IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NO. 11-9900

IN RE: FCC 11-161

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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GLOSSARY

1996 Act	The Telecommunications Act of 1996
Act	The Communications Act of 1934
APA	The Administrative Procedure Act
COLR	Carrier of Last Resort
ETC	Eligible Telecommunications Carrier
FCC	Federal Communications Commission
FNPRM	Further Notice of Proposed Rulemaking
LEC	Local Exchange Carrier
NPRM	Notice of Proposed Rulemaking
USF	Universal Service Fund
WCB	Wireline Competition Bureau

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ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

FEDERAL RESPONDENTS' FINAL RESPONSE TO THE WIRELESS CARRIER UNIVERSAL SERVICE FUND PRINCIPAL BRIEF

ISSUE PRESENTED

Whether the Federal Communications Commission ("FCC") lawfully reformed its universal service rules to efficiently enhance access to wireless mobile voice and broadband services in rural America.

INTRODUCTION AND SUMMARY OF ARGUMENT

In addition to the challenges to the universal service reforms addressed in the FCC's Principal USF Brief, a separate group of smaller mobile wireless service providers attack that part of the *Order* on review.[1] Their sometimes

[1] *Connect America Fund*, 26 FCC Rcd 17663 (2011) ("*Order*") (JA 390-1141).

overlapping claims are equally unfounded, *see* FCC Principal USF Br. 1-2, and the Court should reject them.

I. Petitioners broadly but mistakenly assert that the FCC lacked authority to adopt the reforms in the *Order*. Petitioners' various claims rest on the assertions that the *Order* (1) unlawfully provides federal universal service support for "information services," notably broadband Internet access, and (2) subjects "information services" to impermissible common carrier regulation under Title II of the Act, 47 U.S.C. §201 *et seq*. Petitioners are wrong on both counts.

A. The *Order* does not provide federal universal service support for any services that are not authorized for such support under federal law. In particular, the FCC reasonably determined that section 254 of the Communications Act of 1934 ("the Act"), 47 U.S.C. §254, authorized the agency to provide such support for networks capable of providing both voice and broadband Internet access services.

1. In this regard, petitioners contend that the FCC erred when it relied on 47 U.S.C. §254(b) to inform its reading of the agency's authority under other statutory provisions, notably 47 U.S.C. §254(e). While petitioners characterize the universal service principles in section 254(b) as mere "policy statements," Br. 25, this Court has ruled that they provide the FCC not only

the authority, but also a duty, to ensure that the objectives in that provision are realized. *See Qwest Corp. v. FCC*, 258 F.3d 1191, 1200, 1204 (10th Cir. 2001) ("*Qwest I*"); *Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1238 (10th Cir. 2005) ("*Qwest II*"). Consistent with this precedent, the FCC in the *Order* exercised its authority under section 254 to condition the receipt of federal subsidies on the deployment of broadband-capable networks. As required by 47 U.S.C. §254(b)(1)-(3), that result promotes access to telecommunications and information services that are affordable and reasonably comparable between rural and urban areas.

Petitioners assert that the section 254(b)(2) and (3) principles referencing "information services" are limited to "advanced telecommunications and information services" provided to schools, libraries, and rural health care providers. This argument lacks merit. Given the separate directive in 47 U.S.C. §254(b)(6) that schools, libraries, and rural health care providers should have access to advanced telecommunications services, there is no basis to restrict the broad language in section 254(b)(2) and (3) to those same institutional beneficiaries. Such a reading would render the section 254(b)(2) and (3) principles meaningless.

2. Petitioners also contend that the FCC lacks authority under section 254(e) because the phrase "for which the support is intended" in that

provision allegedly refers to the "telecommunications services" deemed eligible for support under 47 U.S.C. §254(c)(1). To the contrary, the FCC reasonably interpreted that phrase to reference the universal service principles in section 254(b) – thus giving full effect to Congress's stated objectives. Petitioners do not explain how the FCC can achieve the principles in section 254(b)(2) and (3) – which direct that "[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation," and that consumers in rural areas should have access to advanced services comparable to those in urban areas – if it cannot condition federal universal service funding on deployment of the networks required to provide information services. In all events, it was at least reasonable for the FCC to read section 254(e) as it did, and its result should thus be upheld under *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

B. Petitioners also rely on 47 U.S.C. §153(51), which provides that "[a] telecommunications carrier shall be treated as a common carrier … only to the extent that it is engaged in providing telecommunications services."

1. Petitioners argue that an entity cannot provide an information service and still be a "common carrier" that qualifies as an "eligible telecommunications carrier" ("ETC") that may receive universal service

subsidies under 47 U.S.C. §§214(e)(1) and 254(e). But it is well-established that an entity can be a common carrier with regard to some activities, but not others. *See Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) ("*NARUC*"). Thus, the provision of broadband Internet access (an "information service") does not render a provider ineligible for universal service support. Indeed, for more than a decade prior to the *Order*, the FCC's rules permitted ETCs to offer telecommunications *and* information services over a single, dual-use network subsidized with federal universal service support. In any event, many ETCs voluntarily offer broadband on a common carrier basis today, so petitioners' argument fails on its own terms.

2. Petitioners' claim that the *Order* subjects broadband Internet access to common carrier regulation is incorrect as a matter of law. While the *Order* requires carriers that decide to accept universal service funding to provide broadband service as a "public interest obligation," this requirement is *conditional* – carriers only have to provide broadband if they voluntarily seek federal subsidies. As this Court has held, such conditional obligations are not a common carriage requirement. *See WWC Holding Co. v. Sopkin*, 488 F.3d 1262, 1268, 1274 (10th Cir. 2007). It follows that the *Order* does not violate 47 U.S.C. §153(51) by imposing common carrier regulation on an information service.

C. The FCC separately concluded that it has independent authority under section 706 of the Telecommunications Act of 1996 (the "1996 Act"), 47 U.S.C. §1302, to support broadband facilities and services. Where, as here, the FCC has found that broadband is not being deployed in a reasonable and timely manner, that provision empowers the FCC to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." 47 U.S.C. §1302(b). Petitioners do not dispute that evidence in the record showed that support for broadband helps achieve both those statutory objectives. They do contend, however, that section 706 provides the agency no authority to impose common carrier regulation on broadband internet access service. Petitioners' argument is baseless, because the FCC is not regulating broadband, much less doing so on a common carrier basis.

II. To encourage the fast and efficient deployment of dual-use facilities over large geographic areas, the *Order* offers incumbent local exchange carriers ("LECs") subject to price cap regulation a one-time opportunity to claim federal high-cost universal service support in exchange for a commitment to deploy a broadband-capable network in a state. Petitioners argue that this violates the FCC-adopted principle of "competitive

neutrality." But the FCC reasonably found that principle outweighed by the advancement of other principles, notably those in section 254(b)(2) and (3). As this Court has explained, the FCC has substantial discretion to determine how best to balance competing section 254(b) principles in cases like this one. *Qwest I*, 258 F.3d at 1199. Moreover, petitioners' claims of disparate treatment are overstated: wireless carriers like petitioners that meet the FCC's service requirements may be eligible for support where the price cap carrier declines support, and they also have access to a separate Mobility Fund.

