170). "Fund contributors are permitted to, and almost always do, pass those contribution assessments through to their end-user customers." *Ibid.* (JA 170).

The USF has grown dramatically in recent years. In 2001, the USF distributed $4.63 billion in universal service support.[4] By 2007, the USF totaled almost $7 billion annually. As the USF grew, so too did the quarterly contribution factor which, in most instances, is paid indirectly by end-user customers. In Second Quarter 2001, the quarterly contribution factor was approximately 6.9 percent of interstate telecommunications revenues. *See Proposed Second Quarter 2001 Universal Service Contribution Factor*, Public Notice 16 FCC Rcd 5358 (2001). By Second Quarter 2007, when the Commission adopted the *Order* on review, the quarterly contribution factor had climbed to 11.3 percent. *Order* ¶ 6, n.27 (JA 170).

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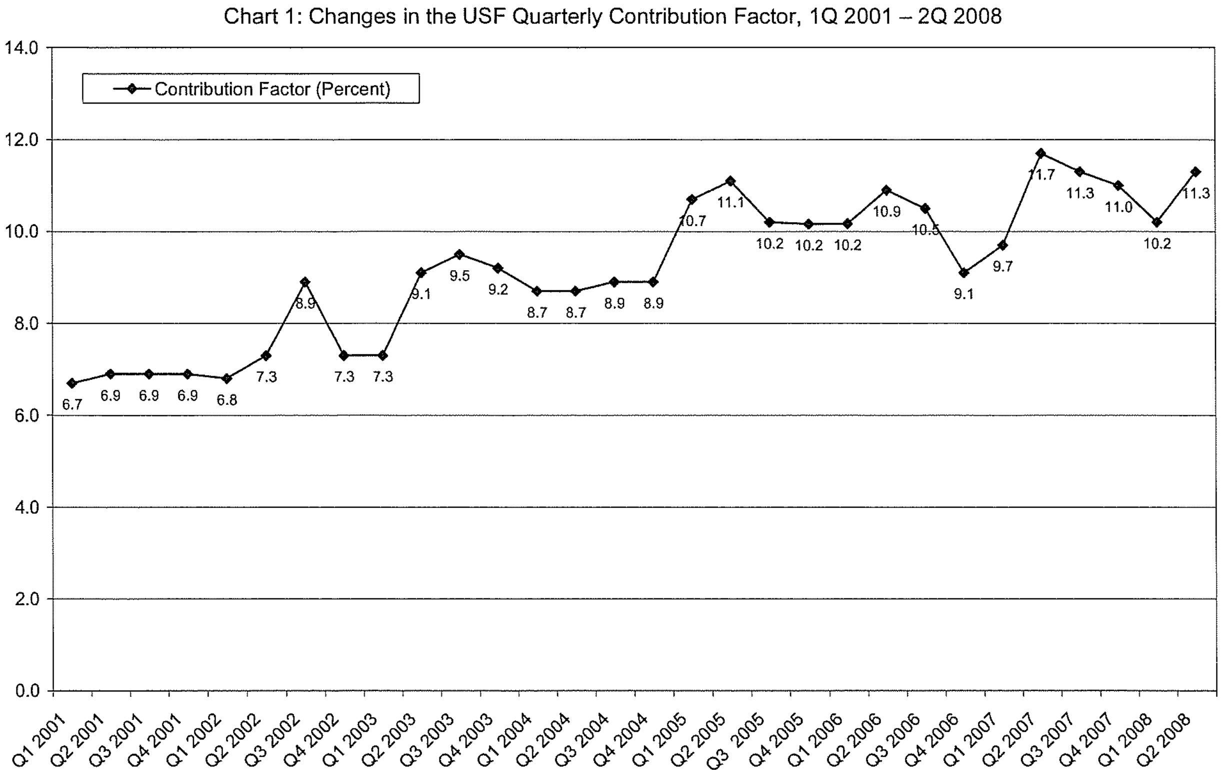
[4] Universal Service Administrative Company, Annual Report 2002 at 2, *available at http://www.usac.org/_res/documents/about/pdf/usac-annual-report-2002.pdf*



High-cost support disbursements represent the lion's share of USF expenditures. Disbursements were allocated among the various universal service programs in the following proportions in 2007: 61.6 percent for high-cost support; 26.0 percent for schools and libraries support; 11.8 percent for low-income support; and 0.5 percent for rural health care support.[5] Prior to the adoption of the

[5] 2008 Universal Service Monitoring Report (data through June 2008), Federal-State Staff for the Federal-State Joint Board on Universal Service (Dec. 31, 2008), Table 1.11, *available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-287688A2.pdf* ("*2008 Universal Service Monitoring Report*").

Order on review, the high-cost program was one of only two components of the USF that was not subject to a cap on total support.[6]

The substantial growth of the high-cost component of the USF is attributable both to its design and to market developments. Prior to the 1996 Act, only incumbent local exchange carriers ("ILECs") received high-cost support. But in the *Universal Service First Report and Order* (at ¶¶ 287, 311), the Commission found that high-cost support should be "portable" to any carrier that serves a particular customer, even if that carrier is a new entrant. The Commission provided that "[a] competitive carrier that has been designated as an eligible telecommunications carrier" under the Act "shall receive universal service support to the extent that it captures subscribers' lines formerly served by an ILEC receiving support or new customer lines in that ILEC's study area." *Id.* ¶ 287. The Commission found that such a policy would "aid the emergence of competition." *Ibid.* The Commission's rules did not distinguish between primary and secondary lines, so both ILECs and competitive ETCs could receive high-cost

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[6] Commission rules cap the schools and libraries program at $2.25 billion per funding year. *See* 47 C.F.R. § 54.507(a). The rural health care program also is capped ($400 million per funding year), although the USF has disbursed only about 10 percent of that amount annually. *See* 47 C.F.R. § 54.623; *2008 Universal Service Monitoring Report,* Table 5.1. And while the low-income program is not capped, it grew by less than $240 million between 2001 and 2007. *See 2008 Universal Service Monitoring Report,* Table 2.2.

support for multiple connections to the same residence or business. *Id.* ¶¶ 94-96. So, for example, if a rural customer had a residential line from an ILEC and a wireless phone from a competitive ETC, both services would be subsidized.

ILECs receive high-cost support based on their costs. *Order* ¶ 14 (JA 173). The Commission initially decided that the "least burdensome way to administer" portability would be to provide a competitive ETC the same per-line support as the ILEC, regardless of the competitive ETC's own cost of providing service. *Universal Service First Report and Order* ¶¶ 288, 313. Accordingly, ETCs are not required to document their own costs to receive high-cost support; instead, they receive support for each of their lines based on the same per-line support the ILEC receives in the relevant service area. *Id.* ¶¶ 288, 312; 47 C.F.R. § 54.307(a)(1). This method of calculating high-cost support for competitive ETCs is known as "identical support."

Rural ILECs challenged the *Universal Service First Report and Order*, claiming that the possibility of losing support to competitors would lead to support levels that are neither "sufficient" nor "predictable" within the meaning of section 254(b). The Fifth Circuit rejected those challenges, finding that "universal service … requires sufficient funding of *customers,* not *providers*." *Alenco Commc'ns, Inc. v. FCC,* 201 F.3d 608, 620 (5th Cir. 2000). "So long as there is sufficient and

competitively-neutral funding to enable all customers to receive basic telecommunications services, the FCC has satisfied the Act and is not further required to ensure sufficient funding of every local telephone provider as well." *Ibid.* In fact, the court stressed that "excessive funding may itself violate the sufficiency requirements of the Act." *Ibid.*

III. Subsequent Efforts to Reform the High-Cost Universal Service Support Distribution Rules

In light of the rapid emergence of competitive ETCs – the vast majority of which are wireless carriers – and corresponding increase in USF expenditures, the Commission in 2002 asked the Joint Board to review the high-cost support rules as applied to areas in which a competitive ETC is providing service. *See Federal-State Joint Board on Universal Service,* Referral Order, 17 FCC Rcd 22642 (2002).

Responding to that referral, the Joint Board proposed a number of rule changes designed to ensure the long-term sustainability of the USF. In particular, it encouraged the Commission to revisit the identical support rule, expressing concern "that funding a competitive ETC based on the incumbent LEC's embedded costs may not be the most economically rational method for calculating support." *See Federal-State Joint Board on Universal Service,* Recommended Decision, 19 FCC Rcd 4257, ¶ 96 (2004).

The Joint Board also recommended that high-cost support be limited to "a single connection that provides access to the public telephone network," rather than subsidizing multiple connections for the same household or business. *Id.* ¶ 56. The Joint Board recognized that while "[c]ompetitive ETCs [in 2004] receive[d] a small fraction of total high-cost support, ... their support ha[d] increased dramatically over the past few years," with "[m]uch of this growth represent[ing] supported wireless connections that supplement, rather than replace, wireline service." *Id.* ¶ 67. The Joint Board concluded that a "primary line" restriction on high-cost support was warranted because "further growth due to supporting multiple connections presents a significant threat to fund sustainability." *Id.* ¶ 68. Before the Commission could act on the Joint Board's proposed primary line restriction, Congress enacted legislation prohibiting such a rule. *Order* ¶ 20 n.63 (JA 175-76).[7]

Despite this prohibition, the Joint Board and the Commission have continued to investigate proposals to reform high-cost support, including alternative methodologies for calculating support in areas served by multiple ETCs. *See Federal-State Joint Board on Universal Service,* Referral Order, 19

[7] Congress recently extended this restriction until March 6, 2009 or until enactment of the applicable regular appropriations bill. *See* Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, 122 Stat 3574, 3575 (2008).

FCC Rcd 11538 (2004) (referring matters to the Joint Board); *Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission's Rules Relating to High-Cost Universal Service Support,* Public Notice, 19 FCC Rcd 16083 (2004) (seeking comment on referral). And the Joint Board subsequently has sought comment on a variety of specific proposals to reform high-cost universal service support, including proposals developed by Joint Board members and staff.[8]

IV. The Proceeding on Review

In May 2007, the Joint Board renewed its request that the Commission "take immediate action to rein in the explosive growth in high-cost universal service support disbursements," which had swelled from $2.6 billion per year in 2001 to $4 billion per year. *High-Cost Universal Service Support,* Recommended Decision, 22 FCC Rcd 8998, ¶¶ 1, 4 (2007) ("*Recommended Decision*") (JA 1, 2-

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[8] *See Federal-State Joint Board on Universal Service Seeks Comment on Proposals to Modify the Commission's Rules Relating to High-Cost Universal Service Support*, Public Notice, 20 FCC Rcd 14267 (2005); *Federal-State Joint Board on Universal Service Seeks Comment on the Merits of Using Auctions to Determine High-Cost Universal Service Support*, Public Notice, 21 FCC Rcd 9292 (2006). In February 2007, the Joint Board held an *en banc* hearing to discuss high-cost universal service support in rural areas, including the use of reverse auctions and geographic information systems to determine support for competitive ETCs. *See Federal-State Joint Board on Universal Service to Hold En Banc Hearing on High-Cost Universal Service Support in Areas Served by Rural Carriers*, Public Notice, 22 FCC Rcd 2545 (2007).

