No. _____

In the
# Supreme Court of the United States

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Tenth Circuit upheld the Federal Communications Commission's radical interpretations of the Communications Act that fundamentally restructure the multi-billion dollar U.S. telecommunications sector. The FCC's redefinition and application of a statutory term in 47 U.S.C. § 251(b)(5) - reciprocal compensation - is in direct conflict with Supreme Court precedent, the plain text of the statute, and established rules of statutory construction. In addition, the Communications Act of 1934 and the Telecommunications Act of 1996 both include specific rules of statutory construction rendered surplus across a range of issues by the FCC and the Tenth Circuit. The questions presented include:

Do the explicit rules of statutory construction in §601(c)(1) of the 1996 Act and 47 U.S.C. §152(b) place any limits on either the FCC's or a reviewing Court's interpretation of agency authority?

Does *Chevron* deference permit the Tenth Circuit to confirm interpretations of the Communications Act, *including* the FCC's re-definition of the term "reciprocal compensation," that cannot be reconciled with the plain text of the statute, applicable principles of statutory construction, and precedent from this Court?

## PARTIES

Federal Communications Commission
United States of America
Direct Communications Cedar Valley, LLC
Totah Communications, Inc.
H & B Communications, Inc.
The Moundridge Telephone Company of Moundridge
Pioneer Telephone Association, Inc.
Twin Valley Telephone, Inc.
Pine Telephone Company, Inc.
Pennsylvania Public Utility Commission
Choctaw Telephone Company
Core Communications, Inc.
National Association of State Utility Consumer Advocates
National Telecommunications Cooperative Association
Cellular South, Inc.
Halo Wireless, Inc.
The Voice on the Net Coalition, Inc.
Public Utilities Commission of Ohio
tw telecom Inc.
Vermont Public Service Board
Transcom Enhanced Services, Inc.
The Kansas State Corporation Commission
CenturyLink, Inc.
Gila River Indian Community
Gila River Telecommunications, Inc.
Allband Communications Cooperative
North County Communications Corporation
United States Cellular Corporation
PR Wireless, Inc.
Docomo Pacific, Inc.
Nex-Tech Wireless, LLC
Penasco Valley Telephone Cooperative, Inc.

Cellular Network Partnership, A Limited Partnership
U.S. TelePacific Corp.
Consolidated Communications Holdings, Inc.
National Association of Regulatory Utility Commissioners
Rural Independent Competitive Alliance
Rural Telephone Service Company, Inc.
Adak Eagle Enterprises LLC
Adams Telephone Cooperative
Alenco Communications, Inc.
Arlington Telephone Company
Bay Springs Telephone Company, Inc.
Big Bend Telephone Company, Inc.
The Blair Telephone Company
Blountsville Telephone LLC
Blue Valley Telecommunications, Inc.
Bluffton Telephone Company, Inc.
BPM, Inc.
Brantley Telephone Company, Inc.
Brazoria Telephone Company
Brindlee Mountain Telephone LLC
Bruce Telephone Company
Bugs Island Telephone Cooperative
Cameron Telephone Company, LLC
Chariton Valley Telephone Corporation
Chequamegon Communications Cooperative, Inc.
Chickamauga Telephone Corporation
Chickasaw Telephone Company
Chippewa County Telephone Company
Citizens Telephone Company
Clear Lake Independent Telephone Company
Comsouth Telecommunications, Inc.
Copper Valley Telephone Cooperative
Cordova Telephone Cooperative
Crockett Telephone Company, Inc.

Darien Telephone Company
Deerfield Farmers' Telephone Company
Delta Telephone Company, Inc.
East Ascension Telephone Company, LLC
Eastern Nebraska Telephone Company
Eastex Telephone Coop., Inc.
Egyptian Telephone Cooperative Association
Elizabeth Telephone Company, LLC
Ellijay Telephone Company
Farmers Telephone Cooperative, Inc.
Flatrock Telephone Coop., Inc.
Franklin Telephone Company, Inc.
Fulton Telephone Company, Inc.
Glenwood Telephone Company
Granby Telephone LLC
Hart Telephone Company
Hiawatha Telephone Company
Holway Telephone Company
Home Telephone Company (St. Jacob, Ill.)
Home Telephone Company (Moncks Corner, SC)
Hopper Telecommunications Company, Inc.
Horry Telephone Cooperative, Inc.
Interior Telephone Company
Kaplan Telephone Company, Inc.
KLM Telephone Company
City of Ketchikan, Alaska
Lackawaxen Telecommunications Services, Inc.
Lafourche Telephone Company, LLC
La Harpe Telephone Company, Inc.
Lakeside Telephone Company
Lincolnville Telephone Company
Loretto Telephone Company, Inc.
Madison Telephone Company
Matanuska Telephone Association, Inc.
McDonough Telephone Coop., Inc.
MGW Telephone Company, Inc.

Mid Century Telephone Coop., Inc.
Midway Telephone Company
Mid-Maine Telecom LLC
Mound Bayou Telephone & Communications, Inc.
Moundville Telephone Company, Inc.
Mukluk Telephone Company, Inc.
National Telephone of Alabama, Inc.
Ontonagon County Telephone Company
Otelco Mid-Missouri LLC
Otelco Telephone LLC
Panhandle Telephone Cooperative, Inc.
Pembroke Telephone Company, Inc.
People's Telephone Company
Peoples Telephone Company
Piedmont Rural Telephone Cooperative, Inc.
Pine Belt Telephone Company
Pine Tree Telephone LLC
Pioneer Telephone Cooperative, Inc.
Poka Lambro Telephone Cooperative, Inc.
Public Service Telephone Company
Ringgold Telephone Company
Roanoke Telephone Company, Inc.
Rock County Telephone Company
Saco River Telephone LLC
Sandhill Telephone Cooperative, Inc.
Shoreham Telephone LLC
The Siskiyou Telephone Company
Sledge Telephone Company
South Canaan Telephone Company
South Central Telephone Association
Star Telephone Company, Inc.
Stayton Cooperative Telephone Company
The North-Eastern Pennsylvania Telephone Company
Tidewater Telecom, Inc.
Tohono O'Odham Utility Authority, SD

Unitel, Inc.
War Telephone LLC
West Carolina Rural Telephone Cooperative, Inc.
West Tennessee Telephone Company, Inc.
West Wisconsin Telcom Cooperative, Inc.
Wiggins Telephone Association
Winnebago Cooperative Telecom Association
Yukon Telephone Co., Inc.
Arizona Corporation Commission
Windstream Corporation
Windstream Communications, Inc.
Sprint Nextel Corporation
Level 3 Communications, LLC
Connecticut Public Utilities Regulatory Authority
Independent Telephone & Telecommunications Alliance
Western Telecommunications Alliance
National Exchange Carrier Association, Inc.
Cambridge Telephone Company
Clarks Telecommunications Co.
Consolidated Telephone Company
Consolidated Telco, Inc.
Consolidated Telecom, Inc.
The Curtis Telephone Company
Great Plains Communications, Inc.
K. & M. Telephone Company, Inc.
Nebraska Central Telephone Company
Northeast Nebraska Telephone Company
Three River Telco
RCA-The Competitive Carriers Association
Rural Telecommunications Group, Inc.
T-Mobile USA, Inc.
Central Texas Telephone Cooperative, Inc.
Venture Communications Cooperative, Inc.
Alpine Communications, LC
Emery Telcom

Peñasco Valley Telephone Cooperative, Inc.
Smithville Communications, Inc.
South Slope Cooperative Telephone Co., Inc.
Spring Grove Communications
3 Rivers Telephone Cooperative, Inc.
Walnut Telephone Company, Inc.
West River Cooperative Telephone Company, Inc.
Ronan Telephone Company
Hot Springs Telephone Company
Hypercube Telecom, LLC
Virginia State Corporation Commission
Montana Public Service Commission
Verizon Wireless
Verizon
AT&T Inc.
Cox Communications, Inc.
Comcast Corporation
Vonage Holdings Corporation
National Cable & Telecommunications Association
Smart City Telecom
State Members of the Federal–State Joint Board on Universal Service

## RULE 29.6 STATEMENT

Petitioner the National Association of Regulatory Utility Commissioners (NARUC) is a non-profit association founded in 1889. NARUC's members include the government agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with regulating the activities of telecommunications, energy, and water utilities. Congress and Courts have consistently recognized NARUC as a proper entity to represent *the collective interests* of the State public utility commissions. In the Communications Act, Congress references NARUC as "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities.[1]

NARUC has no parent company, subsidiary, or affiliate that has issued securities to the public. No publicly traded company owns any equity interest in NARUC.