III. In response to the increasing importance of mobile services to consumers, the *Order* created the Connect America Fund ("CAF") Mobility Fund to support the deployment of mobile broadband networks.

A. Petitioners challenge the FCC's decision to eliminate the identical support rule, which provided competitive ETCs the same per-line amount of federal high-cost universal service support as the incumbent LEC serving the same area. The FCC had good reason to do so, having found that the rule had not functioned as intended and had failed to support mobile voice service efficiently. The record amply supported that expert judgment.

B. Petitioners argue that a new competitive bidding mechanism used to distribute $300 million in one-time high-cost support to wireless carriers usurps state commission authority under section 214(e) of the Act. That

argument fails because it conflates *eligibility* for subsidies with the *right* to receive subsidies. Section 214(e) authorizes the states to determine which carriers are eligible for support, and where they are eligible for support; nothing in the *Order* changes that. But a carrier is not entitled to receive universal service support merely by virtue of its designation as an ETC.

C. The *Order* budgeted $500 million annually for ongoing support of mobile services. The FCC found that this amount would provide sufficient support to ensure affordable and reasonably comparable mobile voice and broadband service. Petitioners disagree with that predictive judgment, but the FCC's conclusion was well supported by record evidence showing that (1) elimination of the identical support rule would significantly reduce the cost of funding mobile wireless services and (2) the four national wireless carriers would not reduce coverage in the absence of universal service support. As an additional safeguard, the FCC established a waiver process that a wireless carrier may use to demonstrate the need for additional support.

D. Finally, the *Order* reasonably denied petitioners' request to establish a separate Mobility Fund (similar to the Tribal Mobility Fund) for insular areas. Petitioners' proposal was based on arguments that the FCC had considered and rejected on multiple occasions – including in Appendix D to the *Order*.

ARGUMENT

I. THE FCC REASONABLY DETERMINED THAT IT HAS AUTHORITY TO ADOPT THE UNIVERSAL SERVICE REFORMS IN THE *ORDER*.

A. The FCC Reasonably Found That It Has Authority Under Section 254 Of The Act To Condition Receipt Of Universal Service Support On Deployment Of Broadband-Capable Networks.

The FCC "ha[s] a 'mandatory duty' to adopt universal service policies that advance the principles … in section 254(b), and … the authority to 'create some inducement' to ensure that those principles are achieved." *Order* ¶65 (JA at 413-414) (citing *Qwest I*, 258 F.3d at 1200, 1204). Two of those principles expressly identify access to information services as an integral component of universal service. *See* 47 U.S.C. §254(b)(2) (providing that "[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation") & §254(b)(3) (providing that consumers in rural areas should have access to telecommunications and information services that are reasonably comparable to those in urban areas).

Relying on section 254(e), which directs ETCs to "use … support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended," the *Order* "require[d] carriers receiving federal universal service support to invest in modern broadband-capable networks." *Order* ¶65 (JA at 413-414). To ensure that "ETCs that receive

universal service funding are … using support for [that] purpose," *id*. ¶110 (JA at 433), the *Order* further required ETCs "to offer broadband service … that meets certain basic performance requirements and to report regularly on associated performance measures." *Id*. ¶86 (JA at 422).

These funding conditions, the FCC found, were necessary to achieve the section 254(b) principles related to advanced telecommunications and information services – in particular, that consumers in rural areas have access to affordable broadband Internet access service that is reasonably comparable to such service in urban areas. *Order* ¶¶65, 87, 91, 106, 113 (JA at 413-414, 422, 423, 430, 435).

Petitioners contend that the FCC is prohibited from providing federal universal service support for "information services" (specifically, broadband Internet access), and the networks used to provide those services. As shown below, under standard *Chevron* analysis, petitioners' arguments provide no basis to set aside the *Order*.

1. Section 254(b).

Petitioners argue that the FCC was prohibited from relying on section 254(b)(2) and (3) of the Act to inform its reading of the agency's authority under other statutory provisions, notably 47 U.S.C. §254(e). Br. 25-26.

Petitioners' interpretation of section 254(b) is contrary to this Court's precedent. In *Qwest I*, this Court acknowledged that "[t]he FCC may not have jurisdiction with respect to intrastate rates," but that the agency "is nevertheless *obligated* to formulate its policies so as to achieve the [section 254(b)(3) principle] of reasonable comparability by inducing 'sufficient ... State mechanisms' to do so." 258 F.3d at 1200, 1204 (emphasis added). Subsequently, in *Qwest II*, 398 F.3d at 1238, the Court affirmed the FCC's authority to withhold federal universal service support from states that failed to certify that rural rates within their boundaries are "reasonably comparable" to urban rates. Hence, petitioners' contention that the section 254(b) principles are mere "policy statements" that the agency cannot act to further is untenable. Br. 25.

Petitioners also argue that the "references to 'advanced telecommunications and information services' in §254(b)(2) and (b)(3)" simply guide the FCC in implementing the separate schools and libraries

program. Br. 25-26; *see id*. at 24, 34.[2] This argument is unsound. Section 254(b)(3) provides that "[c]onsumers in all regions of the Nation" – not just public institutions – should have access to reasonably comparable "advanced telecommunications and information services" at reasonably comparable rates. 47 U.S.C. §254(b)(3). Likewise, section 254(b)(2) broadly states that "[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation." *Id*. §254(b)(2). By contrast, 47 U.S.C. §254(b)(6) specifically provides that "[e]lementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h)." Given section 254(b)(6)'s narrow focus on specifically enumerated institutional beneficiaries, it was reasonable to conclude that section 254(b)(2) and (3) – which use very broad language – are not limited to those same institutional

[2] The FCC, pursuant to 47 U.S.C. §254(c)(3), "may designate additional services for … support … for schools, libraries, and health care providers." 47 U.S.C. §254(h) requires carriers to provide those services at rates subsidized by the federal universal service fund ("USF"). The FCC has defined those "additional services" as "information services," notably broadband Internet access service. *See Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 440-43 (5th Cir. 1999) ("*TOPUC*").

beneficiaries.[3] Any other reading would make those separate statutory provisions superfluous and ignore the differences in statutory text, in conflict with established principles of interpretation. *See In re Dawes*, 652 F.3d 1236, 1242 (10th Cir. 2011) (statutes should be construed "so that no part will be inoperative or superfluous") (citation omitted).

In any event, petitioners' reading of section 254(b) is not clearly compelled by the statutory text, and thus the FCC's alternative, reasonable construction should be upheld under *Chevron*.

2. Section 254(e).

Petitioners' section 254(e) argument likewise does not provide a basis under *Chevron* to overturn the FCC's reasonable construction of the statute. Petitioners assert that the FCC lacked authority under section 254(e) of the Act because the phrase "for which the support is intended" in that statutory provision limits support to facilities used exclusively to provide the

[3] Petitioners claim that the FCC "acquired no regulatory authority" by adopting "support for advanced services" as a new principle because "the FCC may not confer power upon itself." Br. 26. The agency did not confer power on itself. Congress conferred power on the FCC in 47 U.S.C. §254(b)(7), which authorizes "[s]uch 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."