3). This time, however, the Joint Board recommended that the Commission adopt an "interim, emergency cap" on high-cost support to competitive ETCs. *Id.* ¶ 1. (JA 1). As the Joint Board predicted in 2004, "increased support to competitive ETCs which receive high-cost support based on the per-line support that the [ILECs] receive rather than the competitive ETC[s'] own costs" had led to rapid increases in the size of the USF. *Id.* ¶ 4. (JA 2-3). Indeed, "[w]hile support to [ILECs] ha[d] been flat or even declined since 2003… in the six years from 2001 through 2006, competitive ETC support grew from $15 million to almost $1 billion." *Ibid.* The Joint Board concluded that "without immediate action to restrain growth in competitive ETC funding, the federal universal service fund is in dire jeopardy of becoming unsustainable." *Ibid.* (JA 2-3).

The Joint Board urged the Commission to adopt an interim cap on high-cost support disbursements to competitive ETCs, reasoning that such a cap could "stop growth in competitive ETC support while the Joint Board and the Commission consider fundamental reforms to address issues related to the distribution of support." *Id.* ¶ 5. (JA 3-4). The Joint Board committed to making recommendations on comprehensive reform within six months (*i.e.*, by November 2007), *id.* ¶8 (JA 5), and sought comment on comprehensive reform in a Public

Notice released on the same day as the *Recommended Decision*. *Order* ¶ 4, n.13.[9] (JA 3).

Later that month, the Commission released a Notice of Proposed Rulemaking ("NPRM") seeking comment on a proposed interim cap pending comprehensive reform. *See High-Cost Universal Service Support,* Notice of Proposed Rulemaking, 22 FCC Rcd 9705 (2007), 72 Fed. Reg. 28936 (May 23, 2007) (JA 26). After reviewing the comments submitted by Petitioners and others in response to the NPRM, the Commission, in May 2008, largely adopted the Joint Board's proposal in the *Order* on review. *Order* ¶ 1 (JA 166-67).

Like the Joint Board, the Commission found that an interim cap was necessary to "rein in the explosive growth in high-cost universal service support disbursements," *Order,* ¶ 1 (JA 166), which had ballooned from $2.6 billion per year in 2001 to $4.3 billion per year in 2007 – a 65 percent increase. *Id.* ¶¶ 6, 22

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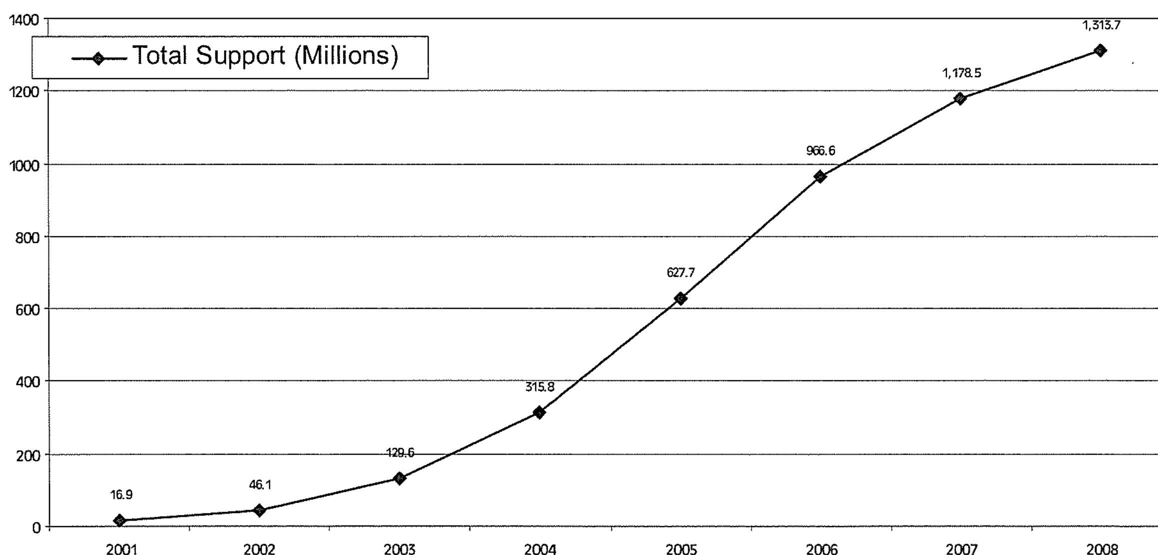
[9] In November 2007, the Joint Board submitted its promised recommendations for comprehensive reform of high-cost universal service support. *See High-Cost Universal Service Support,* Recommended Decision, 22 FCC Rcd 20477 (2007). Based on these recommendations, the Commission released three NPRMs for comprehensive reform of the high-cost universal service support program shortly thereafter. *See High-Cost Universal Service Support,* Notice of Proposed Rulemaking, 23 FCC Rcd 1467 (2008) (proposing changes to the identical support rule); *High-Cost Universal Service Support,* Notice of Proposed Rulemaking, 23 FCC Rcd 1495 (2008) (proposing reverse auctions as a means of distributing high-cost support); *High-Cost Universal Service Support,* Notice of Proposed Rulemaking, 23 FCC Rcd 1531 (2008) (Joint Board comprehensive reform proposal) (collectively, "*Reform Notices*").

(JA 169-70, 176-77). This growth, the Commission stressed, had resulted from increased support to competitive ETCs: "[w]hile support to incumbent LECs has been flat since 2003, competitive ETC support, in the seven years from 2001 through 2007, has grown from under $17 million to $1.18 billion – an average annual growth rate of over 100 percent." *Id.* ¶ 6 (JA 169-70).

Chart 2: Competitive ETC High-Cost Support (Millions), 2001-2008



Source: Universal Monitoring Report Table 3.2

The Commission predicted that future increases in the fund "would require excessive (and ever growing) contributions from consumers." *Ibid.* (JA 169-70). Substantial increases in high-cost disbursements had already helped push the USF contribution factor to 11.7 percent – an all-time high – at the time of the Joint Board's *Recommended Decision,* 22 FCC Rcd at 9000, ¶ 4, n.11 (JA 3). And the

contribution factor had declined only slightly (to 11.3 percent) when the Commission adopted the interim cap. *Order* ¶ 6 n.27 (JA 170). Because "[f]und contributors are permitted to, and almost always do, pass those contribution assessments through to their end-user customers," *ibid., citing* 47 C.F.R. § 54.712, the Commission reasoned that allowing high-cost support to grow unabated "could cripple the universal service fund." *Id.* ¶ 22 (JA 176-77).

The Commission attributed the explosive growth in competitive ETC high-cost support to the identical support rule. When the Commission adopted this rule, "[it] envisioned that competitive ETCs would compete directly against [ILECs] and try to take existing customers from them." *Id.* ¶ 19 (JA 175). But this prediction had "proven inaccurate." *Ibid.* Wireless carriers, which "serve a majority of competitive ETC lines, and have received a majority of competitive ETC support," *ibid.*, "do not capture lines from the [ILEC] to become a customer's sole service provider, except in a small portion of households." *Id.* ¶ 20 (JA 175). Rather, these carriers generally "provide mobile wireless telephony service in addition to a customer's existing wireline service." *Ibid.* And because this rule "promote[s] the sale of multiple supported wireless handsets in given households,"

id. ¶ 9 (JA 171),[10] "many households subscribe to both services and receive support for multiple lines, which has led to a rapid increase in the size of the fund." *Id.* ¶ 21 (JA 176).[11] The Commission concluded that the interim cap would maintain the stability of the USF until it was able to reform the rules that led to the dramatic, unanticipated growth in high-cost support disbursements. *See id.* ¶¶ 1, 21-23 (JA 166, 176-77).

On the basis of historical data, the Commission, like the Joint Board, did not find it necessary to impose the interim cap on ILEC high-cost support because "total [ILEC] support has not grown in recent years and does not have the same potential for rapid explosive growth [that] competitive ETC support does." *Id.* ¶ 11 (JA 172). In fact, ILEC high-cost support had *declined* since 2005. *See Id.* ¶ 6 n.25 (JA 169-70) (ILEC high-cost support dropped from $3.169 billion in 2005 to

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[10] Many carriers, for example, now offer "Family Plans" in which multiple family members each have their own telephone number and handset. Under existing rules, each telephone number is entitled to high-cost universal service support.

[11] In addition to stimulating USF growth, the Commission found that the identical support rule "fails to create efficient investment incentives for competitive ETCs" because a competitive ETC has an "incentive to expand the number of subscribers ... located in the lower-cost parts of high-cost areas" instead of expanding the geographic scope of its network, particularly into areas with the lowest population densities (and correspondingly, the highest costs). *Order* ¶ 21 (JA 176). This result "contraven[es] the Act's universal service goal of improving the access to telecommunications services in rural, insular, and high-cost areas." *Ibid.* (*citing* 47 U.S.C. § 254(b)(3)).

$3.108 billion in 2007). Further, the Commission noted, most ILEC support mechanisms already are capped or subject to growth limits. *Id.* ¶ 10 (JA 171-72).

The *Order* capped the "total annual competitive ETC support" in each state "at the level of support that competitive ETCs in that state were eligible to receive during March 2008 on an annualized basis." *Id.* ¶ 1 (JA 166-67). Under the interim cap, competitive ETCs will see a reduction in their per-line high-cost support if the number of competitive ETC lines in a state increases. The Commission found, however, that because "competitive ETC support is based on the incumbent LEC's costs, rather than on the competitive ETC's own costs, there is no reason to believe – and no record data showing – that support subject to an interim cap would necessarily result in insufficient support levels." *Id.* ¶ 14 (JA 173). Nonetheless, to protect against any possibility that the interim cap might deny competitive ETCs sufficient support, the Commission provided that a competitive ETC "will not be subject to the interim cap to the extent that it files cost data" with the Commission "demonstrating that its costs meet the support threshold in the same manner as the [ILEC]." *Id.* ¶ 1 (JA 166-67).[12]

[12] The Commission also adopted a "limited exception [from the interim cap] for competitive ETCs serving tribal lands or Alaska Native regions." *Order* ¶ 1 (JA 166).