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[1] *See,* 47 U.S.C. § 410(c) (2012) (NARUC nominates members to FCC Joint Federal-State Boards which consider universal service, separations, and related concerns and provide formal recommendations that the FCC must act upon.); *Cf.* 47 U.S.C. § 254(a) (2012) *Cf. NARUC, et al. v. ICC,* 41 F.3d 721 (D.C. Cir 1994) (where the Court explains "…Carriers, to get the cards, applied to…(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the "bingo card" system.")

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NARUC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

## OPINIONS BELOW

The initial opinion of the Tenth Circuit (App. 1a) is reported at 753 F.3d 1015. The report and order of the FCC (App. 281a-1509a) is reported at 26 F.C.C.R. 17663.

## JURISDICTION

The Tenth Circuit's judgment was entered May 23, 2014. Petitions for rehearing were denied August 27, 2014. NARUC requested an extension to petition for certiorari November 7, 2014. On November 12, 2014, Justice Sotomayor extended the time for NARUC's *Application No. 14A499* to January 26, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Sections 152(a)-(b), 153(20), 153(22), 153(50), 153(54), 201, 214(e), 251(a)-(i), 252(a)-(j), 253(a)-(f), 254(a)-(k), 261(b)-(c), 271(c)(2)(B), 276(1)(A)&(B), 309(j), 410(c) of the Act,[2] and sections 601(c)(3) and 706 of the 1996 Act. (App.1541a-1583a)

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[2] *Communications Act of 1934*, (Act), as amended by the *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996), (1996 Act) 47 U.S.C. § 151 *et seq.*

## STATEMENT OF THE CASE

### INTRODUCTION

In the wake of *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1874 (2013), instructions to "apply[] rigorously, in all cases, statutory limits on agencies' authority," the Tenth Circuit, in *In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014) (***Decision***), arguably sets a high-water mark in application of blanket *Chevron*[3] deference.

The ***Decision*** adopts radical contentions by an FCC ***Order***[4] notwithstanding a myriad of challenges to that agency's interpretations of the Communications Act of 1934, as amended. These FCC contentions cannot be reconciled with the unambiguous text of the statute, established principles of statutory construction, and precedent from this Court. This raises the specter of the "fox-in-the-hen-house" problem *City of Arlington's* instructions were designed to prevent.

By confirming the FCC's redefinition of **Reciprocal Compensation** to include **Access Charges** and permitting the agency to set the rate for the newly combined regimes at zero, the ***Decision's*** holdings: (a) conflict with this Court's decision in *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999) (*IUB*), and (b) are contrary to any reasonable reading of the Act as they, *e.g.*: (i) block

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[3] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). (*Chevron*).

[4] *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (***Order***).

State application of the 47 U.S.C. § 252(d)(2)(A) **Reciprocal Compensation** rate rule, (ii) interpret 47 U.S.C. § 252(d)(2)(B) so as to render § 252(d)(2)(A) surplus/a nullity; (iii) are contrary to an express § 252(d)(2)(B)(ii) prohibition; (iv) ignore express reservations of State authority in 47 U.S.C. §§ 251(d)(3)&(f); (v) are contrary to the plain meaning of the term **Reciprocal Compensation;** and (vi) render § 601(c) of the 1996 Act[5] and 47 U.S.C. § 152(b) of the Act a nullity.

The FCC consistently references its ***Order*** as "transformational." The description is, if anything, an understatement. The massive ***Order*** produced 55 pages of regulations that radically restructure the multi-billion dollar U.S. telecommunications sector.

The list of radical changes was not short. More than sixteen years after the 1996 Act passed, the FCC discovered numerous new grants of statutory authority. Almost all either conflict directly with clear text or render other statutory provisions a nullity. The ***Decision*** adopts the agency's reasoning almost completely.

This includes novel FCC statutory constructions, confirmed by the Tenth Circuit:

That the FCC can specify final and interim **Reciprocal Compensation** (and *inter/intrastate access*) rates - based on generic § 201 authority to implement the Act, notwithstanding § 252(c) and § 252(d)(2)(A) *mandates* for State commissions to set rates according to specified criteria – *mandates* confirmed by this Court in *IUB,* 525 U.S. at 384; App.177a-178a.

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[5] 47 U.S.C. §152 note (Pub. L. No. 104-104, § 601(c)).

That the FCC can redefine the § 251(b)(5) **Reciprocal Compensation** duty imposed only on Local Exchange Carriers to require "bill-and-keep" as the only permissible compensation among all carriers, eliminating a mandated §252(d)(2)(A) State *cost-based* review and preempting intrastate rate design options preserved elsewhere. App.177a-297a;

That the FCC can establish with particularity the additional costs of transporting or terminating local traffic (and all other *inter-* and *intra*state traffic) as zero, notwithstanding § 252(d)(2)(B)(ii)'s requirement that the **Reciprocal Compensation** cost standards shall not be construed "to authorize the [FCC] to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls;"

That neither § 601(c)(1)'s requirement that the 1996 Act "shall not be construed to modify, impair, or supersede. . . State[] law unless expressly so provided," nor § 152(b)'s instruction not to "construe" provisions "to apply or give the [FCC] jurisdiction with respect to.. intrastate communication services" - prohibits the FCC from adopting the most preemptive construction of 47 U.S.C. §§ 251-2 possible – a construction that renders § 252(d)(2) and (c)(5)-(6) (and other sections of the Act) nullities; App.185a-187a.

That § 214(e)'s mandate, that only a carrier classified as a "eligible *telecommunications carrier"* may receive federal universal service support, is no longer binding; according to the FCC, a service's classification is irrelevant, as: "[u]nder ***our*** approach, federal support will not turn on whether interconnected VoIP services or the underlying

broadband service falls within *traditional regulatory classifications under the Communications Act*." {*emphasis added*};[6]

That 47 U.S.C. § 254(c)(1)'s unambiguous limitation of universal service to *telecommunications services* (which § 254 consistently says will allow "access to" *information services*) must now be read to mean *telecommunications AND information services.* App.26a-33a;

That § 254(c)'s mandate that services receiving "universal service" subsidy support must be defined is inoperative as the FCC ignored the § 254 process and required carriers to provide a non-qualifying 'service' as a prerequisite of receiving funds to provide the properly defined services;[7]

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[6] ***Order*** at ¶69, App.338a; See also ¶63 ("Our authority to promote universal service . . . does not depend on whether interconnected VoIP services are [classified as] telecommunications services or information services under the Communications Act.") and ¶72 ("[L]imiting federal support based on the regulatory classification of the services offered over broadband networks as telecommunications services would exclude [some] from [participating as] the universal service program providers.") {*emphasis added*}; App.328a, 342a. This is one place the Tenth Circuit indicates, albeit in dicta, the FCC ***was*** wrong – finding "broadband-only providers . . . cannot be designated as "eligible telecommunications carriers," while paradoxically, giving deference to FCC findings that it can condition access to support on a requirement to provide broadband and finding, incorrectly, that the FCC decision not to classify "voice telephony service" as a "telecommunication service" was not ripe. App.27-28a, 33-36a.