"telecommunications services" deemed eligible for support pursuant to 47 U.S.C. §254(c)(1). Br. 17-18.

Petitioners' reading of the statute is not reasonable, much less compelled, as would be necessary to reverse the *Order* under *Chevron*. As the *Order* explained, "[b]y referring to 'facilities' and 'services' as distinct items for which federal universal service funds may be used, … Congress granted the Commission the flexibility not only to designate the types of telecommunications services for which support would be provided, but also to encourage the deployment of the types of facilities that will best achieve the principles set forth in section 254(b)." *Order* ¶64 (JA at 412-413); *id*. ¶308 (JA at 502-503). The FCC thus reasonably interpreted the phrase "for which the support is intended" in section 254(e) to reference the universal service principles in section 254(b) – two of which (§254(b)(2) & (3)) specifically identify access to information services as an integral component of universal service. *Id*.

Without acknowledging section 254(b), petitioners say that the FCC should have "[c]onstru[ed] … §254(e) … *in pari materia* with §254(c)" to limit universal service support to designated telecommunications services and facilities. Br. 18. Section 254(c)(1) of the Act defines "[u]niversal service" as "an evolving level of telecommunications services that the Commission

shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services." 47 U.S.C. §254(c)(1). Reading section 254(c)(1) to prohibit the agency from conditioning universal service subsidies on the deployment of broadband-capable networks is unreasonable because it would undermine the FCC's efforts to promote access to information services, as expressly required by section 254(b)(2) and (3), and thus violate a fundamental tenet of statutory construction by rendering two of the section 254(b) principles "superfluous." *See In re Dawes*, 652 F.3d at 1242. It simply is not plausible, much less mandatory, to read the statute in a way that disables the FCC from advancing Congress's explicit directives. *See Chevron*, 467 U.S. at 842-43; *Sorenson II*, 659 F.3d at 1042.

Petitioners further argue that "facilities" would have a "distinct" meaning only if the statute referred to "facilities *or* services." Br. 26-27 (emphasis added). That view is contrary to this Court's interpretation of the "conjunctive 'and' in the [§254(b)] phrase 'preserve and advance universal service'" – a phrase that "the Commission cannot satisfy … by simply doing one or the other." *Qwest II*, 398 F.3d 1236; *see also Lawrence Nat'l Bank v. Rice*, 83 F.2d 642, 643 (10th Cir. 1936) (explaining that "[t]he phrase 'and cases for winding up the affairs of any such bank' is in the conjunctive" and

thus constitutes "a distinct grant of jurisdiction" to a district court under the statute). Petitioners' interpretation, moreover, disregards this Court's directive in *Qwest II* to give meaning to all of the statutory language in section 254: if the FCC need only support the "services" designated by section 254(c)(1), there would be no need to include the "distinct" term "facilities" in section 254(e). *Order* ¶64 (JA at 412-413). Again, the FCC was not required to adopt an interpretation of the statute that disabled it from achieving the purposes Congress assigned to it – much less to do so by reading the statute in a way that renders its operative language redundant.

B. The *Order* Does Not Violate 47 U.S.C. §153(51).

Petitioners argue that the *Order* runs afoul of the qualification in 47 U.S.C. §153(51) that "[a] telecommunications carrier shall be treated as a common carrier … only to the extent that it is engaged in providing telecommunications services." Br. 12-31. According to petitioners, the *Order* violates that proviso by: (1) funding facilities used to provide telecommunications and information services; (2) funding entities that offer telecommunications and information services; and (3) imposing common carrier regulation on broadband Internet access, an "information service." *Id.*

Petitioners' first two contentions fail to acknowledge that carriers use the same facilities to provide both telecommunications and information

services. Thus, rescinding USF support to carriers that provide information services, or use networks capable of providing information services, would decimate the universal service program. In any event, as we explain below, petitioners' legal arguments uniformly lack merit.

1. The FCC May Provide Universal Service Support For Facilities Used To Provide Telecommunications And Information Services.

Petitioners assert that the first sentence of 47 U.S.C. §254(e), which limits support to "an eligible telecommunications carrier under section 214(e)," incorporates the qualification in 47 U.S.C. §153(51) that "a telecommunications carrier shall be treated as a common carrier … only to the extent that it is engaged in providing telecommunications services." Br. 17. Combining that reading with the second sentence of section 254(e), which provides that a carrier may use support only for "facilities and services for which the support is intended," petitioners discern a legislative intent "to limit ETCs to using support only to provide the telecom services that are designated for support, as well as for any network components used for the provision of such services." Br. 17-18.

This novel reading of the Act would prohibit universal service support for any dual-use facilities – despite the fact that hundreds of carriers, including petitioners, expended support on such facilities under the FCC's

prior "no barriers" policy. *See Order* ¶¶64-65, 308 (JA at 412-414, 502-503); pp. 19-20, below. It thus makes little sense to "limit[] federal support based on the regulatory classification of the services offered over broadband[-capable] networks," as petitioners contend the FCC must, because doing so "would exclude from the universal service program providers who would otherwise be able to deploy broadband infrastructure to consumers." *Order* ¶72 (JA at 417-418). Indeed, that outcome would be contrary to explicit statutory language in section 254(b) that requires the agency to adopt universal service policies that "preserve[]" and "advance[]" access to telecommunications and information services. 47 U.S.C. §254(b); *Qwest II*, 398 F.3d at 1236. At the very least, the FCC acted reasonably in rejecting a statutory construction that disregarded such textual evidence of Congress's intent to advance nationwide access to information services.

2. The FCC May Provide Universal Service Support To Entities That Offer Telecommunications And Information Services.

Pursuant to section 254(e), only "eligible telecommunications carrier[s]," *i.e.*, those entities designated under section 214(e), "shall be eligible to receive federal universal service support." An ETC, by definition, is a "common carrier" that "offer[s] the services that are supported by Federal

universal service support mechanisms under section 254(c)." 47 U.S.C. §214(e)(1).

Relying on 47 U.S.C. §153(51), petitioners argue that, once an entity provides an information service, it cannot be a "common carrier" eligible for ETC designation under section 214(e)(1) and universal service subsidies under section 254(e). Br. 8-9, 13-14. They are wrong.

As the courts have recognized, "one can be a common carrier with regard to some activities but not others." *NARUC*, 533 F.2d at 608; *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994). So long as a provider offers some service on a common carrier basis, it may be eligible for universal service support as an ETC under sections 214(e) and 254(e), even if it offers other services – including "information services" like broadband Internet access – on a non-common carrier basis. *See Cellco P'ship v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012) (discussing "bifurcated regulatory scheme" applicable to wireless providers' mobile voice and data services).