The Commission declined to impose a fixed sunset date on the interim cap. Instead, it provided that the interim cap would remain in effect "until fundamental comprehensive reforms are adopted to address issues related to the distribution of support and to ensure that the universal service fund will be sustainable for future years." *Id.* ¶ 7 (JA 170). At the same time, it "commit[ed] to completing a final order on comprehensive reform as quickly as feasible after the comment cycle is completed on the pending *Reform Notices.*" *Id.* ¶ 37 (JA 182).

V. Subsequent Developments

Petitioners moved this Court for a stay of the Commission's *Order* pending judicial review. On November 3, 2008, the Court denied Petitioners' stay motion.

The Commission has not yet adopted the Joint Board proposals for comprehensive universal service reform at issue in the *Reform Notices* (*see* footnote 9, above), but it has taken steps toward comprehensive universal service reform. On November 5, 2008, the Commission issued a Further Notice of Proposed Rulemaking seeking expedited comment on universal service reform. *See High-Cost Universal Service Support*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 2008 WL 4821547 (2008) ("*Remand Order*"). At the same time, a majority of Commissioners said they intended to act on comprehensive universal service reform and expressed "a tentative but growing

measure of consensus" on key issues, such as (possibly) "eliminating the identical support rule" and moving toward "support based on a company's own cost." *Ibid.* (Joint Statement of FCC Commissioners Copps, Adelstein, Tate and McDowell). Thus, while the Commission "ch[ose] not to implement the Joint Board's recommendations [in the *Reform Notices*] at this time," it explained that "[t]h[e] Further Notice reflects [its] commitment to comprehensive reform of the intercarrier compensation and universal service systems in an expedited fashion." *Ibid.*[13] The formal comment cycle on the further notice closed in December 2008.

STANDARD OF REVIEW

Judicial review of the Commission's interpretation of the Communications Act is governed by *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron,* if the intent of Congress is clear, then "the court, as well as the agency, must give effect to [that] unambiguously expressed

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[13] The Act requires the Commission to "complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations." 47 U.S.C. § 254(a)(2). On November 20, 2007, the Joint Board released recommendations for comprehensive reform of high-cost universal service support, *see High-Cost Universal Service Support,* Recommended Decision, 22 FCC Rcd 20477 (2007). This established a deadline of November 20, 2008 for Commission action. In the *Remand Order,* the FCC, in order to satisfy the statutory deadline in section 254(a)(2), announced that it "cho[]se not to implement [the Joint Board's] recommendations at this time" *Remand Order* ¶ 37. However, as described above, the Commission remains committed to pursuing comprehensive reform.

intent." *Id.* at 842-43. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. "*Chevron* requires a federal court to accept the agency's [reasonable] construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

Under the Administrative Procedure Act ("APA"), the Commission's analysis must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "[T]he ultimate standard of review is a narrow one," and the "court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971). Judicial deference to the Commission's "expert policy judgment" is especially appropriate where the "subject matter … is technical, complex, and dynamic." *Brand X Internet Servs.,* 545 U.S. at 1003 (*quoting Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.,* 534 U.S. 327, 339 (2002)).

SUMMARY OF ARGUMENT

As it works on comprehensive universal service reform, which involves a broad and complex set of issues, the Commission reasonably imposed an interim cap on skyrocketing high-cost support disbursements to competitive ETCs in order to stabilize the program and limit the fees telecommunications customers pay to support it. Petitioners have identified no legal error in the Commission's actions.

1. This Court lacks jurisdiction to consider Petitioners' lead claim that the Commission violated the notice-and-comment rulemaking requirements of the APA, 5 U.S.C. § 553, by imposing interim caps on certain competitive ETCs' high-cost support as a condition of license transfers in separate adjudications entered *prior to* the *Order* on review. Petitioners complain of actions taken in Commission orders that are not before the Court and that can no longer be challenged. Moreover, even if they had timely sought judicial review, petitioners would not have had standing to challenge those orders. The Court also lacks jurisdiction because no party presented such a claim to the Commission in the proceedings leading to the *Order* on review. *See* 47 U.S.C. § 405(a). In any event, this claim fails on the merits since the prior orders were proper exercises of the Commission's authority to impose conditions on particular parties before it when reviewing license transfer applications.

2. The Commission's decision to impose the interim cap was a reasonable response to a record showing dramatic and unanticipated growth in the high-cost portion of the USF – growth that is attributable to increasing disbursements to competitive ETCs. This substantial increase in the size of the USF helped push the quarterly contribution factor to an all-time high while the Commission was considering the interim cap; and it had declined only slightly when the FCC adopted the *Order*. Consumers generally shoulder the burden of such increases in the quarterly contribution factor. Consistent with the Commission's long-standing use of caps to control the size of the USF, the FCC reasonably adopted the interim cap on competitive ETC high-cost support to preserve consumers' access to affordable telecommunications services pending comprehensive reform of high-cost universal service support.

a. Petitioners do not contest these underlying facts; instead, they ask this Court to vacate the *Order* on the basis of little more than their disagreement with the Commission's reasonable predictive judgment that additional growth in high-cost support could render universal service unsustainable. But courts properly defer to an expert agency where, as here, it enacts a prophylactic rule based on its predictive judgment that such measure is necessary to prevent prospective harm.

b. The courts also grant substantial deference to an agency when it enacts interim rules to maintain the status quo pending the outcome of an ongoing proceeding. The Commission reasonably found that the interim cap was necessary to stabilize the USF until the Commission is able to reform the broader regulatory scheme that led to the dramatic and unanticipated growth in high-cost support.

3a. The Commission reasonably interpreted section 254(b)(5) of the Act to require sufficient, but not excessive, universal service support. The Commission's authority to impose a cap on high-cost universal service support has been upheld on precisely these grounds. *Alenco,* 201 F.3d at 620-21. Regardless, Petitioners failed to demonstrate that their high-cost support would actually be insufficient under the interim cap. The Commission found no record evidence for such a claim. Moreover, if a competitive ETC believes its high-cost support is insufficient, the *Order* offers competitive ETCs an exception – a competitive ETC will not be subject to the interim cap if it files cost data demonstrating that its costs meet the support threshold in the same manner as the ILEC.

3b. The Commission reasonably balanced the universal service principles set forth in section 254(b) of the Act, 47 U.S.C. § 254(b), including its own principle of competitive neutrality, when it adopted the interim cap. The Commission is accorded substantial deference when it must balance potentially

conflicting objectives. The interim cap advances the objective of preserving universal service by freezing the growth of high-cost support pending comprehensive reform, thus stabilizing the USF and maintaining the affordability of telephone service. Indeed, in the *Order* on review, the Commission reasonably applied the interim cap to the feature of the existing system that most directly threatens the immediate sustainability of USF – escalating high-cost support disbursements to competitive ETCs.

ARGUMENT

I. This Court Lacks Jurisdiction to Consider Petitioners' Meritless Claim that the Commission Violated the Notice-and-Comment Requirements of the APA.

Petitioners assert that the Commission violated the notice-and-comment rulemaking requirements of the APA, because, according to Petitioners, the Commission unlawfully imposed the interim cap in two adjudicatory orders before adopting the interim cap in a rulemaking. Br. 27, 29-33 (*citing ALLTEL Corp. and Atlantis Holdings, LLC,* 22 FCC Rcd 19517 (2007) ("*ALLTEL-Atlantis Order*") and *AT&T Inc. and Dobson Communications*, 22 FCC Rcd 20295 (2007) ("*AT&T-*

Dobson Order")).[14] This challenge is baseless, since the Commission indisputably adopted the *Order* after a notice-and-comment rulemaking, and Petitioners identify no issue on which they were deprived of adequate notice.[15]

To the extent Petitioners are attempting to challenge the earlier adjudicatory orders, this Court lacks jurisdiction over that claim on three distinct grounds. First, the claim is, in reality, an untimely challenge to the *ALLTEL-Atlantis Order* and

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[14] Petitioners mention in passing that the Joint Board "is supposed to recommend changes in the universal service rules after giving notice and opportunity for public comment," citing 47 U.S.C. § 254(a). Br. 27. But the Joint Board was under no obligation to seek notice and comment before recommending the interim cap on competitive ETC high-cost support that the Commission ultimately adopted. Petitioners misread the statute: section 254(a)(1) of the Act required the Joint Board to provide "notice and opportunity for public comment" only as part of its initial "proceeding to recommend ... regulations in order to implement" the 1996 Act's universal service provisions, which, by statute, had to be completed "9 months after [enactment]." 47 U.S.C. § 254(a)(1). The Joint Board satisfied this requirement in 1996, *see TOPUC*, 183 F.3d at 406, and the statute imposes no separate notice-and-comment requirement upon the Joint Board in connection with subsequent proceedings. In any event, Petitioners' assertion that the Joint Board violated the Act provides no support for their argument that *the Commission* violated the APA, particularly given that the Commission sought notice and comment on the Joint Board's recommendation in an NPRM, *Notice,* 22 FCC Rcd 9705 (JA 26), and Petitioners took advantage of that opportunity.

[15] Petitioners criticize the Commission for adopting the recommendation of the expert Joint Board, Br. 31. But far from demonstrating that "the notice-and-comment proceeding served no purpose," *ibid.*, the Commission's decision simply reflects its view that the record compiled in that proceeding demonstrated the wisdom of the Joint Board's recommendation. The *Recommended Decision* received widespread support in the record compiled by the Commission from a diverse array of telecommunications carriers and individual parties. *See, e.g., Order* ¶ 7 n.28 (JA 170).

the *AT&T-Dobson Order* and must therefore be dismissed. Second, Petitioners lack standing to challenge those orders. Third, Petitioners' notice-and-comment challenge is not properly before the Court because it was not first presented to the Commission, as required by 47 U.S.C. § 405(a).

A. The crux of Petitioners' challenge is that the Commission allegedly acted unlawfully when it capped competitive ETC high-cost support for particular carriers in the *ALLTEL-Atlantis* and *AT&T-Dobson* license transfer adjudications prior to conducting the rulemaking that led to the *Order* on review. Br. 27-30. Petitioners did not seek judicial review of either Order when it was issued in 2007, however, and their attempt to do so now is untimely.