[7] App.94a-95a, The ***Decision*** rejects arguments that §§

That 47 U.S.C. § 214(e) now includes authority to hold auctions to distribute universal service support and both permits and requires "conditional" State designations of carriers to provide service;[8]

That § 214(e)'s mandate that a carrier designated as eligible for the federal subsidy "shall" offer and advertise the supported services, is properly interpreted to mean a carrier so designated "may" provide those services, but only if the designated carrier wins an auction;[9] and

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254(c)(1) and 254(e) bar the FCC from conditioning funds on a designated carriers' agreement to provide broadband. App.29a-31a.

[8] App.69a-74a. Section 214(e) designation procedures are inconsistent with the auction process. There is no reference to "competitive bidding" or "conditional designations" in §214 – unusual given in 1993, Congress authorized auctions for spectrum using explicit language. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(b), 107 Stat. 312, 392 (1993) (codified at 47 U.S.C. §309(j)). Indeed, Congress amended §309(j) *in the 1996 Act* to addressed *auction revenue* from the 1993 amendment.

[9] The ***Decision*** accepts the FCC's argument that petitioners conflate "eligibility for subsidies with the right to receive subsidies," App.73a-74a, but never addresses the mandate that designated carriers "shall" provide and advertise supported services – whether or not they receive a subsidy. 47 U.S.C. §214(e)(1).

That 47 U.S.C. § 410(c)'s mandate that the FCC "shall refer" to a joint board "any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations" does not "regard" formal rulemakings which specifically "sought comment on the implications of the jurisdictional separations process," App.1062a-1063a, and amends Part 36 Separations rules with changes that alter both whom the rules apply to and how costs shift across jurisdictions.[10]

These are some of many questionable interpretations confirmed by the ***Decision*** based, in part, on a deficient application of *Chevron*. All are worthy of review. They illustrate that amplification of *Arlington*'s rigorous standard with respect to a review of the "statutory limits on agencies' authority" is needed. Other petitions for certiorari have been filed on this FCC action. To make the case for review, while adhering to required word limits, this petition focuses on the most egregious holdings: the FCC's determination that the term **Reciprocal Compensation** includes **Access Charges**, and that the agency is entitled to mandate default and transitional rates for the combined fees. App.173a-207a. This Court should grant certiorari and reverse the ***Decision*** below, because it conflicts with decisions of this Court and other Courts of Appeals and the plain text of the statute, and because it

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[10] App.1355a-1363a. Under the rationale upheld by the ***Decision***, App.108a-115a, there simply is no longer any circumstance when separation issues must be referred to a federal state joint board, and a recommendation received, as a pre-requisite for FCC action.

disables critical provisions of an "unusually important legislative enactment," *Reno v. ACLU,* 521 U.S. 844, 857 (1997), the Telecommunications Act of 1996.

## BACKGROUND

Local telephone calling areas are called *exchanges*.[11] The provider of local phone service in exchanges is called a *Local Exchange Carrier* or LEC. Traffic between exchanges is *interexchange* and long distance companies that carry traffic between those local exchanges are called *Interexchange Carriers* or IXCs.

Prior to 1990, local exchange service and *intra*state interexchange service were generally provided by monopoly providers granted exclusive franchises by States. The FCC regulated *inter*state interexchange operations. To replace the inter-carrier "settlement" payments AT&T made to LECs before the 1984 AT&T divestiture, the FCC established **Access Charges**. IXCs paid tariffed **Access Charges** to LECs to compensate for using their networks to originate and terminate *inter*state calls. Most States adopted similar regimes for *intra*state interexchange calls and encouraged toll

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[11] The 1934 Act defined "telephone exchange service" as "services within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunication services of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge." 47 USC 153(54)(A). The 1996 Act updates the definition to include, in (B), any "comparable service."

competition. In return, LECs provided "access" to IXCs to and from the exchange/local calling area – a service the 1996 Act defined as "exchange access."[12] **Access charges** are never reciprocal. Only the IXC pays originating and terminating **Access Charges** to the LECs at both ends of a toll call. A LEC originates a call and delivers it to the customer's designated IXC, who delivers it to a second LEC that terminates the call locally to the called party.

As a result of these structural changes, long-distance markets became competitive. *See NARUC v. FCC,* 737 F.2d 1095, 1103-11 (D.C. Cir. 1984).

In the 1990s, a similar transformation began in local service, driven by State Commissions. States encouraged competition in local exchanges between competing LECs. By 1996, fifteen States, representing 48% of U.S. phone lines, were "in the advanced stages of the process towards local competition." Another eleven States were at the "middle stages" moving towards local competition.[13]

Carriers competing in local exchanges were expected to pay each other **Reciprocal Compensation** for terminating calls that originated in the exchange on one local provider's/LEC's network and were terminated within the same

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[12] 47 U.S.C. §153(20).

[13] See Comfort, Stephanie, et al., *Telecommunications Services: National Survey of Local Competition Issues: A State-by-State View* (1996). See also Davis, Vivian, et al., *Aspects of Telecommunications Reform: Results of a Survey of State Regulatory Commissions*, at 1, NRRI 95-05 (Feb. 1995), ("In . . . 13 states . . . competition in switched local service is already allowed . . . under formal consideration in 16" more.)

exchange (local calling area) on a competitor's network.

Before the 1996 Act, (1) legal/economic experts detailing State competition experiments,[14] (2) utility industry executives testifying before Congress in 1995,[15] (3) State regulators,[16] (4) Congress,[17] and

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[14] Dingwall, Craig D., *The Last Mile: A Race for Local Telecommunications Competition Policy*, 48 FCLJ 105 (1995) discussing **Reciprocal Compensation** and State orders and citing an *Economic Strategy Institute* study that said one regulatory "choke point" that could "'forestall local exchange service competition" was "reciprocal compensation for terminating traffic." {*emphasis added*}.

[15] Prepared Testimony of Robert Annunziata, President, Chairman and CEO, Teleport Communications Group before the Subcommittee on Telecommunications and Finance, Commerce Committee, U.S. House of Representatives H.R. 1555, Communications Act of 1995 (May 11, 1995) ("The single most important "right" element of H.R. 1555 is the requirement for reciprocal compensation for the mutual exchange of local traffic.") {*emphasis added*}

[16] See, e.g., Communications Daily Vol. 15, No. 245 (Warren Publ. 12/21/95) Pg. 3 ("Fla. PSC approved 2-year interconnection agreement involving competitive access provider. . . sets terms for rates, reciprocal compensation."); *Industry Lukewarm on FCC Plan To Collect Data on Competition*, Communications Daily, Vol. 15, No. 239 (Warren Publ. 12/13/95) Pg. 4 ("[S]urvey has 2 "fundamental flaws": (1) Bureau "omitted requests for data on the essential elements for [local] competition" -- such as reciprocal compensation."); *Brief Transmission MFS, Pac Bell Form Local Telecomms Pac*t, Telecomworldwire (M2 Communications Ltd. 10/21/95) MFS Communications has aligned in an agreement with Pacific Bell

even (5) the FCC[18] used the term R**eciprocal Compensation** to refer to the compensation for the