Under the FCC's prior "no barriers" policy, for example, many ETCs offered traditional circuit-switched voice service (a "telecommunications service") and broadband (an "information service") over a single, dual-use network subsidized with federal universal service support. *Order* ¶¶64, 308 (JA at 412-413, 502-503). Petitioners never identified a statutory violation

concerning that policy in prior years and, in fact, supported that policy in the proceeding below.[4]

Petitioners also seem to claim that the *Order* violates the Act because, under sections 214(e) and 254(e), an ETC is eligible for support only for its provision of "telecommunications services." Br. 9, 16-17. This argument hinges on petitioners' mistaken view that the *Order* provides universal service support under section 254 for broadband Internet access, an information service. *See id*. That is not the case. The *Order* "support[s] the provision of 'voice telephony service' and the underlying mobile network," under section 254. *Order* ¶309 (JA at 503); *id*. ¶64 (JA at 412-413). As the FCC explained in this regard, "[t]hat the network will also be used to provide information services to consumers does not make the network ineligible to receive support." *Id*. ¶309 (JA at 503).

Petitioners' argument also fails on its own terms. Though broadband Internet access service has been classified as an information service exempt

[4] For example, petitioner United States Cellular Corporation ("U.S. Cellular") asked the FCC to codify the prior "no barriers" policy in its rules. "While carriers rely on it today," U.S. Cellular argued, "a clarification that support may be used to invest in advanced 4G technology would provide much needed certainty for carriers and accelerate the deployment of equipment in rural areas that is capable of providing advanced broadband services." Letter from David A. LaFuria, Counsel for United States Cellular Corporation, to Marlene H. Dortch, FCC, WC Docket No. 10-90 at 3 (filed Oct. 19, 2011) (JA at 3971).

from common carrier regulation, the FCC has allowed carriers to provide broadband on a common carrier basis. *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14899-903 (¶¶ 86-95) (2005). Today, more than 800 incumbent LECs voluntarily offer broadband subject to common carrier regulation under Title II of the Act. *See Connect America Fund*, 26 FCC Rcd 4554, 4577 (¶60, n.68) (2011) (SJA at 24). Because, consistent with sections 214 and 254, an ETC could voluntarily provide broadband on a common carrier basis to satisfy the requirements of both the *Order* and petitioners' construction of the Act, petitioners' "facial challenge" to the *Order* fails. *Cellco P'ship*, 700 F.3d at 549 (a court "must uphold [the Order]" against a facial challenge "unless no set of circumstances exists in which it can be lawfully applied") (internal quotation marks and citation omitted).

3. The *Order* Does Not Impose Impermissible Common Carrier Regulation On Information Services.

The *Order* conditioned the receipt of support on a carrier's deployment of a broadband-capable network pursuant to sections 254(b) and (e) of the Act. *Order* ¶64 (JA at 412-413). To ensure that recipients of "universal service funding are … using support for [that] purpose," *id*. ¶110 (JA at 433), the *Order* further required ETCs to offer broadband service (although that service itself is *not* supported under the *Order*). *Id*. ¶86 (JA at 422). Thus,

the *Order* does not "regulate" broadband Internet access service, Br. 12-31; rather, it merely conditions the receipt of support from the USF (a federal subsidy program) on the provision of broadband service by those who apply for it, *Order* ¶¶86-114 (JA at 422-436). *See* FCC Principal USF Br. 20-24.

As this Court has explained, such conditions do not amount to "regulation," much less common carrier regulation under Title II of the Act. *See WWC Holding Co.*, 488 F.3d at 1268, 1274 (finding that conditioning a wireless carrier's ETC designation on compliance with "consumer protection and operational standards" is not commensurate with common carrier regulation). A funding condition, like the broadband public interest obligation, is unlike common carrier regulation because providers voluntarily assume the condition in exchange for support and "retain[] the ability to opt out of [the condition] entirely by declining … federal universal service subsidies." *Id*. at 1274. The *Order* is fully consistent with this precedent.

Finally, even if the *Order* imposed some obligations that overlap with common carrier duties (which it does not), "common carriage is not all or nothing – there is a gray area in which, although a given regulation might be applied to common carriers, the obligations imposed are not common carriage *per se*." *Cellco P'ship*, 700 F.3d at 547. In this regard, the *Order* does "not extend[] the gamut of telephone regulations" under Title II of the Act to all

providers of broadband Internet access service; it simply requires providers that "approach[] the [FCC] to receive federal universal service subsidies," *WWC Holding Co.*, 488 F.3d at 1274, "to offer broadband service … that meets certain basic performance requirements and to report regularly on associated performance measures," *Order* ¶86 (JA at 422). In such a circumstance, "the Commission's determination" that the broadband public interest obligation "does not confer common carrier status warrants deference" from the Court. *Cellco P'ship*, 700 F.3d at 547.

C. The FCC Reasonably Found That Section 706 Of The 1996 Act Independently Authorizes It To Require Recipients Of Universal Service Support To Deploy Broadband-Capable Networks.

In section 706(b) of the 1996 Act, 47 U.S.C. §1302(b), Congress instructed the FCC to "determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion," and, if the agency concludes that it is not, to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." 47 U.S.C. §1302(b). The FCC, in the *Order*, found that "[p]roviding support for broadband helps achieve section 706(b)'s objectives." *Order* ¶66 (JA at 414-415); *id*. ¶¶67-68 (JA at 415-416); FCC Principal USF Br. 29. Having found that "broadband capability is not being

'deployed to all Americans in a reasonable and timely fashion,'" *Order* ¶70 (JA at 416) (quoting section 706(b)) – a finding that petitioners do not challenge – the FCC reasonably concluded that it "ha[s] independent authority under section 706 of the [1996 Act] to fund the deployment of broadband networks." *Id*. ¶66 (JA at 414-415).

1. Petitioners assert that the FCC's authority under section 706 would result in Congress's having "hid[den] elephants in mouseholes." Br. 29 (quoting *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001)). Petitioners' argument rests on the sweeping assertion that Congress fenced off broadband Internet access from FCC policymaking. Br. 3, 28-29. That is incorrect.

As another court has found, "[t]he general and generous phrasing of §706 means that the FCC possesses significant … authority and discretion to settle on the best regulatory or deregulatory approach to broadband." *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 906-07 (D.C. Cir. 2009); *id*. at 908. Section 706 plainly envisions an FCC role in broadband policy, *see id*., and section 706(b) commands the agency to act immediately to enhance broadband deployment if the agency finds it lagging. In fact, Congress described section 706 as a "fail safe" provision to ensure the FCC's ability to promote broadband deployment. *Order* ¶70 n.95 (JA at 416) (discussing

section 706's legislative history). There is nothing obscure about such explicit statutory commands.

Petitioners, relying on *Comcast Corp. v. FCC*, 600 F.3d 642, 659 (D.C. Cir. 2010), further assert that the FCC "acknowledged" that "§706 grants it no regulatory authority." Br. 28; *see id.* at 10, 22-24. As we explained in the FCC Principal USF Brief at 29-30, however, *Comcast* relied on an understanding of the FCC's precedent concerning section 706 that the agency unequivocally rejected in a post-*Comcast* order. Accordingly, petitioners find no support in *Comcast*.