This is the case whether those Orders could have been challenged by a petition for review under the Hobbs Act, *see* 47 U.S.C. § 402(a); 28 U.S.C. § 2344 (petition for review must be filed "within 60 days after" the entry of the challenged order), or by an appeal of a licensing determination, *see* 47 U.S.C. § 402(b), (c) (30-day deadline). In either case, Petitioners' "failure to file within that window constitutes a bar to [this Court's] review." *Charter Commc'ns, Inc. v. FCC*, 460 F.3d 31, 38 (D.C. Cir. 2006) (discussing § 402(a)); *see Waterway Commc'ns Sys. v. FCC*, 851 F.2d 401, 405 (D.C. Cir. 1988) (same for § 402(b)).

B. Petitioners also lack standing to present any notice-and-comment challenge predicated on the *ALLTEL-Atlantis* and *AT&T-Dobson* license transfer adjudications. In the former, the Commission imposed a company-specific interim cap on high-cost support. *See* 22 FCC Rcd 19517, ¶¶ 9-11 (2007). In the latter, the Commission approved a company-specific interim cap on high-cost support as a voluntary condition. *See* 22 FCC Rcd 20295, ¶ 72. Neither Order imposes any obligations or restrictions on other parties, including Petitioners, and thus Petitioners did not suffer any "concrete" or "actual" injury that is "fairly traceable" to either Order. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Indeed, the parties subject to the *ALLTEL-Atlantis Order* and the *AT&T-Dobson Order* have intervened in this case to *support* the interim cap. Thus, although Petitioners never sought timely judicial review of either Order, this Court would not have had Article III jurisdiction to consider such a challenge by Petitioners had it been made. *See ibid.*

C. Furthermore, section 405(a) of the Act provides that the "filing of a petition for reconsideration" is a "condition precedent to judicial review" of any FCC order "where the party seeking such review … relies on questions of fact or law upon which the Commission … has been afforded no opportunity to pass." Under section 405(a), this Court "generally lack[s] jurisdiction to review arguments that have not first been presented to the Commission." *BDPCS, Inc. v.*

FCC, 351 F.3d 1777, 1182 (D.C. Cir. 2003). That principle controls here because no party in the current administrative proceeding presented Petitioners' notice-and-comment claim prior to the May 1, 2008, issuance of the *Order* on review.

In an apparent effort to demonstrate that this claim has been preserved, Petitioners point to petitions for reconsideration filed by N.E. Colorado Cellular in different proceedings *in 2004*. Br. 32. But Petitioners cannot credibly argue that filings made more than four years ago, in a separate proceeding that has nothing to do with the subject of the interim cap (*i.e.,* the distribution of high-cost universal service support), provided the Commission a "fair opportunity" to pass on this argument. Under established law, the petitioner "has the burden of clarifying its position before the agency," and therefore must 'assume[] at least a modicum of responsibility for flagging the relevant issues" in the agency proceeding under review. *Bartholdi Cable Co., Inc. v. FCC,* 114 F.3d 274, 279-80 (D.C. Cir. 1997) (internal quotation marks omitted). This Court has explained that it "see[s] no reason the Commission should be required to sift through pleadings in other proceedings in search of issues that a petitioner raised elsewhere and might have raised here had it thought to do so." *Charter Commc'ns,* 460 F.3d at 39 (*quoting Beehive Tel. Co., Inc. v. FCC,* 179 F.3d 941, 945 (D.C. Cir. 1999)).

D. In any event, even if the Court had jurisdiction to consider Petitioners' challenge, it would fail. The Commission was on firm ground when it adopted the company-specific interim caps on high-cost support in the *ALLTEL-Atlantis Order* and the *AT&T-Dobson Order*.

Pursuant to sections 214 and 310(d) of the Act, the Commission must pre-approve a transfer in the control of a license. 47 U.S.C. § 214, 310(d). The Commission also may impose conditions on a transfer of control to ensure that it serves the public interest, convenience, and necessity. 47 U.S.C. § 310(d). Typically, the Commission exercises its authority over license transfers in adjudicatory proceedings, *see NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974) ("[T]he choice between rulemaking and adjudication lies within the first instance with the [agency's] discretion."), and the Commission can make new law that applies to the parties to the adjudication. *Id.* at 292-93.

That is precisely what the Commission did in the *ALLTEL-Atlantis Order* and the *AT&T-Dobson Order*. In those adjudications, wireless carriers – which also happened to be the largest competitive ETC recipients of high-cost support – sought Commission authorization to transfer the control of certain licenses and related authorizations. Pursuant to sections 214 and 310(d), the Commission found that each transfer would only be in the public interest if certain conditions were

met; among those conditions was an interim cap on only those *particular* competitive ETCs' high-cost support, pending comprehensive universal service reform. *ALLTEL-Atlantis Order*, 22 FCC Rcd 19517, ¶ 13; *AT&T-Dobson Order*, 22 FCC Rcd 20295, ¶ 72. Because the Commission had explicit statutory authority to impose those conditions, they are entirely lawful.

II. The Commission Acted Reasonably in Adopting the Interim Cap on High-Cost Support to Competitive ETCs.

Petitioners challenge the Commission's predictive judgment that the interim cap was needed to curb explosive growth in high-cost universal service support disbursements. Br. 34-40. Yet there can be no question that the Commission was faced with dramatic growth in the high-cost portion of USF – growth that it found was largely attributable to competitive ETCs. The record showed that, in 2007, high-cost support totaled $4.3 billion – an increase of $1.7 billion, or about 65 percent, since 2001. *Order* ¶¶ 6, 22 (JA 169-70, 176-77). Further, "[w]hile support to [ILECs] had been flat" in recent years, competitive ETC support "from 2001 through 2007, ha[d] grown from under $17 million to $1.18 billion." *Id.* ¶ 6 (JA 169-70). These facts are undisputed.

This substantial increase in disbursements helped push the USF contribution factor to 11.7 percent – an all-time high – at the time of the Joint Board's

Recommended Decision, 22 FCC Rcd at 9000, ¶ 4, n.11 (JA 2-3). The contribution factor had declined only slightly (to 11.3 percent) when the Commission adopted the interim cap. *Order* ¶ 6 n.27 (JA 170). On a record showing actual, substantial increases in both the absolute size of the USF and the quarterly contribution factor – which, in most cases, results in higher rates paid by consumers when carriers pass through their USF assessment – the Commission logically concluded that allowing high-cost support to grow unabated could "cripple the universal service fund." *Id.* ¶ 22 (JA 176-77). The Commission's decision to impose the interim cap in these circumstances was a reasonable response designed to preserve consumers' access to affordable telecommunications services pending comprehensive universal service reform. *See Alenco,* 201 F.3d at 620-21 ("The agency's broad discretion to provide sufficient universal service funding includes the decision to impose cost controls to avoid excessive expenditures that will detract from universal service.").

In fact, the Commission has long used caps as a means of controlling the growth of the USF. *See, e.g.,* 47 C.F.R. § 54.507(a) (capping funding for the schools and libraries program); 47 C.F.R. § 54.623 (capping funding for the rural health care program); 47 C.F.R. § 54.305(e) (capping safety valve support for individual rural carriers, as well as the total amount of safety valve support for all rural carriers); 47 C.F.R. § 36.621(a)(4)(ii)(D) (capping rural high-cost loop

support on an indexed basis); *Access Charge Reform, Price Cap Performance Review for LECs, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service,* Order on Remand, 18 FCC Rcd 14976, ¶ 14 (2003) (targeting interstate access support). The interim cap on competitive ETC high-cost support quite reasonably follows this long-standing agency practice.

A. The Commission's Reasonable Predictive Judgment Is Entitled to Substantial Deference.

As described below, the Commission reasonably predicted that the USF would become so large that its sustainability would be threatened absent the interim cap. Courts properly defer to an agency when, as in this case, an issue concerns a predictive matter within the agency's expertise. When "factual determinations" are "primarily of a judgmental or predictive nature … complete factual support in the record for the Commission's judgment or prediction is not required;" "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency." *FCC v. Nat'l Citizens Comm. for Broad.,* 436 U.S. 775, 813-14 (1978); *see also NAB v. FCC*, 740 F.2d 1190, 1210 (D.C. Cir. 1984) ("[A]dministrative action generally occurs against a shifting background in which facts, predictions, and policies are in flux and in which an agency would be paralyzed if all the necessary answers had to be in before any action at all could be taken."); *Fresno Mobile*

Radio, Inc. v. FCC, 165 F.3d 965, 971 (D.C. Cir. 1999) ("[A]n agency's predictive judgment regarding a matter within its sphere of expertise is entitled to particularly deferential review.") (internal quotation marks omitted); *U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 235 (D.C. Cir. 2000) ("We defer to the agency regarding a predictive matter … within its expertise.").

Undaunted by the substantial deference due the Commission, Petitioners attack the reasonableness of the FCC's decision to impose the interim cap on several grounds, all of which lack merit. Petitioners initially assert that the Commission's predictive judgment is suspect because while competitive ETC high-cost support disbursements have continued to grow since the Joint Board issued the *Recommended Decision,* they have done so at a less dramatic rate than the Joint Board predicted. The Commission, however, did not adopt the interim cap on the basis of the Joint Board's specific forecast that competitive ETC high-cost support could reach almost $2 billion in 2008 and $2.5 billion in 2009, Br. 37; to the contrary, the Commission never even referenced the Joint Board's specific predictions in the *Order* on review and instead adopted the interim cap based on its own analysis of past growth and of the impact that future growth in competitive ETC high-cost support disbursements would have on the sustainability of USF. *Order* ¶¶ 6, 22 (JA 169-70, 176-77) (competitive ETC support grew from less than $17 million to $1.18 billion between 2001 and 2007).