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to provide the first Californian competitive local telephone company . . . providing . . .reciprocal compensation.") *NARUC Convention; Work Group Urges Fewer Telecom Entry Barriers*, Communications Daily Vol. 15, No. 222 (Warren Publishing 11/17/95) Pg. 2 ("NARUC Communications Subcommittee local competition work group in recommendations [says] terms must . . .include . . .reciprocal compensation.'). {*emphasis added*}

[17] See, e.g., H.R. CONF. REP. 104-458, at pp 117, 123, where the Senate distinguishes **Access Charges** from **Reciprocal Compensation** by discussing its version of §251 of the conferenced bill, which included the **Reciprocal Compensation** provision: "[t]he obligations and procedures proscribed in this section do not apply to interconnection arrangements between local exchange carriers and telecommunications carriers under §201 . . . for the purposes of providing interexchange service, and nothing in this section is intended to affect the Commission's access charge rules" {*emphasis added*} It makes no sense for the Senate to say **Reciprocal Compensation** does NOT include **Access Charges** and the FCC to opine that it does below.

[18] *In the Matter of Ameritech Operating Companies*, 11 F.C.C. Rcd. 14028 (1996) A FCC February 1996 order grants a 1993-filed LEC petition that "proposes the establishment of reciprocal compensation agreements for terminating local traffic between Ameritech and new providers of local exchange services." *Id.* at 14038. In 1995, the Illinois Commission agreed Ameritech "and new local exchange providers should compensate each other at the same rate for terminating each other's traffic, but rejected Ameritech's proposal to use switched access rates as a basis for such reciprocal compensation." *Id.* Ameritech "exchanged 6,484,000 minutes of switched local exchange traffic with competitors pursuant to

reciprocal exchange of *local* traffic that terminates *locally* and to distinguish such charges from the existing **Access Charge** regimes.

**THE 1996 ACT**

The 1996 Act is a carefully designed exercise in "cooperative federalism." *Puerto Rico Tel. Co. v. Telecom. Reg. Bd. of Puerto Rico,* 189 F.3d 1, 8 (1st Cir. 1999). It requires the FCC to work hand-in-hand with States to open local markets to competition.[19] It is *explicit* when it preempts State authority and has the FCC set *intra*state rates, *e.g.*, 47 U.S.C. § 276's specification that the FCC is to set a per call compensation plan for every "intrastate and interstate call" on payphones. App.1581a. It requires any proposed preemption of intrastate operations to be on a case-specific basis[20] and includes numerous

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reciprocal compensation agreements." *Id.* at 14070. "End office integration trunks are trunks on which traffic can be measured for calculating reciprocal compensation. These trunks allow Ameritech to interconnect with competing local service providers." *Id.* at 14061, n.154.

[19] *See, e.g., Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko, LLP,* 124 S. Ct. 872 at 876, 882 (2004); Weiser, Philip, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act,* 76 N.Y.U.L.Rev. 1692, 1694 (2001) (describing the 1996 Act as "perhaps the most ambitious cooperative federalism regulatory program to date").

[20] 47 U.S.C. § 253 allows the FCC to preempt any State law "to the extent necessary", if it finds, on a case-by-case basis, that such law effectively prohibits "any entity" from providing any telecommunications service. But even there Congress specifically preserved State "requirements necessary to preserve...universal service, protect the public safety and

reservations of State authority, *e.g.,* §§ 251(d)(3), 253(b)&(c) and 261(b)&(c).

The 1996 Act drew directly from State experiments, requiring, in § 251(b)(5), that all LECs have a duty to provide **Reciprocal Compensation** arrangements to competitors in local markets. It preserved State and FCC **Access Charge** regimes in §§ 251(d)(3) and 251(g). It built on State efforts, seeking to "introduce competition to local telephone markets" while simultaneously "preserving universal service." *Qwest Corp. v. FCC,* 258 F.3d 1191, 1196 (10th Cir.2001). The Act also obligates incumbent LECs to interconnect their networks with competitors. 47 U.S.C. § 251(c)(2); *AT&T Communications Sys. v. Pacific Bell*, 203 F.3d 1183, 1184 (9th Cir. 2000) (Congress imposed the duty for incumbent LECs to share networks after "[r]ecognizing that competitors would have difficulty replicating local network[s]").

The Act requires new competitors and incumbents to negotiate interconnection agreements**.** 47 U.S.C. § 251(c)(1). If negotiations fail, State commissions conduct arbitrations, applying FCC rate methodologies to the statutory rate formula, subject solely to federal district court review. *AT&T v. Illinois Bell,* 349 F.3d 402, 405 (7th Cir. 2003). State commissions "establish any rates" in dispute, ensuring that they meet specific statutory pricing standards. 47 U.S.C. §252(c); *IUB*, 525 U.S. 384.

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welfare, ensure the continued quality of telecommunication services and safeguard the rights of consumers." *Id.*

The term **Reciprocal Compensation** only appears **four** times in the 1996 Act, twice in §251(b)(5):

> (b) **Obligations of all local exchange carriers** Each [LEC] carrier has the following duties:
>
> *****
>
> (5) **Reciprocal Compensation:** The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

Once in the 47 U.S.C. §271(c)(2)(B) "competitive checklist" as a specific reference to compliance with § 252(d)(2), and, finally in § 252(d)(2):

> **(d) Pricing standards**
>
> ***
>
> **(2) Charges for transport and termination of traffic**
>
> **(A) In general** For the purposes of compliance by an incumbent local exchange carrier with section 251 (b)(5) of this title, a State commission shall not consider the terms and conditions for **reciprocal compensation** to be just and reasonable unless—
>
> (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network

facilities of calls that originate on the network facilities of the other carrier; and

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

**(B) Rules of construction**

This paragraph shall not be construed—

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements);[21] or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls . . .

47 U.S.C. § 252(d)(2) {*emphasis added*}

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[21] The **Decision** is wrong to conclude § 252(d)(2) just applies to "compulsory arbitration." App.198a. It also applies to **Reciprocal Compensation** under § 252(f)(2) "Statements of Generally Available Terms." Presumably, an LEC *could* seek State approval of such a statement that includes "bill and keep" for carriers that *voluntarily agree* to such an arrangement.

Section 252 mentions State Commissions 50 times. It mentions the FCC seven times – *specifying the FCC can act only if the State abdicates its role*. Section 252(e)(5)&(6). In that case Congress directed the FCC to stand in the shoes of the State for that specific proceeding. *Id.*

Section 252(e)(6) gives the Courts, and not the FCC, exclusive authority to review State commission decisions on, e.g., rate determinations.

Section 252(d)(2)(A)(i) mandates that States base R**eciprocal Compensation** rates on "the additional costs of" termination, and ensure "mutual and reciprocal recovery by each carrier" of the costs of terminating "calls that originate on. . . the other carrier."

Only § 252(d)(2)(B)(i) arrangements "*that afford the mutual recovery of costs through* the *offsetting* of *reciprocal obligations,* including . . . bill-and-keep" are not *precluded."* {*emphasis added*}

To further the goal of reducing regulation, Section 252(d)(2)(B)(ii) prohibits the FCC (and States) from "establishing with particularity the additional cost of transporting or terminating calls."

Congress delineated other specific tasks affected by the ***Order*****,** including § 254(k)'s instructions requiring that the FCC, only "…with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules…to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities."

The ***Decision's*** approval of the FCC's extreme construction of **Reciprocal Compensation** ignores all six Congressional directives.