2. Petitioners separately assert that "§706(b) conferred no Title II regulatory authority over the services to be provided by the deployed broadband telecom capability" and cannot "overrid[e] the [47 U.S.C.] §230 policy that any information service that provides Internet access should remain unregulated." Br. 28. Both of these claims hinge on petitioners' mistaken view that the *Order* imposed Title II common carrier regulation on broadband Internet access, an information service. Br. 27-29.

As we explain above, *see* Point I.B.3., the FCC did no such thing. Petitioners' attacks on the FCC's section 706 authority (as well as its authority under section 254, Br. 22-27) thus fail for the simple reason that the *Order* does not "regulate" broadband. It follows that the FCC was not

required to locate Title II authority in section 706(b) (or any other provision of the Act) to enact the reforms in the *Order*, nor was the agency barred by section 230(b) (or any other provision of the Act) from enacting those reforms pursuant to section 706(b). Br. 10, 28-30.[5]

II. THE FCC REASONABLY OFFERED PRICE CAP CARRIERS UNIVERSAL SERVICE SUPPORT IN EXCHANGE FOR A STATE-LEVEL COMMITMENT TO DEPLOY BROADBAND.

The *Order* overhauled the rules that distribute high-cost universal service support to incumbent LECs subject to price cap regulation. After an initial freeze ("CAF Phase I"), the FCC will offer each price cap carrier high-cost support in exchange for a commitment to offer voice and broadband service in a state ("CAF Phase II"). *Order* ¶171 (JA at 456). Should they decline, "support to serve the unserved areas located within the incumbent [LEC]'s service area will be awarded by competitive bidding, and all providers will have an equal opportunity to seek USF support." *Id*. ¶178 (JA at 459). "[E]ven where the incumbent LEC makes a state-level commitment, its right to support will terminate after five years," at which time the FCC expects to distribute all support through a competitive bidding process. *Id*.

[5] Likewise, because the *Order* does not regulate broadband Internet access under Title II, the FCC was not required to find that broadband Internet access is provided on a common carriage basis before enacting the universal service reforms in the *Order*. Br. 20-22.

In adopting these reforms, the FCC acknowledged that "the C[onnect] A[merica] F[und] is not created on a blank slate, but rather against the backdrop of a decades-old regulatory system." *Order* ¶165 (JA at 454). The FCC thus offered price cap carriers a limited right of first refusal "to avoid consumer disruption … while getting robust, scalable broadband to substantial numbers of unserved rural Americans as quickly as possible." *Id.*; *id*. ¶¶177-178 (JA at 458-459). Where, as here, the FCC adopts interim rules designed to ease the transition to a new universal service regime, the courts accord the agency substantial deference.[6]

Petitioners contend that the FCC "did not explain how it was fair to disadvantage [competitive] ETCs by … reserving … support for large [incumbent] LECs." Br. 34. To the contrary, the FCC fully explained its decision. In particular, it explained that "several considerations support[ed its] determination not to immediately adopt competitive bidding everywhere." *Order* ¶¶174-175 (JA at 457-458). First, "the incumbent LEC is likely to have the only wireline facilities" capable of supporting broadband in the areas eligible for universal service support. *Id*. ¶175 (JA at 457-458). Second, "the

[6] *See Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105-06 (D.C. Cir. 2009) ("*RCA I*"); *CompTel v. FCC*, 309 F.3d 8, 14-15 (D.C. Cir. 2002); *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 620-22 (5th Cir. 2000); *Sw. Bell Tel. Co. v. FCC*, 153 F.3d 523, 537-39, 549-50 (8th Cir. 1998); *CompTel v. FCC*, 117 F.3d 1068, 1074 (8th Cir. 1997).

incumbent LEC is likely to have at most the same, and sometimes lower, costs compared to a new entrant." *Id*.; *id*. ¶191 (JA at 463-464). Finally, "in many states the incumbent carrier still has the continuing obligation to provide voice service and cannot exit the marketplace absent state permission." *Id*. ¶175 (JA at 457-458). In light of these findings – which petitioners do not even acknowledge, let alone attempt to challenge – the FCC concluded that its interim approach would "speed the deployment of broadband … while minimizing the impact on the Universal Service Fund." *Id*. ¶174 (JA at 457).

Petitioners also contend that the *Order* "flouts the FCC's longstanding core principle of competitive neutrality." Br. 33-34. That principle generally holds that "universal service support mechanisms … should not unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another." *Order* ¶176 (JA at 458) (internal quotation marks omitted). The principle relied on by petitioners, however, is one that the FCC adopted pursuant to 47 U.S.C. §254(b)(7), and as such is simply one among several sometimes conflicting principles that guide its exercise of discretion in distributing universal service support. *See Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8801-03 (¶¶48 & 52) (1997). Moreover, as the FCC explained, "neither the

competitive neutrality principle nor the other section 254(b) principles impose inflexible requirements." *Order* ¶176 (JA at 458).

In determining how to best balance the statutorily prescribed principles governing universal service support (*see* 47 U.S.C. §254(b)) with considerations of competitive neutrality, the FCC emphasized that "incumbent LECs have had a long history of providing service throughout the relevant areas … [and] generally have already obtained the ETC designation necessary to receive USF support throughout large service areas." *Order* ¶177 (JA at 458-459). While recognizing that "other classes of providers may be well situated to make broadband commitments with respect to small geographic areas," the agency accorded greater weight to the incumbent LECs' "unique" ability "to deploy broadband networks rapidly and efficiently." *Id*. And, taking account of "the limited scope and duration of the state-level commitment procedure," the FCC reasonably "conclude[d] that any departure from strict competitive neutrality … is outweighed by the advancement of other section 254(b) principles, in particular, the principles that '[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation,' and that consumers in rural areas should have access to advanced services comparable to those available

in urban areas." *Id*. ¶177 (JA at 458-459) (citing 47 U.S.C. §254(b)(2)-(3)); *id*. ¶178 (JA at 459).[7]

"The Commission enjoys broad discretion when conducting exactly this type of balancing." *RCA I*, 588 F.3d at 1103 (citing *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999)); *see also Alenco*, 201 F.3d at 621. Indeed, this Court has emphasized that the FCC "may exercise its discretion to balance the principles against one another when they conflict," and "any particular principle can be trumped in the appropriate case." *Qwest II*, 398 F.3d at 1234 (quoting *Qwest I*, 258 F.3d at 1200).