Nor, for that matter, did the Commission "assume that CETC support would continue to grow at an average annual growth rate of over 100 percent." Br. 37-38. Although the Commission accurately noted that competitive ETC high-cost support had grown at such an average percentage rate from 2001 through 2007, *Order* ¶ 6 (JA 169-70), the agency focused as well on the absolute rate of growth in competitive ETC support during those years. In particular, the Commission stressed that "competitive ETC support, in the seven years from 2001 through 2007, has grown from under $17 million to $1.18 billion." *Ibid.*; *see also id.* ¶ 22 (JA 176-77) (noting that "high-cost support has increased by $1.7 billion – more than 65 percent – from 2001 to 2007"). Since a decreasing annual percentage growth rate was manifestly evident in the absolute growth data upon which the Commission relied, the FCC's conclusion that "the continued growth of the fund at this rate is not sustainable" was obviously not a projection of annual 100 percent growth. Instead, the Commission was referring to the absolute and ongoing growth in competitive ETC high-cost support disbursements from 2001 through 2007. Indeed, it was the *absolute size* of those disbursements that helped drive the quarterly contribution factor past 11 percent, triggering the Commission's concern that competitive ETC high-cost support, if allowed to grow unabated, could make telephone service unaffordable.

In fact, Petitioners' heavy reliance on the declining *percentage* growth rate of high-cost support disbursements to competitive ETCs (rather than its continuing robust growth in absolute terms) ignores basic math: a slower rate of growth on a large base ($1.18 billion in high-cost support for competitive ETCs in 2007) has a greater impact on total USF size than a faster rate of growth on a very small base ($17 million in 2001, upon competitive ETC entry). That competitive ETC high-cost support disbursements are growing at a slower rate (in percentage terms) today than they did upon competitive ETC entry in 2001 does nothing to undercut the reasonableness of the Commission's prediction that the USF could grow to an unsustainable size absent the interim cap.

Likewise, the fact that competitive ETC high-cost disbursements grew "only" 12 percent to $1.31 billion in 2008 – or less than the Joint Board predicted – does not render the FCC's earlier decision to impose the interim cap unreasonable. Br. 36. The claim fails at the threshold because the Commission did not adopt that Joint Board prediction, so its decision was clearly not based on it. Moreover, Petitioners have made no showing that the Commission's decision was unreasonable *ex ante*; instead, Petitioners argue that the Commission's enactment of the interim cap appears *ex post* to have been mistaken. Because "this argument is not a challenge to the reasonableness of the agency's decision on the basis of the record then before it," Petitioners' "claim must fail." *Fresno Mobile Radio, Inc.,*

165 F.3d at 971 (affirming the use of bidding credits in lieu of installment payments for small entities in a spectrum license auction, because, notwithstanding post-record experience, that choice was reasonable based on the record before the agency).

In any event, Petitioners' own brief acknowledges that high-cost support disbursements grew substantially – just not by as much as the Joint Board predicted. Br. 36. Likewise, Petitioners' emphasis on the fact that "CETC support had grown *just* 22 percent . . . in 2007," less than predicted by the Joint Board, Br. 13 (emphasis added), demonstrates their myopic focus on the accuracy of predictions of substantial growth, rather than the real issue, which is the substantial growth itself. The record showing consistent, substantial growth in total high-cost support disbursements to competitive ETCs fully justified the Commission's decision to impose the interim cap.

Petitioners nevertheless contend that there is no correlation between the annual growth in competitive ETC support and the overall size of the USF. Br. 37. That is incorrect – the growth of the USF can be attributed in large part to escalating high-cost support disbursements to competitive ETCs. *See Order* ¶¶ 6, 22 (JA 169-70, 176-77). Both the schools and libraries program and the rural health care program are subject to annual funding caps. *See* 47 C.F.R. § 54.507(a)

(schools and libraries program); 47 C.F.R. § 54.623 (rural health care program). In addition, low-income support, though not capped, grew by less than $240 million from 2001-2007. *See 2008 Universal Service Monitoring Report,* Table 2.2. Moreover, the recent growth in high-cost support is clearly attributable to competitive ETCs, not ILECs, since ILEC high-cost support has actually *declined* since 2005, *Order* ¶ 6 n.25 (JA 169-70), and most ILEC support mechanisms already are capped or are subject to growth limits. *Id.* ¶ 10 (JA 171-72). Thus, the substantial increase in the size of USF in the past few years can be isolated to the high-cost program subsidizing competitive ETCs, which was permitted to grow without limit prior to the adoption of the *Order* on review.

Petitioners also attack the Commission's common sense prediction that absent the interim cap, rates for basic telephone service could be rendered unaffordable due to increases in the quarterly USF contribution factor. Br. 39-40. That finding, however, is eminently reasonable. In Second Quarter 2001, prior to the emergence of competitive ETCs, the quarterly contribution factor was only 6.8 percent. *See Proposed Second Quarter 2001 Universal Service Contribution Factor*, Public Notice, 16 FCC Rcd 5358 (2001). But as the Commission found in the *Order,* the substantial increase in high-cost support disbursements to competitive ETCs helped push the quarterly USF contribution factor to 11.7 percent – an all-time high – at the time of the Joint Board's *Recommended*

Decision. *Order* ¶ 6 n.27 (JA 170). The contribution factor had declined only slightly (11.3 percent) when the Commission adopted the interim cap. *Ibid.* (JA 170). The Commission could reasonably conclude that the combination of contribution rates in that historically high range and the general upward trend would threaten future affordability since "[f]und contributors are permitted to, and almost always do, pass those contribution assessments through to their end-user customers." *Ibid.*[16] And the Commission may enact prophylactic rules intended to avoid foreseeable problems; the FCC is not, as Petitioners seem to argue, restricted to enacting rules only after it is too late. *See Chamber of Commerce of U.S. v. Sec. Exch. Comm'n,* 412 F.3d 133, 141 (D.C. Cir. 2005).

[16] Petitioners suggest in passing that the most recent (First Quarter 2009) USF contribution rate of 9.5 percent further undermines the Commission's affordability analysis. Br. 39 n.50 (*citing Proposed First Quarter 2009 Universal Service Contribution Factor*, Public Notice, 2008 WL 5212453, at 1 (2008)). Such *ex post* results are not legally relevant to the reasonableness of the Commission's analysis of the record before it. *See Fresno Mobile Radio, Inc.*, 165 F.3d at 971. Regardless, the contribution factor frequently fluctuates from quarter to quarter based on changes in the demand for universal service support disbursements, changes in total interstate telecommunications revenues (against which contributions are assessed), and accounting adjustments related to prior quarters in which actual revenues or disbursements varied from the initial projections. Notwithstanding idiosyncratic deviations in individual quarterly contribution factors, as shown in Chart 1, the general trend shows a steadily increasing contribution factor since 2001 commensurate with the increase in the absolute size of the USF.

B. The Commission Is Entitled to Substantial Deference When It Enacts Interim Regulation.

Petitioners contend that, rather than immediately adopting an interim cap in the *Order*, the Commission should have taken the purportedly "obvious reasonable alternative" course of "shovel[ing] the interim cap matter off to die quietly in the comprehensive reform proceeding." Br. 40-43. The Commission can hardly be faulted for rejecting that course, however, given that record evidence showed that continued increases in the USF "would require excessive (and ever growing) contributions from consumers." *Order* ¶ 6 (JA 170). Moreover, the argument that the interim cap would only slow "the growth of high-cost support for a seven-month period," Br. 42-43, presumes that the Commission would adopt the comprehensive reform measures set forth in the *Reform Notices* by November 20, 2008, the statutory deadline for the FCC to act on the Joint Board's recommendations.[17] However, in light of the complexities and difficulties associated with achieving comprehensive universal service reform, there was no guarantee that would happen when the Commission adopted the *Order*, and in fact, it did not. *Remand Order* ¶ 37. In sum, the Commission's decision to proceed by adopting an interim cap while it considers broader "permanent" reform of the high-cost support distribution rules was entirely reasonable.

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[17] *See* n.13, above.

Petitioners would apparently require the Commission to identify the exact point at which the USF would become so large as to risk rendering basic telephone service unaffordable, *see* Br. 39, or demonstrate that the USF had actually reached that size, as "manifested ... in consumer complaints," Br. 44, before adopting interim cost controls. The courts, however, do not require this degree of precision, particularly when an agency promulgates interim rules. "Substantial deference must be accorded an agency when it acts to maintain the status quo so that the objectives of a pending rulemaking proceeding will not be frustrated." *MCI v. FCC,* 750 F.2d 135, 141 (D.C. Cir. 1984) (upholding an interim freeze on the Subscriber Plant Factor, which separated costs between the intrastate and interstate jurisdictions); *see also ACS of Anchorage, Inc. v. FCC,* 290 F.3d 403, 409-10 (D.C. Cir. 2002) (upholding the interim assignment of internet service provider-related costs to the intrastate jurisdiction pending comprehensive reform of interstate access charges, consistent with the principle of "regulatory orderliness"). "What needs to be shown to uphold the FCC is that 'existing, possibly inadequate rules' had to be frozen to avoid 'compounding present difficulties.'" *MCI,* 750 F.2d at 141 (*citing Kessler v. FCC,* 326 F.2d 673, 684 (D.C. Cir. 1963)).

In particular, courts regularly defer to the Commission's enactment of interim rules based on the agency's predictive judgment that such rules were necessary to preserve universal service. *See, e.g., CompTel v. FCC,* 309 F.3d 8,

14-15 (D.C. Cir. 2002) (affirming a temporary rule imposing use restrictions on certain transport facilities to avoid disrupting the implicit universal service subsidies embedded in carrier access charges); *Alenco,* 201 F.3d at 620-22 (affirming transitional rules that capped support for ILEC high-cost loops and corporate operation expenses); *Southwestern Bell Tel. Co. v. FCC,* 153 F.3d 523, 537-39, 549-50 (8th Cir. 1998) (affirming interim access charge rules and the FCC's refusal to immediately remove all implicit subsidies from access charges to preserve universal service); *CompTel v. FCC,* 117 F.3d 1068, 1074 (8th Cir. 1997) (affirming the FCC's decision temporarily to allow ILECs to recover certain access charges to preserve universal service).

The standard of review for interim rules is easily met here. As in *MCI,* 750 F.2d at 141, "[t]he FCC concluded that an interim freeze was necessary" because its rules "had not performed … as had been originally envisioned." The Commission attributed the explosive growth in competitive ETC high-cost support disbursements to its identical support rule. When the Commission adopted that rule, "[it] envisioned that competitive ETCs would compete directly against [ILECs] and try to take existing customers from them." *Order* ¶ 19 (JA 175). But this prediction has "proven inaccurate," *ibid.* (JA 175): wireless carriers, which "serve a majority of competitive ETC lines, and have received a majority of competitive ETC support … do not capture lines from the [ILEC] to become a

customer's sole service provider, except in a small portion of households." *Id.* ¶ 20 (JA 175). Rather, these carriers generally "provide mobile wireless telephony service *in addition to* a customer's existing wireline service," *ibid.* (JA 175) (emphasis added), often selling "multiple supported wireless handsets in given households" under so-called "family plans." *Id.* ¶ 9 (JA 171). As a result, "many households subscribe to both services and receive support for multiple lines, which has led to a rapid increase in the size of the fund." *Id.* ¶ 21 (JA 176).