**FCC IMPLEMENTATION OF THE ACT**

Shortly after the 1996 Act passed, the FCC issued its first implementation order. It pointed out, in ¶53 that "[v]irtually every decision in this Report and Order borrows from decisions reached at the state level." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C. Rcd. 15499, 15527 (1996). (*Local Competition Order*).

The discussion of **Reciprocal Compensation** is illuminating. The FCC "recognized that transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions." *Id.* at 16012-13. The agency states its belief "that the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge." *Id.* {*emphasis added*} But even though the FCC believed in 1996, as it mandated in the ***Order*** on review, that rates for **Access Charges** (long distance) and **Reciprocal Compensation** (local) should converge, they **still** specifically concluded, "as a legal matter" that:

> transport and termination of local traffic are different services than access service for long distance telecommunications. Transport and termination of local traffic for purposes of reciprocal compensation are governed by sections 251(b)(5) and 252(d)(2), while access

> charges for interstate long-distance traffic are governed by sections 201 and 202 of the Act. The Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic.

*Id.* {*emphasis added*}

The FCC consistently interpreted § 252(d)(2)(B) to authorize "bill-and-keep" for **Reciprocal Compensation** only where carrier rates were symmetrical and traffic was in balance. *Id.* at 16055-16057, ¶1111-1116. The FCC also recognized what the statute unambiguously provides: that under such circumstances, the statutory requirement of "mutual recovery of costs through the offsetting of reciprocal obligations" is satisfied through an "in kind" exchange. *Id.*

The FCC found mandatory bill-and-keep arrangements outside these limited circumstances would not satisfy § 252(d)(2)'s mandate that LEC rates provide "mutual and reciprocal recovery" of carrier costs:

> [W]e find that carriers incur costs in terminating traffic that are not *de minimis*, and consequently, bill-and-keep arrangements that lack any provisions for compensation do not provide for recovery of costs.

*Id.* at ¶1112.

The FCC also adopted symmetrical **Reciprocal Compensation** rules, with the ILEC's

prices serving as a proxy for the other carrier's "additional costs" of transport and termination. *Id.* at 16040. States were to use these FCC default proxy price "ceilings and ranges" until a particular State either established its own rates using the FCC's pricing methodology, or a bill-and-keep arrangement where carrier rates were symmetrical and traffic was in balance. *Id.* at 15883-84, 16024.

The Eighth Circuit vacated these default rates, based on the *IUB* determination that only States may set rates under §§ 251-252. *Iowa Utilities Bd. v FCC*, 219 F.3d 744, 757 (8th Cir. 2000). Subsequently, *Verizon Communications v. FCC*, 535 U.S. 467, 489 (2000) (*Verizon*) confirmed that Congress established "a hybrid jurisdictional scheme with the FCC setting a basic, default methodology for use in setting rates when carriers fail to agree, but leaving it to state utility commissions to set the actual rate." The FCC subsequently made "incremental efforts" to modify its intercarrier compensation regime and issued a series of rulings that eventually resulted in rate caps for **Reciprocal Compensation** for dial-up calls to so-called Internet Service Providers. *Core Communications v. FCC*, 592 F.3d 139, 141-42 (D.C. Cir. 2010).

**THE "TRANSFORMATIONAL" *ORDER***

The 752–page November 2011 FCC ***Order*** preempts State regulation of intrastate rates, abolishes the current intrastate and interstate compensation schemes and adopts a "uniform national bill-and-keep framework." App. 17a

The FCC did what it said in 1996 the Act barred it from doing "as a legal matter."

It decided that the term **Reciprocal Compensation** included **Access Charges** and that it could "converge" and set the rates. App.858a.

It preempted intrastate **Access Charges**. App.861a-864a. The new rules transition intrastate/interstate termination rates to a rate of zero for all traffic. This rate applies to all telecommunications, including local traffic and traffic previously "subject to the interstate and intrastate access regimes." App.867a-868a. *Intra*state terminating access rates will be lowered in stages, first to equal interstate access rates, then in stages to zero. App. 307a-308a.

The FCC claimed its authority to impose these rules "flows directly" from the LEC § 251(b)(5) duty to establish **Reciprocal Compensation** "for the transport and termination of telecommunications," and from its § 201(b) rulemaking authority. App.857a. It acknowledged the new rules supersede the traditional access regime, which the FCC claims is preserved under § 251(g). App.860a-861a. It rejected arguments that § 251(b)(5) does not apply to intrastate access, while *admitting* the *pricing standard* in § 252(d) "simply does not apply to most of the traffic that is the focus of this Order." App.872a. It rejected arguments that it exceeded its authority under §252 by setting a rate of zero, rather than only establishing a methodology, and that a zero rate contravenes applicable statutory requirements. App.872a-876a.

The Tenth Circuit agreed with, and largely repeated, the FCC's rationale based on *Chevron*.

## REASONS FOR GRANTING THE WRIT

The FCC's radical restructuring of intercarrier compensation perverts the plan promulgated in the 1996 Act. Congress directed an exercise in cooperative federalism.

This petition raises important recurring questions this Court should resolve about the meaning of key provisions of the Act and the proper application of *Chevron*. The Act's local competition provisions "profoundly affect[] a crucial segment of the economy worth tens of billions of dollars," and "fundamentally restructure[] local telephone markets." *IUB,* 525 U.S. 370, 397. This Court has recognized the crucial importance of these provisions by taking certiorari to address § 251 and § 252 before – also to cure agency overreach. *Id.*

On its face, the FCC's rate setting activities below are contrary to this Court's ruling in *IUB*. Those rates, and other FCC determinations, are contrary to the plain text of the statute and cannons of statutory construction. The Tenth Circuit's flawed analysis of the FCC's ***Order*** and the statute in the wake of *Arlington* suggests additional clarification of *Chevron* is needed.

### I. The Court Should Settle the Recurring Question of Proper Application of §152(b) and §601(c)(1) upon Agency *Discretion* to Construe the Act.

Title I of the Act contains **General Provisions**. In § 152 it specifies how Chapter 5, (which includes the Title II local competition provisions), is to be applied.

Section 152(a) states "[t]he provisions of this chapter shall apply to all interstate and foreign communication by wire or radio."{*emphasis added*}[22] And §152(b) reinforces § 152(a)'s limitation:

> Except as provided in [§§]223 through 227 . . . inclusive, and [§]332…nothing in this chapter *shall be construed* to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with *intra*state communication service.

{*emphasis added*}.

Section 152(b) clearly specifies both its coverage and exclusions to its coverage. It contains "not only a substantive jurisdictional limitation on the FCC's power, but also a rule of statutory construction." *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355, 373 (1986).

The application of §152(b) to the Title II local competition provisions added by the 1996 Act was the subject of considerable Congressional pre-Act debate.

On June 15, 1995, S.652 passed the Senate with an amendment, stating:

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[22] Indeed, Congress directs that "the term 'interstate communication'… shall not, with respect to subchapter II of this chapter… include wire or radio communication between points in the same State… if such communication is regulated by a State commission." 47 U.S.C. §153(22).

> §152(b)[]…is amended by striking "'sections 223 through 227, inclusive, and section 332,'" and inserting "'section 214(d), sections 223 through 227, *part II of title II*, and section 332.[23]
>
> {*emphasis added*}

On August 4, 1995, the House passed H.R.1555, which also specified § 152(b):

> is amended by inserting "*part II of title II*," after "227, inclusive.[24]
>
> {*emphasis added*}

On October 12, 1995, the House passed its version of S.652 retaining this August 4th text."[25]

States protested these amendments[26] *because they blocked the application of § 152(b) to Title II.*

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[23] *Telecommunications Competition and Deregulation Act of 1995* (S.652), 141 Congressional Record (August 12, 1995) H9954-9978, H9958.