In any event, petitioners' claims of disparate treatment overlook key facts. The state-level commitment procedure is available to price cap carriers for only five years. During that period, competitive ETCs may compete for CAF Phase II support in areas where the price cap carrier declines a state-level commitment. *Order* ¶514 (JA at 558). Competitive ETCs that offer mobile wireless services will also have access to a separate Mobility Fund that is available only to wireless carriers for mobile services. *Id*. Citing these facts, the FCC noted that "many" competitive ETCs "could receive similar or

[7] Petitioners argue that the FCC cannot balance competitive neutrality against the section 254(b)(2) and (3) principles, because the latter confer no authority on the agency to require the deployment of broadband-capable networks. Br. 34-35. Petitioners' interpretation of section 254(b)(2) and (3) is wrong. *See* pp. 10-13, above.

even greater amounts of funding" after implementation of the reforms in the *Order*. *Id.*

Finally, petitioners claim that "[t]he FCC entirely failed to consider that making … support available to only [incumbent] LECs would not aid in opening local telecom markets to effective competition, which was the principal goal of the 1996 Act." Br. 35. Contrary to petitioners' claim, the statute does not require the FCC to subsidize competition where it would not otherwise develop. As the FCC explained, "the statute's goal is to expand availability of service to users," *Order* ¶318 (JA at 507), "not to subsidize competition through universal service in areas that are challenging for even one provider to serve." *Id.* ¶319 (JA at 507); *see also Qwest II*, 398 F.3d at 1226; *TOPUC*, 183 F.3d at 406; *Alenco*, 201 F.3d at 616.

III. THE FCC'S NEW RULES FOR SUPPORTING MOBILE WIRELESS SERVICES ARE REASONABLE.

In response to the increasing importance of mobile services to consumers, the FCC created the Mobility Fund, "the first universal service mechanism dedicated to ensuring availability of mobile broadband networks in areas where a private-sector business case is lacking." *Order* ¶28 (JA at 401-402). Although existing high-cost support will be phased out during a transition period, wireless carriers will be eligible for Mobility Fund support. *Id.* ¶¶29, 512-532 (JA at 402, 557-564).

During the transition period, the FCC will allocate Mobility Fund support in two stages. Phase I will provide one-time support of up to $300 million to jump-start deployment of mobile broadband networks in unserved areas. *Order* ¶¶28, 301-478 (JA at 401-402, 500-545). Phase II "will provide up to $500 million per year in ongoing support." *Id*. ¶28 (JA at 401-402); *id*. ¶¶493-497 (JA at 551-552).

The FCC will distribute Phase I subsidies through a nationwide "reverse auction," by which funding is awarded to the carriers that offer to expand mobile wireless coverage most cost effectively. *Order* ¶¶321-329 (JA at 507-510). The winning bidder must offer both voice and broadband service. *Id*. ¶¶358-368 (JA at 517-520).

On September 27, 2012, the FCC completed the Mobility Fund Phase I Auction. Based on this auction, thirty-three winning bidders became eligible to receive a total of $299,998,632 in one-time universal service support to provide third-generation or better mobile voice and broadband services covering up to 83,494 road miles in 795 biddable geographic areas located in thirty-one states and one territory. *Mobility Fund Phase I Auction Closes Winning Bidders Announced for Auction 901*, 27 FCC Rcd 12031 (2012).

A. The FCC Reasonably Eliminated The Wasteful Identical Support Rule.

Prior to the *Order*, the FCC's "identical support rule" "provide[d] competitive ETCs the same per-line amount of high-cost universal service support as the incumbent [LEC] serving the same area." *Order* ¶498 (JA at 552) (citing 47 C.F.R. §54.307). As part of its transition to a more efficient and economically rational universal service regime, the *Order* eliminated that rule, noting prior findings that the rule had "not functioned as intended" and had produced perverse results. *Id*. ¶502 (JA at 554); *High-Cost Universal Service Support*, 23 FCC Rcd 8834, 8843-44 (¶¶19-21) (2008) ("*Interim Cap Order*"), *aff'd RCA I*, 588 F.3d 1095; *High-Cost Universal Service Support*, 25 FCC Rcd 18146 (2010), *aff'd Rural Cellular Ass'n v. FCC*, 685 F.3d 1083 (D.C. Cir. 2012) ("*RCA II*").

Petitioners complain that "[w]hen it repealed the identical support rule, the FCC ignored its prior policy choice of ensuring competitively-neutral funding." Br. 37. The FCC did no such thing. Far from "ignoring" any prior policy, the agency expressly found that the rule did not further that principle because it largely distributed subsidies to wireless carriers that do not, in the majority of circumstances, provide services that supplant the services offered by incumbent LECs. *See Order* ¶498 n.826 & ¶503 (JA at 552, 554-555); *Interim Cap Order*, 23 FCC Rcd at 8843-44 (¶¶20-21).

The FCC adopted the rule "assum[ing] that competitive ETCs would be competitive LECs (*i.e.*, wireline telephone providers) competing directly with incumbent LECs for particular customers." *Order* ¶498 n.826 (JA at 552). The agency thus "concluded that high-cost support should be portable – *i.e.*, that support would follow the customer to the new LEC when the customer switched service providers." *Id.*

Unfortunately, the FCC's prior expectation failed to materialize. "Overwhelmingly, high-cost support for competitive ETCs has been distributed to wireless carriers." *Id.* ¶503 (JA at 554-555). And, while "nearly 30 percent of households … have only wireless voice service," the remainder generally subscribe to both wireline and wireless services. *Id.*; *see also RCA II*, 685 F.3d at 1094-95. The consequence was that the identical support rule did not promote competitive neutrality; it "simply subsidize[d] duplicative voice service." *RCA II*, 685 F.3d at 1094 (internal quotation marks and citation omitted).

Petitioners also seem to assert that the FCC eliminated the identical support rule after finding that it does not efficiently support mobile broadband service. Br. 37. That is incorrect. The FCC, in paragraphs 504-506 of the *Order* (JA at 555), found that the identical support rule does not efficiently support mobile *voice* service – the service that even petitioners

concede is eligible for federal universal service support. Br. 12-16. The FCC explained that "[t]he support levels generated by the identical support rule bear no relation to the efficient cost of providing mobile voice service in a particular geography." *Order* ¶504 (JA at 555). Indeed, because support is based on the costs of the wireline incumbent LEC, wireless carriers often "receive subsidies well in excess of their costs." *RCA I*, 588 F.3d at 1104.

The identical support rule also failed to provide competitive ETCs "appropriate incentives for entry." *Order* ¶505 (JA at 555); *id*. ¶¶296-297 (JA at 459). While the rule has "provide[d] approximately $1 billion in annual support to wireless carriers, … there remain areas of the country … that lack even basic mobile voice coverage, and many more areas that lack mobile broadband coverage." *Id*. ¶8 (JA at 396). This is because "areas with per-line support amounts that are relatively high may be attracting multiple competitive ETCs, each of which invests in its own duplicative infrastructure." *Id*. ¶505 (JA at 555). That "investment," the FCC found, "could otherwise be directed elsewhere, including areas that are not currently served." *Id*.; *see also RCA I*, 588 F.3d at 1104; *Interim Cap Order*, 23 FCC Rcd at 8844 (¶21).