Until the Commission is able to reform the regulatory scheme that led to the dramatic, unanticipated growth in high-cost support, the interim cap will "preserve its ability to implement comprehensive … revisions," *MCI,* 750 F.2d at 141, by "stabliz[ing] high-cost universal service support and ensur[ing] a specific, predictable, and sufficient fund." *Order* ¶ 22 (JA 176-77). The Commission's action was thus eminently reasonable.

III. The Interim Cap on High-Cost Support to Competitive ETCs Is Consistent with the Act.

A. The Commission Reasonably Interpreted Section 254 to Require Sufficient, but Not Excessive, Universal Service Support.

There is no legal error in the Commission's interpretation of the statutory term "sufficient" or its related interest in avoiding excessive funding that would threaten the sustainability of the USF. *See* 47 U.S.C. § 254(b)(5). Indeed, the

Commission's authority to impose caps on high-cost support has been upheld against a similar challenge. *See Alenco*, 201 F.3d at 620-21.

When the Commission enacted the cost controls at issue in *Alenco*, its judgment was largely predictive – it was not faced with the explosive growth in the USF that led to the interim cap on competitive ETC high-cost support at issue here. The Fifth Circuit in *Alenco* nevertheless affirmed the Commission's purely prophylactic caps, finding that "[t]he agency's broad discretion to provide sufficient universal service funding includes the decision to impose cost controls to avoid excessive expenditures that will detract from universal service." *Ibid.* Critically, the court realized that "excessive funding may itself violate the sufficiency requirements of the Act." *Id.* at 620. "Because universal service is funded by a general pool subsidized by all telecommunications providers – and thus indirectly by the customers – excess subsidization in some cases may detract from universal service by causing rates to unnecessarily to rise, thereby pricing some consumers out of the market." *Ibid.*

Alenco thus underscores the error of Petitioners' position that the Commission may not even consider the sustainability of the USF or guard against "'excessive'" USF contributions when deciding how best to administer the program. Br. 21, 47-50. It is hard to imagine how a USF that is "sufficient" for

purposes of section 254(b)(5) (47 U.S.C. § 254(b)(5)), yet so large that it actually reduces the affordability of basic telecommunications services, in violation of section 254(b)(1) (47 U.S.C. § 254(b)(1)), could achieve the overarching policy goal of section 254, which is "the preservation and advancement of universal service." 47 U.S.C. § 254(b).

Moreover, "the Act only promises universal service, and that is a goal that requires sufficient funding of customers, not providers." *Alenco*, 201 F.3d at 620. "So long as there is sufficient and competitively-neutral funding to enable all customers to receive basic telecommunications services, the FCC has satisfied the Act and is not further required to ensure sufficient funding of every local telephone provider as well." *Id.*

Petitioners have not even attempted to demonstrate that the interim cap will undercut adequate telephone services for customers; rather, they argue only that it might result in a reduction in support to certain providers. *See, e.g.*, Declaration of Daniel E. Hopkins ¶ 7 (attached to Br.) (claiming only "financial harm" to competitive ETC from interim cap but making no claim about harm to customers); Declaration of Michael Felicissimo ¶ 7 (same). If "'[s]ufficient' funding of the customers' right to adequate telephone service can be achieved regardless of which carrier ultimately receives the subsidy," *Alenco,* 201 F.3d at 621, then sufficient

funding certainly can be achieved if one group of carriers, in some circumstances, merely receives less subsidy. Accordingly, while "all ETCs must be eligible to receive support," the Act does not "require the Commission to continue to provide identical levels of support to all carriers." *Order* ¶ 17 (JA 174).

Regardless, Petitioners (and amicus curiae Corr Wireless) failed to demonstrate before the Commission that their high-cost support would, in fact, be insufficient under the interim cap. As the Commission found, "because competitive ETC support is based on the incumbent LEC's costs, rather than on the competitive ETC's own costs, there is no reason to believe – and no record data showing – that support subject to an interim cap would necessarily result in insufficient support levels." *Id.* ¶ 14 (JA 173).

Nonetheless, to ensure the sufficiency of high-cost support, the *Order* offers competitive ETCs an exception from the interim cap if their capped support truly is insufficient. Specifically, "a competitive ETC will not be subject to the interim cap to the extent that it files cost data demonstrating that its costs meet the support threshold in the same manner as the incumbent LEC." *Id.* ¶ 31 (JA 180). Thus, there is simply no merit to amicus Corr Wireless's allegations that under the interim cap, competitive ETCs will "receive only a portion of the subsidy which they need to meet their costs," Amicus Br. 4, or that the interim cap has made it

"impossible" for Corr Wireless to "recover anywhere near [its] needed level of support." Amicus Br. 5. Rather, under the exception outlined above, Corr Wireless and other competitive ETCs may submit cost data to the Commission to secure greater per-line support if their high-cost universal service support under the interim cap proves insufficient. *Order* ¶ 31 (JA 180).[18]

The availability of this exception, which neither Petitioners nor their amicus even mention, also undercuts their allegation that the interim cap will prevent newly designated competitive ETCs from receiving high-cost support in states that received no competitive ETC high-cost support prior to March 2008. Br. 49. A competitive ETC will be eligible for support in these states if it makes the cost showing required by the *Order*.

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[18] To the extent that Corr Wireless further argues that the interim cap "must be unlawful … because it establishes an arbitrary level of support which bears no relationship to the actual level of need," Amicus Br. 4, that criticism is better levied against the identical support rule, which determines a competitive ETC's per-line high-cost support based on the ILEC's support, without any consideration of the competitive ETC's own need.

B. The Commission Reasonably Balanced the Universal Service Principles in Section 254 When It Imposed the Interim Cap on High-Cost Support to Competitive ETCs.

Petitioners also complain that the Commission placed too much emphasis on sufficiency, to the detriment of other universal service principles in section 254(b), 47 U.S.C. § 254(b), when it "temporarily prioritiz[ed] the immediate need to stabilize high-cost universal service support and ensure a specific, predictable, and sufficient fund." *Order* ¶ 22 (JA 176-77). According to Petitioners, the Commission unlawfully sacrificed the principle of "competitive neutrality," which the Commission adopted as an "additional" universal service principle pursuant to the authority granted by section 254(b)(7), 47 U.S.C. § 254(b)(7). Br. 50-52. This claim is insubstantial.

"Rather than setting up specific conditions or requirements, § 254(b) reflects a Congressional intent to delegate these difficult policy choices to agency discretion." *TOPUC*, 183 F.3d at 411. And competitive neutrality "has been developed by the FCC through regulation." *Id.* at 430 n.60. The Commission, therefore, is entitled to "broad deference" interpreting the non-statutory principle of "competitive neutrality" and balancing it against other universal service principles. *Ibid.* Moreover, "[w]hen an agency must balance a number of potentially conflicting objectives … judicial review is limited to determining

whether the agency's decision reasonably advances at least one of those objectives and its decisionmaking process was regular." *Fresno Mobile Radio, Inc.,* 165 F.3d at 971. Here, the Commission did just that – it advanced the objective of preserving universal service (47 U.S.C. § 254(b)) (as well as the statutory principles of sufficiency (47 U.S.C. § 254(b)(5)) and affordability (47 U.S.C. § 254(b)(1))) by freezing the growth of high-cost support to competitive ETCs, on an interim basis, pending comprehensive reform.

In all events, the Commission did not violate the principle of competitive neutrality when it enacted the interim cap, even if that principle were viewed in isolation. As previously discussed, the per-line high-cost support a competitive ETC receives under the Commission's existing rules is based on the ILEC's costs, not the competitive ETC's own costs. To the extent that a competitive ETC believes it should be entitled to greater per-line high-cost support than the amount disbursed under the interim cap, the *Order* permits a competitive ETC to obtain an exception from the interim cap upon "fil[ing] cost data demonstrating that its costs meet the support threshold in the same manner as the incumbent LEC." *Order* ¶ 31 (JA 180). If the competitive ETC cannot make this showing, it is hard to argue that reducing a competitive ETC's per-line high-cost support below that of the ILEC violates the principle of competitive neutrality.

The Commission, in fact, found that "it is not clear that identical support has … resulted in competitive neutrality." *Id.* ¶ 22 (JA 176-77). In most instances, competitive ETCs do not "compete directly against incumbent LECs" by "try[ing] to take existing customers from them." *Id.* ¶ 19 (JA 175). Rather, "many households subscribe to both services and receive support for multiple lines, which has led to a rapid increase in the size of the fund." *Id.* ¶ 21 (JA 176). Identical support also "fails to create efficient investment incentives for competitive ETCs" and "contraven[es] the Act's universal service goal of improving the access to telecommunications services in rural, insular and high-cost areas." *Ibid.* (*citing* 47 U.S.C. § 254(b)(3)) (JA 176). "Because a competitive ETC's per-line support is based solely on the per-line support received by the [ILEC], rather than its own network investment in an area," the competitive ETC has an "incentive to expand the number of subscribers … located in the lower-cost parts of high-cost areas" instead of expanding the geographic scope of its network, particularly into areas with the lowest population densities (and correspondingly, the highest costs). *Ibid.* (JA 176).

The thrust of Petitioners' argument is that the Commission should have imposed the interim cap on all recipients of high-cost support, not just competitive ETCs, to preserve the identical support rule. Br. 51; *see also* Amicus Br. 3. This argument ignores the fact that the Commission quite reasonably "applie[d] interim

cost controls to the aspect that most directly threatens the specificity, predictability, and sustainability of the fund: the rapid growth of competitive ETC support." *Order* ¶ 9 (JA 171). The record before the Commission showed that "[c]ompetitive ETC support, in the seven years from 2001 through 2007, ha[d] grown from $17 million to $1.18 billion," *id.* ¶ 6 (JA 169-70), whereas "total incumbent LEC support has not grown in recent years." *Id.* ¶ 11 (JA 172). Indeed, ILEC high-cost support has actually *declined* since 2005, *id.* ¶ 6 n.25 (JA 169-70), and most ILEC support mechanisms already are capped or are subject to growth limits. *Id.* ¶ 10 (JA 171-72).