[24] *Communications Act of 1995* (H.R. 1555), 141 Congressional Record (August 4, 1995) H8426-8451, H8431.

[25] *Communications Act of 1995* (S.652), 141 Congressional Record (August 12, 1995) H9978-10000, H9984.

[26] *See, e.g.,* Julius Caesar Watts (OK). "Communications Act of 1995" 141 Congressional Record H8453 – H8454 (August 4, 1995) p. During the debate of HR 1555,which included "Title II" exclusionary text for §152(b) and §601(c)(1), Mr. Watts stated: "Yesterday, my office heard from public utility commissioners all over the country, Alabama, Arizona, California, Kansas, New Hampshire, Nebraska, Nevada, my home State of Oklahoma, Oregon, Utah, and Wisconsin." Mr.

The June 15th and October 12th bills were conferenced to produce the 1996 Act. In part, because of the State protests, *the amendments were eliminated to assure § 152(b) applied to the Title II competition provisions.*[27]

Congress also included a new rule of statutory construction that, like § 152(b), applies to Title II by its express terms. It also had prior versions that make plain that the new Title II provisions were its focus.[28]

Section 601(c)(1) of the 1996 Act**,** captioned "NO IMPLIED EFFECT", provides "[t]his Act and the amendments made by this Act *shall not be construed to modify, impair, or supersede . . . State*,

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Watts placed letters in the record including one from the Wisconsin Commission Chair, which said: "H.R. 1555 . . . allows the FCC to preempt the states on many key issues. This provides an incentive for the current monopoly provider to challenge every state decision. . .To the extent that your efforts would give the states a stronger chance to gain some ground on the jurisdictional issues in conference committee, I would . . .support your efforts.")

[27] *See, e.g. Russello v. United States*, 464 U.S. 16, 23-24 (1983). ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.")

[28] The August 4th passed H.R.1555 restricted application of this rule also, stating: "Parts II . . . of title II… shall supersede State and local law to the extent that such law would impair or prevent the operation of such part." But that text was dropped in the House's August 12th bill. See 141 Congressional Record (August 12, 1995) H9999.

or local *law unless expressly so provided in such Act or amendments*." {*emphasis added*}

Either alone or in tandem, both §§ 152(b) and 601(c)(1), by their express terms, require the FCC to "construe" preemptive portions of the Act narrowly and reservations of State authority broadly.[29]

Both the ***Order*** and the Tenth Circuit's ***Decision*** suggest those rules are irrelevant and have no impact.

The FCC's redefinition of **Reciprocal Compensation** is patently unreasonable. But even if it were not, Congress specified the FCC, and presumably Courts reviewing FCC action, must narrowly construe issues of preemption.

That is not what happened.

For 16 years, the FCC "construed" §251(b)(5)'s **Reciprocal Compensation** in a way that does not require preemption of intrastate **Access Charges**. It now applies a construction that is breathtakingly broad and in conflict with clear statutory text.[30]

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[29] Compare this to the citations to *IUB* in ¶772 of the ***Order,*** App.869a-870a, which if considered on a standalone basis, indicates States have no remaining jurisdiction.

[30] Logically, the FCC interpretation of "telecommunications" as unbounded by the interstate/intrastate division in §152 would require State commissions to set *interstate access* rates under the plain language of § 252(d)(2)(A). Clearly Congress did not intend that result. See *Ransom v. FIA Card Services*, N.A., 131 S.Ct. 716, 724-725 and n.5 (2011) ("This reading of 'applicable' also draws support from the statutory context.").

When the statute is capable of two reasonable interpretations – one preemptive – one not, these two rules of construction leave only one permissible choice.

The FCC did not make a permissible choice here.

The Tenth Circuit, based on limited precedent on § 152(b) and, guided by *Chevron* and its progeny, upheld that FCC action.[31]

This Court instructs a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."[32]

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[31] App.187a. The ***Decision*** follows the FCC's lead and cites *IUB*, 525 U.S. 380-81 & n.7. There were three strong dissents on the non-application of § 152(b): "Congress neither eliminated §[152](b) altogether nor added §§251 and 252 to the list of provisions exempted from its jurisdictional fence. I believe that we are obliged to honor that choice." *Id.* at 409-10 (THOMAS, J., concurring in part and dissenting in part, joined by REHNQUIST, C.J. & BREYER, J); "[T]he Communications Act…comes equipped with a specific instruction that courts are not to 'construe' the FCC's statutory grant of authority as giv[ing] the Commission jurisdiction with respect to ... intrastate communication." *Id.* at 421 (BREYER, J., concurring in part and dissenting in part). (quoting §152(b)) (emphasis original).

[32] *Corley v. United States*, 556 U.S. 303, 314 (2009) (citations omitted).

Yet the FCC's analysis (or rather lack thereof) does exactly that.[33]

It cannot be seriously contended that Congress did not expect these two explicit rules to limit the FCC's construction of ambiguous provisions. In practice, the FCC does not consider them, except to claim the deference it is due makes them inapplicable. There is no attempt to place any limiting construction on the text by either the FCC or the Tenth Circuit. The Tenth Circuit merely "defers to the FCC's interpretation of a statutory ambiguity that concerns the scope of its regulatory authority." App.187a

The Court should grant certiorari to provide clarification on how these rules apply when the statutory text is ambiguous, and also where, as here, the text compels a contrary conclusion.

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[33] *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1195 (10th Cir. 2002) citing *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Statutes are entitled to the presumption of non-preemption."). Petitioner respectfully suggests that the addition of specific rules should require more than a perfunctory citation/analysis parroting case-law on "the presumption against preemption." Congress included explicit rules presumably to assure a more rigorous overview than already available via Court precedent.

## II. The Court Should Correct Conflicts with Statutory Text, Decisions of the Supreme Court and other Courts of Appeals.

### A. The Tenth Circuit *Decision* Conflicts with Statutory Text and This Court's Precedent.

Section 252(c)(2) specifies that "[i]n resolving by arbitration . . . a State commission shall—(2) establish any rates for interconnection, services. . . . according to subsection (d)." In *IUB,* this Court construed § 201(b) to permit the FCC to establish a methodology for prices involving interconnection but specified that States "determin[e] the concrete result in particular circumstances. That is enough to constitute the establishment of rates." *IUB*, 525 U.S. at 384.

In *Iowa Utilities Board v. FCC,* 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part by Verizon Communications, Inc. v FCC,* 535 U.S. 467 (2002), the Eighth Circuit struck down the FCC's proxy prices for interconnection, network element charges, wholesale rates, and transport and termination rates, holding "[s]etting specific prices goes beyond the FCC's authority to design a pricing methodology and intrudes on the states' right to set the actual rates pursuant to §252(c)(2)." *Id.* at 757.

The FCC ***Order*** does not establish a methodology; it sets a zero rate and interim specific non-zero rates. Both actions conflict directly with the holding in *IUB* and the cited Eighth Circuit decision.

Neither the FCC nor the Tenth Circuit ever really explain why the FCC's imposition of bill-and-keep – which results in a zero rate – does not conflict with these decisions.

The Tenth Circuit simply concludes, "[a]gainst the backdrop of [*IUB*], the FCC reasonably concluded that bill-and-keep involves a permissible methodology notwithstanding the states' authority to set rates under § 252(c)." App.202a.