Finally, petitioners claim that the FCC failed to "provide a detailed explanation" of its decision "to replace the [identical support] rule with the

Mobility [Fund Phase] I auction." Br. 38. No such explanation was required, because the latter did not replace the former. The Mobility Phase I reverse auction was designed to distribute $300 million in one-time support for the expansion of third-generation (or better) mobile networks in areas without such networks. *Order* ¶314 (JA at 505-506). It was not intended to target areas where ongoing support is required. *Id*. ¶323 (JA at 508). Separate and apart from Mobility Fund Phase I, multiple competitive ETCs serving the same geographic area will continue to receive subsidies as frozen identical support phases down during a five-year transition period. *Id*. ¶¶29, 512-532 (JA at 402, 557-564).

B. The FCC's Mobility Fund Phase I Reverse Auction Preserved State Commission Authority Under Sections 214(e)(2) And (5) Of The Act.

The FCC limited Mobility Fund Phase I support to one provider per area through a reverse auction because its "priority in awarding USF support should be to expand service," not to subsidize multiple providers serving the same pool of customers in the same geographic area – an outcome the agency reasonably feared "would drain Mobility Fund resources with limited corresponding benefits to consumers." *Order* ¶316 (JA at 506); *id*. ¶319 (JA

at 509).[8] The FCC also defined the areas eligible for support based on census blocks, the smallest possible geographical unit for which service data is readily available, because this would "identify unserved areas with greater accuracy than if [it] used larger areas." *Id*. ¶¶331-332, 346 (JA at 510-511, 514-515).

Petitioners contend that the provision of support to a single ETC in a given service area preempts state authority under 47 U.S.C. §214(e)(2). Br. 38-41. That subsection provides that a "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."

Petitioners' argument fails because it conflates eligibility for subsidies with the right to receive subsidies. Although states have authority under the Act to designate multiple ETCs, 47 U.S.C. §214(e)(2), *Order* ¶390 & n.662 (JA at 525), "nothing in the statute compels that every party eligible for

[8] "The purpose of [the reverse auction] [wa]s to identify those areas where additional investment can make as large a difference as possible in improving current-generation mobile wireless coverage." *Order* ¶322 (JA at 508). Thus, in that auction, "bidders [we]re asked to indicate the amount of one-time support they would require to achieve the defined performance standards for specified numbers of units in given unserved areas." *Id*. The auction identified winners based on the lowest per-unit bids.

support actually receive it." *Id*. ¶318 (JA at 507); FCC Principal USF Br. 62-63. Section 214(e)(1) of the Act states "[a] common carrier designated as an eligible telecommunications carrier … shall be *eligible* to receive universal service support in accordance with section 254" (emphasis added). Likewise, section 254(e) states "only an eligible telecommunications carrier designated under section 214(e) … shall be *eligible* to receive specific Federal universal service support" (emphasis added). "This language indicates that designation as an ETC does not automatically entitle a carrier to receive universal service support." *Interim Cap Order*, 23 FCC Rcd at 8847 (¶29).

Section 254 also "distinguishe[s] between those who are merely 'eligible' to receive support and those who are 'entitled' to receive benefits." *Id*. For example, section 254(e) provides that "an eligible telecommunications carrier designated under section 214(e) … shall be eligible to receive specific Federal universal service support." In sharp contrast, 47 U.S.C. §254(h)(1)(A) provides that carriers offering certain services to rural health care providers "shall be entitled" to have the difference between the rates charged to health care providers and those charged to other customers in comparable rural areas treated as an offset to any universal service contribution obligation. This "careful delineation demonstrates an intention" on the part of Congress "to ascribe different

statutory rights." *Interim Cap Order*, 23 FCC Rcd at 8847 (¶29 & n.87) (citing *Transbrasil S.A. Linhas Aereas v. Dep't of Transp.*, 791 F.2d 202, 205 (D.C. Cir. 1986)).[9]

Moreover, there "are advantages to obtaining and maintaining an ETC designation regardless of whether a competitive ETC receives high-cost support." *Interim Cap Order*, 23 FCC Rcd at 8847-48 (¶30). "In particular," an ETC could be eligible to receive "low-income universal service support" from a separate federal mechanism and "universal service support at the state level." *Id.*

For similar reasons, there is no merit to petitioners' argument that the *Order* usurps state authority under 47 U.S.C. §214(e)(5), which allows state commissions to designate the "service areas" used "for the purpose of determining universal service obligations and support mechanisms." Br. 39-41. While ETCs are required to "offer" supported services "throughout the service area for which the designation is received," 47 U.S.C. §214(e)(1),

[9] *WWC Holding Co.*, 488 F.3d at 1271, Br. 39, is consistent with the FCC's view. In that decision, the Court simply held that "states are given the primary responsibility for deciding which carriers qualify as ETCs to be *eligible* for subsidies from the federal universal service fund," 488 F.3d at 1271 (emphasis added); it said nothing about whether ETCs, once designated, are *entitled* to receive federal support.

nothing in the Act requires the FCC to distribute federal high-cost universal service support to those same areas.

C. The FCC Reasonably Predicted That The Mobility Fund Phase II Annual Budget Will Provide Sufficient Support.

Sections 254(b)(5) and (e) of the Act require "sufficient" universal service support. *See* 47 U.S.C. §254(b)(5), (e). "[W]hat constitutes 'sufficient' support" is "ambiguous"; so long as "the FCC…offer[s] reasonable explanations of why it thinks the funds will still be 'sufficient' to support high-cost areas," the Court should "defer to the agency's judgment." *TOPUC*, 183 F.3d at 425-26; FCC Principal USF Br. 33.

The *Order* established a $500 million annual budget for Mobility Fund Phase II, which will provide ongoing support for mobile wireless services. *Order* ¶494 (JA at 551). The FCC found that this amount "w[ould] be sufficient to sustain and expand the availability of mobile broadband." *Id.* ¶495 (JA at 551-552).

There is no merit to petitioners' claim that the FCC "failed to supply a nexus between any record findings and its conclusion" that the Mobility Fund Phase II budget would provide "sufficient" funding. Br. 42. First, as discussed above, *see* pp. 33-36, elimination of the wasteful identical support rule significantly reduced the prospective cost of supporting mobility. *Order* ¶495 (JA at 551-552). Second, exercising its predictive judgment, the FCC

found that the four national wireless carriers "would [not] reduce coverage or shut down towers in the absence of ETC support." *Id.*[10] Finally, to ensure sufficiency, the FCC established a waiver process that a wireless ETC may use to demonstrate that additional support is needed for its customers to continue receiving wireless mobile voice service. *Id.* ¶¶539-544 (JA at 566-569).