Because ILEC high-cost support "does not have the same potential for rapid explosive growth [that] competitive ETC support does," it was thus quite reasonable for the Commission to impose the interim cap on competitive ETCs only and defer issues related to ILEC high-cost support to proceedings on "comprehensive universal service reform." *Id.* ¶ 11 (JA 172). That decision also is entirely consistent with precedent upholding the Commission's authority to "engage in incremental rulemaking and ... defer resolution of issues raised in a rulemaking even when those issues are related to the main ones being considered." *NAB,* 740 F.2d at 1210 (internal quotations omitted); *see also Brand X Internet Servs.,* 545 U.S. at 1002 (affirming the FCC's decision to incrementally address

the regulatory framework for different categories of facilities-based information service providers).[19]

* * *

Against this legal and factual backdrop, there is no merit to Petitioners' argument that the interim cap violates the statutory principle of sufficiency (47 U.S.C. § 254(b)(5)) or the Commission's own principle of competitive neutrality (adopted pursuant to 47 U.S.C. § 254(b)(7)), because it only limits high-cost support disbursements to competitive ETCs pending comprehensive reform. The Commission's interpretation of section 254 of the Act, 47 U.S.C. § 254, was reasonable and easily satisfies the governing *Chevron* standard. 467 U.S. at 843.[20]

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[19] Accordingly, amicus Corr Wireless's colorful discussion of "Xerxes' fallacy" is unpersuasive. Amicus Br. at 1-3. The Commission, in its discretion, may curb the exploding population of goats (*i.e.,* high-cost support to competitive ETCs) first to prevent the barge from sinking, nothwithstanding the continued, but declining, presence of elephants (*i.e.,* high-cost support to ILECs) on board.

[20] As shown above, the *Order* is lawful and reasonable and thus there is no basis to consider the question of remedy. If the Court reaches that question, however, it should not grant Petitioners' request (Br. 45-46) to vacate the *Order*, but rather should allow the interim cap to remain in place during remand proceedings before the agency. It is conceivable that the Commission could correct any perceived deficiencies identified by the Court on remand. In addition, lifting the interim cap could be highly disruptive, creating the possibility that the USF could expand to an unsustainable size, frustrating the Comission's ability to revise its high-cost support distribution rules and enact comprehensive universal service reform. In these circumstances, the Court has ample discretion to remand the case to the Commission without vacating the *Order*. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993).

CONCLUSION

The Court should dismiss those portions of the petitions for review over which it lacks jurisdiction and otherwise should deny the petitions for review.

Respectfully submitted,

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February 11, 2009

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

RURAL CELLULAR ASSOCIATION, ET AL., PETITIONERS, V. FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA RESPONDENTS	))))))))))	NO. 08-1284 CONSOLIDATED WITH NO. 08-1285

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 12108 words.

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March 25, 2009

Appendix:
Statutes and Regulations

5 U.S.C. § 553
5 U.S.C. § 706
28 U.S.C. § 2342
28 U.S.C. § 2344
47 U.S.C. § 153(37)
47 U.S.C. § 214(e)
47 U.S.C. § 254(a), (b), (d), (e), (h) and (j)
47 U.S.C. § 402
47 U.S.C. § 405(a)
47 C.F.R. § 36.621
47 C.F.R. § 51.5
47 C.F.R. § 54.5
47 C.F.R. § 54.305(e)
47 C.F.R. § 54.307(a)
47 C.F.R. § 54.507(a)
47 C.F.R. § 54.623
47 C.F.R. § 54.706
47 C.F.R. § 54.712

5 U.S.C. § 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency

hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

> (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
>
> (2) interpretative rules and statements of policy; or
>
> (3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 U.S.C. § 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of--

(A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101-56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and

(B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S.C. § 2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of --

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

47 U.S.C. § 153. Definitions

(37) Rural telephone company

The term "rural telephone company" means a local exchange carrier operating entity to the extent that such entity--

> (A) provides common carrier service to any local exchange carrier study area that does not include either--
>
> > (i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or
> >
> > (ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;
>
> (B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;
>
> (C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or
>
> (D) has less than 15 percent of its access lines in communities of more than 50,000 on February 8, 1996.

47 U.S.C. § 214. Extension of lines or discontinuance of service; certificate of public convenience and necessity

(e) Provision of universal service

(1) Eligible telecommunications carriers

A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received--

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

(2) Designation of eligible telecommunications carriers

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

(3) Designation of eligible telecommunications carriers for unserved areas

If no common carrier will provide the services that are supported by Federal universal service support mechanisms under section 254(c) of this title to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services or an area served by a common carrier to which paragraph (6) applies, or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof. Any carrier or carriers ordered to provide such service under this paragraph shall meet the requirements of paragraph (1) and shall be designated as an eligible telecommunications carrier for that community or portion thereof.

(4) Relinquishment of universal service

A State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier. An eligible telecommunications carrier that seeks to relinquish its eligible telecommunications carrier designation for an area served by more than one eligible telecommunications carrier shall give advance notice to the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) of such relinquishment. Prior to permitting a telecommunications carrier designated as an eligible telecommunications carrier to cease providing universal service in an area served by more than one eligible telecommunications carrier, the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall require the remaining eligible telecommunications carrier or carriers to ensure that all customers served by the relinquishing carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier. The State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall establish a time, not to exceed one year after the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) approves such relinquishment under this paragraph, within which such purchase or construction shall be completed.

(5) "Service area defined"

The term "service area" means a geographic area established by a State commission (or the Commission under paragraph (6)) for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c) of this title, establish a different definition of service area for such company.

(6) Common carriers not subject to state commission jurisdiction

In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission, the Commission shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the Commission consistent with applicable Federal and State law. Upon request and consistent with the public interest, convenience and necessity, the Commission may, with respect to an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated under this paragraph, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the Commission shall find that the designation is in the public interest.

47 U.S.C. § 254. Universal service

(a) Procedures to review universal service requirements

(1) Federal-State Joint Board on universal service

Within one month after February 8, 1996, the Commission shall institute and refer to a Federal-State Joint Board under section 410(c) of this title a proceeding to recommend changes to any of its regulations in order to implement sections 214(e) of this title and this section, including the definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for completion of such recommendations. In addition to the members of the Joint Board required under section 410(c) of this title, one member of such Joint Board shall be a State-appointed utility consumer advocate nominated by a national organization of State utility consumer advocates. The Joint Board shall, after notice and opportunity for public comment, make its recommendations to the Commission 9 months after February 8, 1996.

(2) Commission action

The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board required by paragraph (1) and shall complete such proceeding within 15 months after February 8, 1996. The rules established by such proceeding shall include a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation. Thereafter, the Commission shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations.

(b) Universal service principles

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

(1) Quality and rates

Quality services should be available at just, reasonable, and affordable rates.

(2) Access to advanced services

Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in rural and high cost areas

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) Equitable and nondiscriminatory contributions

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) Specific and predictable support mechanisms

There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) Access to advanced telecommunications services for schools, health care, and libraries

Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h) of this section.

(7) Additional principles

Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.

(d) Telecommunications carrier contribution

Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

(e) Universal service support

After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

(h) Telecommunications services for certain providers

(1) In general

(A) Health care providers for rural areas

A telecommunications carrier shall, upon receiving a bona fide request, provide telecommunications services which are necessary for the provision of health care services in a State, including instruction relating to such services, to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State. A telecommunications carrier providing service under this paragraph shall be entitled to have an amount equal to the difference, if any, between the rates for services

provided to health care providers for rural areas in a State and the rates for similar services provided to other customers in comparable rural areas in that State treated as a service obligation as a part of its obligation to participate in the mechanisms to preserve and advance universal service.

(B) Educational providers and libraries

All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3) of this section, provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. The discount shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities. A telecommunications carrier providing service under this paragraph shall--

(i) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or

(ii) notwithstanding the provisions of subsection (e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service.

(j) Lifeline assistance

Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission under regulations set forth in section 69.117 of title 47, Code of Federal Regulations, and other related sections of such title.

47 U.S.C. § 402. Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

(c) Filing notice of appeal; contents; jurisdiction; temporary orders

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) Notice to interested parties; filing of record

Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28.

(e) Intervention

Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person

who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) Records and briefs

The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) Time of hearing; procedure

The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of Title 5.

(h) Remand

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) Judgment for costs

The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) Finality of decision; review by Supreme Court

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

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

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: Provided, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

47 C.F.R. § 36.621. Study area total unseparated loop cost

(a) For the purpose of calculating the expense adjustment, the study area total unseparated loop cost equals the sum of the following:

(1) Return component for net unseparated Exchange Line C&WF subcategory 1.3 investment and Exchange Line CO Circuit Equipment Category 4.13 investment. This amount is calculated by deducting the accumulated depreciation and noncurrent deferred Federal income taxes attributable to C&WF subcategory 1.3 investment and Exchange Line Category 4.13 circuit investment reported pursuant to § 36.611(b) from the gross investment in Exchange Line C&WF subcategory 1.3 and CO Category 4.13 reported pursuant to § 36.611(a) to obtain the net unseparated C&WF subcategory 1.3 investment, and CO Category 4.13 investment. The net unseparated C&WF subcategory 1.3 investment and CO Category 4.13 investment is multiplied by the study area's authorized interstate rate of return.

(2) Depreciation expense attributable to C&WF subcategory 1.3 investment, and CO Category 4.13 investment as reported in § 36.611(c).

(3) Maintenance expense attributable to C&WF subcategory 1.3 investment, and CO Category 4.13 investment as reported in § 36.611(d).

(4) Corporate Operations Expenses, Operating Taxes and the benefits and rent portions of operating expenses, as reported in § 36.611(e) attributable to investment in C&WF Category 1.3 and COE Category 4.13. This amount is calculated by multiplying the total amount of these expenses and taxes by the ratio of the unseparated gross exchange plant investment in C&WF Category 1.3 and COE Category 4.13, as reported in § 36.611(a), to the unseparated gross telecommunications plant investment, as reported in § 36.611(f). Total Corporate Operations Expense, for purposes of calculating universal service support payments beginning July 1, 2001, shall be limited to the lesser of:

(i) The actual average monthly per-loop Corporate Operations Expense; or

(ii) A monthly per-loop amount computed according to paragraphs (a)(4)(ii)(A), (a)(4)(ii)(B), (a)(4)(ii)(C), and (a)(4)(ii)(D) of this

section. To the extent that some carriers' corporate operations expenses are disallowed pursuant to these limitations, the national average unseparated cost per loop shall be adjusted accordingly.