To suggest that a "zero" rate, the only possible outcome of a "bill and keep" methodology, is not setting the rate defies logic[34] and ignores the *IUB* directive that States "determin[e] the concrete result in particular circumstances." *IUB*, 525 U.S. at 384.

Rather than address head-on the FCC-set interim and final rates, the Tenth Circuit endorses the FCC "but-States-can-still-pick-a-point–for-delivery-of-terminating-traffic" argument:

> The FCC reasonably determined that by continuing to set the network "edge," states retain their role under § 252(d) in "determin[ing] the concrete result in particular circumstances.

App.199a-200a.

This theory conflates the § 251(b)(5) **Reciprocal Compensation** obligation with the separate § 251(c)(2) obligation on incumbent LECs to

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[34] The FCC concedes the trespass on the acknowledged State authority by arguing a zero rate "methodology" is "less burdensome than approaches that would require…[S]tate commissions to set a uniform positive [ICC] rate, such as $0.0007." ***Order*** ¶743 App.839a-840a.

allow interconnection "at any technically feasible point." A State's "pick-a-point" capability is constrained to an examination of technical feasibility of the interconnection point requested.

The 10th Circuit does not mention the FCC alternative argument that States still have a role in setting rates because they will continue "to regulate rates carriers charge their end-users." App.874a.

But it does state that with a zero rate "carriers will recover their costs from end-users." App.206a. However, the "concrete result" that *IUB* addresses, and Congress required, is the rate charged between the two carriers in arbitration. The Act is not silent on this issue. Sections 251(b)(5) and 252(d) indicate carriers will recover transport and termination costs through "*reciprocal* compensation arrangements." 47 U.S.C. §§251(b)(5), 252(d)(2)(A) {*emphasis added*}. Even where bill-and-keep is imposed, carriers still recover their costs "through the offsetting of *reciprocal* obligations." §252(d)(2)(B)(i) {*emphasis added*}. For compensation to be "reciprocal" it must, by definition, be given by "each to the other." *Webster's New World Dictionary* 1120 (3d College Ed. 1988). By mandating carriers seek compensation from retail customers, the FCC plan conflicts with the clear text, which requires the carriers exchanging traffic to compensate each other.

The Tenth Circuit also finds comfort in the contention that an FCC-set zero rate is permissible because bill-and-keep arrangements are allowed by § 252(d). App.202a-203a. While it may be true the phrase "terms and conditions" will not result in actual money changing hands if a State can allow bill-and-keep (because the traffic is balanced) under

§ 252(d)(2)(A), *IUB* still teaches that the "concrete result" remains out of the FCC's purview.

The Tenth Circuit also condones here the related FCC finding that that bill-and-keep is consistent with § 252(d)'s pricing standard because §252(d)(2)(B) allows "arrangements that waive mutual recovery (such as bill-and-keep)" – and because carriers can always recover their costs from end-users.[35] App.206a. Even assuming the FCC could, consistent with the Act, set a rate *under this* § 252(d)(2)(B)(i) *provision*, the industry-wide zero rate it establishes, is not consistent with the §252(d)(2)(A) standard. Section 252(d)(2)(A) requires the price to be based on the "additional costs of terminating such calls" which is something other than a "zero" rate.[36] States can set a zero rate only when an examination reveals they "afford the *mutual* recovery of costs through the *offsetting* of r*eciprocal* obligations." § 252(d)(2)(B)(i)

### B. The *Decision* is Not Faithful to the Dictates of Either *Chevron* or *City of Arlington*.

The Tenth Circuit's grant of *Chevron* deference to the FCC on the definition of

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[35] How can the FCC waive a right Congress gave a connecting carrier to recover costs? And why would Congress place an anticipated "default" rule in an exception to an affirmative cost-based pricing standard?

[36] Although the FCC characterizes call termination costs as "very nearly zero," ***Order***, App.853a, it acknowledges that the "additional" costs of termination may be more than nominal. *Id.* at n.1333. Such charges, by definition, recover the carrier's *actual* termination costs.

**Reciprocal Compensation** is inconsistent with the plain text of the statute. In light of *Arlington*'s "rigorous[ ]" standard with respect to a review of the "statutory limits on agencies' authority," 133 S.Ct. 1874, the Court should determine if *Chevron* deference allows a reviewing court to acquiesce to an expansive agency interpretation that runs afoul of the text and applicable principles of statutory construction.

Congress did speak to the precise questions at issue here. But, even granting, *arguendo*, some ambiguity, the FCC's view is still not based on a permissible construction of the statute.

As *Chevron* teaches, if a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law, and must be given effect. *Chevron,* 467 U.S. at 842-43 & n.9; *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,* 515 U.S. 687, 696-708 (1995), (evaluating the reasonableness of an administrative interpretation by analyzing the "ordinary" and "dictionary" meanings of the relevant provision; the "statutory context" of the provision; and the "broad purpose" and "legislative history" of the statute).

The FCC, ***Order,*** App.859a-860a, found the word "telecommunications" in § 251(b)(5), defined at 47 U.S.C. § 153(50), can be construed as untethered to geographic or regulatory limits, which allows the agency to define **Reciprocal Compensation** to cover interstate and intrastate **Access Charges**, and also of course to continue to cover the traffic

**Reciprocal Compensation** covered before the ***Order***.[37]

With (or without) *Chevron* deference at any level, the FCC's constructions cannot be justified. The conflicts with the statute are evident.

The FCC "rate" establishes that the "additional costs of transporting or terminating calls" is zero and finds Congressional instructions in § 252(d)(2)(A) irrelevant.[38]

As discussed, *supra*, the plain text of § 252(d)(2) contradicts the FCC's new interpretation.

Without question, that new interpretation renders surplus the mandated State role to assure **Reciprocal Compensation** complies with the § 252(d)(2)(A) cost standard.

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[37] The FCC advances a new definition of a statutory term, **Reciprocal Compensation**, and then in the same order uses that same term to mean what it says it cannot mean. The Supreme Court, in *Louisiana, 476 U.S.* at 372, noted a similar irony and, rejecting another FCC's attempt to redefine a word in the statute, found: "It is worth noting that the FCC itself, in the very orders underlying this litigation, used "charges" to mean "depreciation charges." Like *Louisiana*, in the ***Order,*** *e.g.*, App.902-a907a, FCC uses **Reciprocal Compensation** to distinguish certain charges from **Access Charges**. *Cf. Bailey v. United States*, 516 U.S. 137, 146 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.")

[38] ***Order***, App.867a, rejecting "the view of some commenters that the pricing standard in section 252(d)(2)(A) limits the scope of section 251(b)(5)."

Without question, it renders surplus the provision giving the FCC authority to act only if the State fails to act.

Without question, the zero bill-and-keep rate the FCC has required for all (even non-reciprocal) traffic – bears no resemblance to the "bill-and-keep" arrangements the statute "does not preclude."

The ***Order*** also appears to conflict with §252(d)(2)(B)(ii)'s requirement that the mandatory costing standards in § 252(d)(2)(A) "shall" not be construed ". . .to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls." Note, if the FCC *does* have the "*independent"* authority under § 251(b)(5) it claims, this injunction would be unnecessary.

"[A] statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context."[39]

Read in context, § 251(b)(5) can only apply to non-access traffic. It *cannot* include ***Access Charges*** for *exchange access services,* either intrastate or interstate. LECs have never established **Reciprocal Compensation** arrangements with IXCs. Indeed, Congress distinguished *exchange access* services from the **Reciprocal Compensation** transport and

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[39] *King v. St. Vincent's Hosp.,* 502 U.S. 215, 221 (1991); *see also*, *Dolan v. United States Postal Service*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context.")

termination arrangements required by § 251(b)(5), when it specified that competitive LECs can utilize interconnection with the facilities of incumbents "for the transmission and routing of telephone exchange service and exchange access." § 251(c)(2)(A). Section 252(d)(2)(A) supports this view by referring to an "incumbent local exchange carrier's" compliance with § 251(b)(5) and specifying "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." Calls do not originate or terminate on IXC networks – they do both on LEC networks.