Petitioners' other challenges to the Mobility Fund Phase II budget are baseless. Petitioners object that "[t]he FCC did not cite to any record representation by Verizon, Sprint, AT&T, or T-Mobile that it would maintain current coverage if its USF support is phased out." Br. 43. But, as the FCC explained, "[u]nder 2008 commitments to phase down their competitive ETC support, Verizon Wireless and Sprint have already given up significant amounts of the support they received under the identical support rule," and "nothing in the record show[ed] that either carrier is reducing coverage or

[10] Petitioners argue that the FCC also failed to adhere to *Qwest II*, 398 F.3d at 1237, because it "did not attempt to demonstrate that it considered the §254(b) principles" in establishing the Mobility Fund Phase II budget. Br. 44; 42. That is incorrect. The FCC, in paragraphs 307-312 of the *Order* (JA at 502-504) expressly considered the section 254(b) principles, and concluded that the new Mobility Fund would provide "sufficient" support, *id.* ¶¶311, 493-497 (JA at 504, 551-552).

shutting down towers." *Order* ¶495 (JA at 551-552).[11] "Nor [wa]s there anything in the record that suggest[ed that] AT&T or T-Mobile would reduce coverage or shut down towers in the absence of ETC support." *Id*. Thus, it was sufficient for the FCC to rely on its predictive judgment that the four national wireless carriers would not discontinue service absent high-cost support. *See Franklin Sav. Ass'n v. Dir., Office of Thrift Supervision*, 934 F.2d 1127, 1147-48 (10th Cir. 1991); *Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012).

Petitioners also miss the mark in arguing that "[t]he FCC made no findings supporting its conclusions that $579 million was sufficient support for regional and small wireless [competitive] ETCs in 2010 and that $500 million in annual support would be sufficient for them in the future." Br. 43. This comparison of funding levels is meaningless given that the FCC eliminated the flawed identical support rule, which subsidized duplicative voice services, *Order* ¶¶316, 319, 496, 503 (JA at 506, 507, 552, 554-555); *RCA II*, 685 F.3d at 1094, at inefficient levels, *Order* ¶¶504-505 (JA at 555). As we explain above, *see* pp. 33-36, by declining to subsidize multiple providers serving the same pool of customers in the same geographic area,

[11] The FCC's most recent data show that wireless subscribership in rural areas is increasing. *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 26 FCC Rcd 9664, 9878 (¶378) (2011).

the FCC can more cost-effectively expand mobile wireless coverage in rural areas prospectively.

Finally, petitioners claim that "no findings supported the FCC's conclusion that providing 800 percent more USF funding to large [incumbent] LECs than to wireless [competitive] ETCs would constitute competitively neutral funding." Br. 43-44. To the contrary, the FCC addressed this issue. "Although the budget for fixed services exceeds the budget for mobile services," the FCC found "that today significantly more Americans have access to 3G mobile coverage than have access to residential broadband via fixed wireless, DSL, cable, or fiber." *Order* ¶494 (JA at 551). The FCC "expect[ed] that as [fourth-generation wireless service] is rolled out, this disparity will persist." *Id.* Hence, it was not "unfair" for the FCC to provide different levels of funding to wireline and wireless carriers to help ensure that consumers have access to fixed and mobile broadband services. *See RCA I*, 588 F.3d at 1104-05.

D. The FCC Reasonably Declined To Establish A Separate Mobility Fund For Insular Areas.

The FCC has long recognized that "the presence of certain additional factors on tribal lands" warrants specially tailored support mechanisms for

those areas.[12] These factors include, but are not limited to: cultural and language barriers; access to rights-of-way, where access is controlled by Tribal authorities; and questions concerning a state's authority to assert jurisdiction over the provision of telecommunications services on Tribal lands. *Twelfth Report and Order*, 15 FCC Rcd at 12226 (¶32). Those same "factors" led to the creation of a Tribal Mobility Fund in the *Order*, *id.* ¶482 (JA at 547).

The FCC, in the *Order*, denied petitioners' request to establish a separate Mobility Fund for insular areas on the ground that "[insular] areas generally do not face the same level of deployment challenges as Tribal lands." *Order* ¶481 n.790 (JA at 546-547).[13] Indeed, in Appendix D to the *Order* (JA at 974-978), the FCC denied a petition filed by Puerto Rico Telephone Company, Inc. ("PRTC") seeking reconsideration of a 2010

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[12] *Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, 15 FCC Rcd 12208, 12226 (¶32) (2000) ("*Twelfth Report and Order*"); *see also High-Cost Universal Service Support*, 25 FCC Rcd 4136, 4166 (¶50) (2010) ("*Insular Areas Order*").

[13] *Accord Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8946 (¶315 & n.791) (1997), *aff'd in part and reversed in part, TOPUC*, 183 F.3d 393; *Federal-State Joint Board on Universal Service*, 18 FCC Rcd 22559, 22636-39 (¶¶138-40) (2003), *remanded in part, Qwest II*, 398 F.3d 1222; *Federal-State Joint Board on Universal Service*, 19 FCC Rcd 23824, 23831-32 (¶20) (2004); *Insular Areas Order*, 25 FCC Rcd 4136.

decision declining to adopt a new insular support mechanism, similar to the mechanism sought by petitioners. The FCC was not persuaded by PRTC's argument that the "costs and burdens of providing telephone service" in insular areas warrant a separate support mechanism. *Id*. ¶13 (JA at 977); *Insular Areas Order*, 25 FCC Rcd at 4159-62 (¶¶38-42). It also rejected PRTC's argument that additional high-cost support is necessary to address low telephone subscribership levels in insular areas, which the FCC found are "related to consumer income" and thus are better addressed through "its existing low-income support programs." *Id*. ¶11 (JA at 976-977); *Insular Areas Order*, 25 FCC Rcd at 4155-57 (¶¶33-35).

Petitioners' requests for an insular mobility fund relied on the same flawed arguments. *See* Br. 46 n.28. Petitioners now complain that the FCC erred in not providing a fuller response when it declined to adopt their proposal. Br. 44-47. The FCC, however, "need not repeat itself incessantly." *Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993); *see also Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 63 (2007); *RCA II*, 685 F.3d at 1094. As Appendix D to the *Order* makes clear, there are no changed circumstances that would require the FCC to reconsider its longstanding (and repeatedly confirmed) view that a separate support mechanism for insular areas is unnecessary because those areas do not exhibit

cost or other characteristics that warrant an exemption from generally applicable high-cost support mechanisms. Thus, it was sufficient for the FCC to deny petitioners' request by reiterating that insular areas do not face unique "deployment challenges" that would warrant the creation of a separate support mechanism. *Order* ¶481 n.790 (JA at 546-547).

CONCLUSION

The petitions for review should be dismissed in part and otherwise denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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1. This brief complies with the type-volume limitation of the Second Briefing Order. It does not exceed 15% of the size of the brief to which it is responding. The Wireless Carrier Universal Service Fund Principal Brief was certified to be 9,199 words in length. Therefore, the FCC may file a response brief up to 10,578 words in length. This brief contains 9,582 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 10th Cir. R. 32(a) and the type style requirements of Fed. R. App. P. 32(a)(6) because this filing has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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July 24, 2013

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2013, I caused the foregoing Federal Respondents' Final Response to the Wireless Carrier Universal Service Fund Principal Brief to be filed by delivering a copy to the Court via e-mail at FCC_briefs_only@ca10.uscourts.gov. I further certify that the foregoing document will be furnished by the Court through (ECF) electronic service to all parties in this case through a registered CM/ECF user. This document will be available for viewing and downloading on the CM/ECF system.

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July 24, 2013