(A) For study areas with 6,000 or fewer working loops the amount monthly per working loop shall be $33.30853-(.00246 x the number of working loops), or, $50,000 / the number of working loops, whichever is greater;

(B) For study areas with more than 6,000 but fewer than 18,006 working loops, the monthly amount per working loop shall be $3.83195 + (88,429.20 / the number of working loops); and

(C) For study areas with 18,006 or more working loops, the monthly amount per working loop shall be $8.74472.

(D) Beginning January 1, 2002, the monthly per-loop amount computed according to paragraphs (a)(4)(ii)(A), (a)(4)(ii)(B), and (a)(4)(ii)(C) of this section shall be adjusted each year to reflect the annual percentage change in the United States Department of Commerce's Gross Domestic Product-Chained Price Index (GDP-CPI).

(b) [Reserved]

47 C.F.R. § 51.5. Terms and Definitions

Rural telephone company. A rural telephone company is a LEC operating entity to the extent that such entity:

> (1) Provides common carrier service to any local exchange carrier study area that does not include either:
>
> (i) Any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or
>
> (ii) Any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;
>
> (2) Provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;
>
> (3) Provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or
>
> (4) Has less than 15 percent of its access lines in communities of more than 50,000 on February 8, 1996.

47 C.F.R. § 54.5. Terms and Definitions

Rural telephone company. "Rural telephone company" has the same meaning as that term is defined in § 51.5 of this chapter.

47 C.F.R. § 54.305(e). Sale or transfer of exchanges

(e) The sum of the safety valve loop cost expense adjustment for all eligible study areas operated by rural telephone companies shall not exceed five (5) percent of the total rural incumbent local exchange carrier portion of the annual nationwide loop cost expense adjustment calculated pursuant to § 36.603 of this chapter. The five (5) percent cap on the safety valve mechanism shall be based on the lesser of the rural incumbent local exchange carrier portion of the annual nationwide loop cost expense adjustment calculated pursuant to § 36.603 of this chapter or the sum of rural incumbent local exchange carrier expense adjustments calculated pursuant to § 36.631 of this chapter. The percentage multiplier used to derive study area safety valve loop cost expense adjustments for rural telephone companies shall be the lesser of fifty (50) percent or a percentage calculated to produce the maximum total safety valve loop cost expense adjustment for all eligible study areas pursuant to this paragraph. The safety valve loop cost expense adjustment of an individual rural incumbent local exchange carrier also may be further reduced as described in paragraph (d)(3) of this section.

47 C.F.R. § 54.307. Support to a competitive eligible telecommunications carrier

(a) Calculation of support. A competitive eligible telecommunications carrier shall receive universal service support to the extent that the competitive eligible telecommunications carrier captures the subscriber lines of an incumbent local exchange carrier (LEC) or serves new subscriber lines in the incumbent LEC's service area.

(1) A competitive eligible telecommunications carrier serving loops in the service area of a rural incumbent local exchange carrier, as that term is defined in § 54.5 of this chapter, shall receive support for each line it serves in a particular service area based on the support the incumbent LEC would receive for each such line, disaggregated by cost zone if disaggregation zones have been established within the service area pursuant to § 54.315 of this subpart. A competitive eligible telecommunications carrier serving loops in the service area of a non-rural incumbent local exchange carrier shall receive support for each line it serves in a particular wire center based on the support the incumbent LEC would receive for each such line. A competitive eligible telecommunications carrier serving loops in the service area of a rate-of-return carrier shall be eligible to receive Interstate Common Line Support for each line it serves in the service area in accordance with the formula in § 54.901.

(2) A competitive eligible telecommunications carrier that uses switching purchased as unbundled network elements pursuant to § 51.307 of this chapter to provide the supported services shall receive the lesser of the unbundled network element price for switching or the per-line DEM support of the incumbent LEC, if any. A competitive eligible telecommunications carrier that uses loops purchased as unbundled network elements pursuant to § 51.307 of this chapter to provide the supported services shall receive the lesser of the unbundled network element price for the loop or the incumbent LEC's per-line payment from the high-cost loop support, LTS, and Interstate Common Line Support mechanisms, if any. The incumbent LEC providing nondiscriminatory access to unbundled network elements to such competitive eligible telecommunications carrier shall receive the difference between the level of universal service support provided to the competitive eligible telecommunications carrier and the per-customer level of support that the incumbent LEC would have received.

(3) A competitive eligible telecommunications carrier that provides the supported services using neither unbundled network elements purchased pursuant to § 51.307 of this chapter nor wholesale service purchased pursuant to section 251(c)(4) of the Act will receive the full amount of universal service support that the incumbent LEC would have received for that customer.

47 C.F.R. § 54.507. Cap on Universal Service Support for Schools and Libraries

(a) Amount of the annual cap. The annual funding cap on federal universal service support for schools and libraries shall be $2.25 billion per funding year. All funding authority for a given funding year that is unused in that funding year shall be carried forward into subsequent funding years for use in accordance with demand. All funds collected that are unused shall be applied to stabilize universal service contributions in accordance with the public interest and consistent with § 54.709(b) for no more than three quarters, beginning with third quarter 2002. Beginning no later than second quarter 2003, all funds collected that are unused shall be carried forward into subsequent funding years for use in the schools and libraries support mechanism in accordance with the public interest and notwithstanding the annual cap.

(1) Amount of unused funds. The Administrator shall report to the Commission, on a quarterly basis, funding that is unused from prior years of the schools and libraries support mechanism.

(2) Application of unused funds. On an annual basis, in the second quarter of each calendar year, all funds that are collected and that are unused from prior years shall be available for use in the next full funding year of the schools and libraries mechanism in accordance with the public interest and notwithstanding the annual cap, as described in paragraph (a) of this section.

47 C.F.R. § 54.623. Cap on Universal Service Support for Rural Health Care

(a) Amount of the annual cap. The annual cap on federal universal service support for health care providers shall be $400 million per funding year, with the following exceptions.

(b) Funding year. A funding year for purposes of the health care providers cap shall be the period July 1 through June 30.

(c) Requests. Funds shall be available as follows:

> (1) Generally, funds shall be available to eligible health care providers on a first-come-first-served basis, with requests accepted beginning on the first of January prior to each funding year.
>
> (2), (3) [Reserved]
>
> (4) The Administrator shall implement a filing period that treats all rural health care providers filing within the period as if their applications were simultaneously received.

(d) Annual filing requirement. Health care providers shall file new funding requests for each funding year.

(e) Long term contracts. If health care providers enter into long term contracts for eligible services, the Administrator shall only commit funds to cover the portion of such a long term contract scheduled to be delivered during the funding year for which universal service support is sought.

(f) Pro-rata reductions. Administrator shall act in accordance with this paragraph when a filing period described in paragraph (c) of this section is in effect. When a filing period described in paragraph (c) of this section closes, Administrator shall calculate the total demand for support submitted by all applicants during the filing window. If the total demand exceeds the total support available for the funding year, Administrator shall take the following steps:

> (1) Administrator shall divide the total funds available for the funding year by the total amount of support requested to produce a pro-rata factor.

(2) Administrator shall calculate the amount of support requested by each applicant that has filed during the filing window.

(3) Administrator shall multiply the pro-rata factor by the total dollar amount requested by each applicant. Administrator shall then commit funds to each applicant consistent with this calculation.

47 C.F.R. § 54.706. Universal Service Contributions

(a) Entities that provide interstate telecommunications to the public, or to such classes of users as to be effectively available to the public, for a fee will be considered telecommunications carriers providing interstate telecommunications services and must contribute to the universal service support mechanisms. Certain other providers of interstate telecommunications, such as payphone providers that are aggregators, providers of interstate telecommunications for a fee on a non-common carrier basis, and interconnected VoIP providers, also must contribute to the universal service support mechanisms. Interstate telecommunications include, but are not limited to:

(1) Cellular telephone and paging services;

(2) Mobile radio services;

(3) Operator services;

(4) Personal communications services (PCS);

(5) Access to interexchange service;

(6) Special access service;

(7) WATS;

(8) Toll-free service;

(9) 900 service;

(10) Message telephone service (MTS);

(11) Private line service;

(12) Telex;

(13) Telegraph;

(14) Video services;

(15) Satellite service;

(16) Resale of interstate services;

(17) Payphone services; and

(18) Interconnected VoIP services.

(19) Prepaid calling card providers.

(b) Except as provided in paragraph (c) of this section, every entity required to contribute to the federal universal service support mechanisms under paragraph (a) of this section shall contribute on the basis of its projected collected interstate and international end-user telecommunications revenues, net of projected contributions.

(c) Any entity required to contribute to the federal universal service support mechanisms whose projected collected interstate end-user telecommunications revenues comprise less than 12 percent of its combined projected collected interstate and international end-user telecommunications revenues shall contribute based only on such entity's projected collected interstate end-user telecommunications revenues, net of projected contributions. For purposes of this paragraph, an "entity" shall refer to the entity that is subject to the universal service reporting requirements in § 54.711 and shall include all of that entity's affiliated providers of interstate and international telecommunications and telecommunications services.

(d) Entities providing open video systems (OVS), cable leased access, or direct broadcast satellite (DBS) services are not required to contribute on the basis of revenues derived from those services. The following entities will not be required to contribute to universal service: non-profit health care providers; broadcasters; systems integrators that derive less than five percent of their systems integration revenues from the resale of telecommunications. Prepaid calling card providers are not required to contribute on the basis of revenues derived from prepaid calling cards sold by, to, or pursuant to contract with the Department of Defense (DoD) or a DoD entity.

(e) Any entity required to contribute to the federal universal service support mechanisms shall retain, for at least five years from the date of the contribution, all records that may be required to demonstrate to auditors that the contributions made were in compliance with the Commission's universal service rules. These records

shall include without limitation the following: Financial statements and supporting documentation; accounting records; historical customer records; general ledgers; and any other relevant documentation. This document retention requirement also applies to any contractor or consultant working on behalf of the contributor.

47 C.F.R. 54.712. Contributor recovery of universal service costs from end users.

(a) Federal universal service contribution costs may be recovered through interstate telecommunications-related charges to end users. If a contributor chooses to recover its federal universal service contribution costs through a line item on a customer's bill the amount of the federal universal service line-item charge may not exceed the interstate telecommunications portion of that customer's bill times the relevant contribution factor.

(b) [Reserved]