Moreover, § 251(b)(5) specifies that only LECs have a duty to establish **Reciprocal Compensation** arrangements. Which strongly suggests Congress expected the term to cover only LECs trading local traffic with other LECs. To have the meaning the FCC ascribes makes the § 251 duty for *all* "telecommunications carriers" to directly or indirectly connect networks surplus.

The FCC's conflation of "telephone exchange service" and "exchange access" is flatly inconsistent with both the express terms of the statute and the FCC's prior interpretations of those two terms.

Moreover, the term "telecommunications" within § 251(b)(5) cannot be divorced from the duty to establish "**Reciprocal Compensation** arrangements" or from other provisions of the Act. For compensation to be "reciprocal" it must, by

definition, be given by "each to the other."[40] *Exchange access traffic* and *access charge* payments are *never* reciprocal. The IXC pays LECs serving the calling and called parties for the service on both ends of the long distance call. There is no reciprocal exchange of payments.

Moreover, § 251(b)(5) applies only when traffic is both transported *and terminated* by the carrier seeking compensation – so *termination* necessarily limits the scope of § 251(b)(5) traffic. Indeed, the *Local Competition Order* found that "transport and termination of local traffic" is distinct from "access service for long distance," and rejected claims that § 251(b)(5) governs exchanges between a LEC and an IXC.[41] As the FCC noted there, it is the LEC, not the IXC, which terminates the traffic. *Id.* An IXC never "terminates" traffic.

The Tenth Circuit found compelling the FCC's success in permitting one-way wireless paging traffic to use the "**Reciprocal Compensation**" scheme – even though it was not mutual. The Court found this one circumstance justifies vitiation of the statutory scheme and permits the agency to do what Congress said in 252(d)(2)(B)(ii) it could not.

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[40] *Webster's New World Dictionary* 1120 (3d College Ed. 1988). *See, Ransom,* 131 S. Ct. at 724-25. (noting that "[b]ecause the Code does not define 'applicable,' we look to the ordinary meaning of the term," and describing how that meaning "draws support from the statutory context" and "consideration of the provisions purpose.")

[41] 11 FCC Rcd at 16013. The FCC also defined transport "as the transmission of terminating traffic that is subject to section 251(b)(5)." *Id.* at 16015.

App.181a-182a. The paging traffic cited did not have all the characteristics of either "**Access Charges**" or "**Reciprocal Compensation**".

The FCC could have either created a new compensation scheme or placed paging in one of the existing schemes. Whatever it did would be litigated. It is one thing to bend a scheme to classify traffic that fits into neither statutory category. That may justify *Chevron* deference. However, it is quite another matter to ignore clear instructions from Congress to collapse two distinct concepts that have definitional schemes in the statute to support them.

Both the term **Access Charge** and **Reciprocal Compensation** *had established meaning before the 1996 Act passed*[42] - established meanings the FCC spoke about in proceedings that predate the Act by years, confirmed just after the Act passed, and used consistently for 16 years thereafter.

This Court has confirmed on numerous occasions, that words have meanings and industry use informs those meanings.[43] The Tenth Circuit agreed, App.179a, that under step one of *Chevron:*

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[42] *See* discussion and footnotes, *supra,* at p. 8-12**.**

[43] *See*, *T-Mobile South, LLC v. City of Roswell, Ga.,* __ U.S. ___, No. 13-975, 2015 WL 159278 *5 (U.S. Jan. 14, 2015) ("[W]hen Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.")(quoting *FAA v. Cooper*, 566 U.S. __, __, 132 S.Ct. 1441, 1449 (2012)) (internal quotation marks omitted).

> [W]e give technical terms of art their established meaning absent a contrary indication in the statute. *McDermott Int'l Inc. v. Wilander,* 498 U.S. 337, 342, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991); *La. Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 371–72, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986).

The Tenth Circuit side-stepped the requirement, arguing Petitioners did not produce enough evidence to eliminate ambiguity. App.180a. NARUC was constrained below, as it is here, by the sheer number of issues raised by the ***Order***, and by the required joint briefing with 15 of the 31 petitioners below to include limited examples. However, those cited clearly indicate the established use. Indeed, one article references a NARUC local competition working group's use of the term "**Reciprocal Compensation**" in a 1995 report. The working group involved representatives from a majority of State Commissions. Nor did the Court find persuasive the conference report language, cited *supra*, at 11, n.17, demonstrating that the Senate distinguished between **Reciprocal Compensation** and **Access Charges**. App.184a.

Petitioners emphasized, below, that the FCC confirmed the distinction between the terms in 1996 just after passage, citing *Secretary of Labor v. Excel Mining, LLC*, 334 F.3d 1, 7 (D.C. Cir. 2003) (Court prefers an agency interpretation made "when the origins of both the statute and the finding were fresh in the minds of their administrators" over a subsequent interpretation.)

The Tenth Court responded that "[b]ecause the FCC's interpretation . . . is entitled to *Chevron* deference under settled law, its "freshness" is irrelevant." App.178a at n.3. The Court never really addresses the FCC's unexplained departure from prior interpretations. It does contend, somewhat illogically, the FCC did not need to explain because it did not change its definition of "termination" when it adopted a new view of "the traffic that is subject to § 251(b)(5)." App.194a.

To change its position, an agency must, at a minimum, acknowledge that it is departing from its earlier view and "show there are good reasons for the new policy." "[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules . . .still on the books." *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009).

The FCC cannot satisfy this requirement because it never acknowledged its prior definitions of "transport" and "termination," much less provided a reasoned explanation for changing its position. The Tenth Circuit expressed the view that the explanation provided was sufficient.

Moreover, the underlying facts regarding the network arrangements between local service on the one hand and interexchange/toll service on the other have not changed, and the FCC made no attempt to demonstrate any changed facts or circumstances to support the new, but flawed, interpretation of § 251(b)(5).

The Tenth Circuit does critique the FCC's adoption of a construction of Section § 251(g), conceding it could have been read in a way that supports Petitioners view absent "*Chevron*."[44] This again raises the question of the apparent irrelevance of § 152(b) and § 601(c)(1) to the Court's statutory analysis – an irrelevance that ignores clear Congressional intent.

The Tenth Circuit's analysis of the FCC ***Order***, either improperly grants *Chevron* deference where no deference is due, because Congressional intent is clear, or failed to reject a construction that is not "permissible" under *Chevron*.

## CONCLUSION

The FCC's reliance on § 252(d)(2)(B)'s parenthetical reference to "bill and keep" – in a Congressional instruction to *State commissions* that statutory pricing rules States are to apply "shall not be construed to preclude" approval of "arrangements that waive mutual recovery" – as a delegation of authority to the FCC to impose *mandatory* "bill and keep" for all traffic is more than the statute will bear. The FCC's other excesses raise similar concerns.

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[44] Specifically, at App. 192a, the Court states: "This interpretation was not the only one possible . . .one could also view § 251(g) to reflect the widespread assumptions in 1996 that states (not the FCC) regulated intrastate access. But under the second step of *Chevron,* the FCC's contrary reading of §251(g) was at least reasonable."

The Court should grant this petition.

Respectfully submitted,

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