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EXECUTIVE

February 11, 2000

VIA HAND DELIVERY

Mr. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37201

Re: *Petition of the Tennessee Small Local Exchange Company Coalition For Temporary Suspension of 47 U.S.C. §251(b) and 251(c) Pursuant To 47 U.S.C. §(f)(2) and 47 U.S.C. §253(b)*
Docket No. 99-00613

Dear Mr. Waddell:

Enclosed for filing are the original and thirteen copies of the Response of AT&T Communications of the South Central States, Inc.'s to Petitioner's Request for Data and Production of Documents and the Objections of AT&T Communications of the South Central States, Inc. to the Report and Recommendation of the Pre-Hearing Officer.

Yours very truly,

Val Sanford

VS/ghc
Enclosures
cc: Counsel of Record
James P. Lamoureux, Esq.
Garry Sharp

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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IN RE: *Petition of The Tennessee Small Local Exchange Company Coalition for Temporary Suspension of 47 U.S.C. §251(b) and 251(c) Pursuant to 47 U.S.C. §251(f) and 47 U.S.C. §253(b)*

Docket No. 99-00613

RESPONSE OF AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC. TO PETITIONER'S REQUEST FOR DATA AND PRODUCTION OF DOCUMENTS

AT&T Communications of the South Central States, Inc. ("AT&T") makes the following responses to the requests for data and production of documents served on it by Petitioners:

GENERAL OBJECTIONS

AT&T concurs in and adopts the objections filed by SECCA and by US LEC and Hyperion; and in addition makes the following responses:

I. DATA REQUESTS

REQUEST NO. 1. Please provide information pertaining to the size of your company, including but not limited to, your company's annual revenues, assets, number of customers, number of access lines serviced, and the geographic areas of your operations.

RESPONSE: AT&T objects to this request on the ground that it is not relevant to the subject matter of this proceeding. The subject matter of this proceeding is

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defined by the issues properly before the TRA. Those issues are in turn limited to those issues raised by the pertinent provisions of the federal statutes, as definitively construed by the FCC.

The petition in this case is based on 47 U.S.C. §§ 251(f)(2) and 253(b). The criteria for granting petitions under §251(f)(2) involves proof of facts demonstrating that the suspension or modification sought:

> (A) is necessary –
> (i) to avoid a significant adverse economic impact on users of telecommunications services generally;
> (ii) to avoid imposing a requirement that is unduly economically burdensome; or
> (iii) to avoid imposing a requirement that is technically infeasible; and
> (B) is consistent with the public interest, convenience, and necessity.

In its Local Competition Order, the FCC discussed the proper interpretation of 252(f)(2), at ¶1262:

> We believe that Congress intended exemption, suspension, or modification of the of the section 251 requirements to be the exception rather than the rule, and to apply only to the extent, and for the period of time, that policy considerations justify such exemption, suspension, or modification. We believe that Congress did not intend to insulate smaller or rural LECs from competition, and thereby prevent subscribers in those communities from obtaining the benefits of competitive local exchange service. Thus, we believe that, in order to justify continued exemption once a bona fide request has been made, or to justify suspension, or modification of the Commission's section 251 requirements, a LEC must offer evidence that application of those requirements would be likely to cause undue economic burdens beyond the economic burdens typically associated with efficient competitive entry. State commissions will need to decide on a case-by-case basis whether such a showing has been made.

In order to implement these decision, the FCC adopted a Rule that suspension or modification determinations must be made "on a case-by-case basis," 47 C.F.R. §51.401. The FCC further adopted Rule 51.405(d), which provides:

> In order to justify a suspension or modification under section 251(f)(2) of the Act, a LEC must offer evidence that the application of section 251(b) or section 251(c) of the Act would be likely to cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry.

The Eighth Circuit in Iowa Utilities Bd. v. FCC, 120 F.3d 753, 802-03 (8th Cir. 1997) vacated Rule 51.405 on jurisdictional grounds. The United States Supreme Court, however, expressly reversed the Eighth Circuit as to the FCC's jurisdiction to adopt Rule 51.405; AT&T Corp. v. Iowa Utilities Bd., ___ U.S. ____, 119 S.Ct. 721, 733, 142 L.Ed.2d 835 (1999).

The TRA in entertaining petitions under 47 U.S.C. §251(f)(2) is bound to follow the FCC's rules.

The information sought by this request is not relevant to the issues properly before the TRA under §251(f)(2).

Section 253(a) provides:

> (a) **In General.** – No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

Section 253(b), on which the Petitioners rely to avoid §253(a) provides:

> (b) **State Regulatory Authority.** – Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

The key to the exercise of a State's power under §253(b) is that it must be competitively neutral. Any State action which has the effect of precluding competitive entry is not competitively neutral. Competitive neutrality does not apply only to new entrants, but rather to the market as a whole, including the incumbent LEC whether or not a rural carrier. See RT Communications, Inc. v. FCC, 2000 W.L. 20712 (10th Cir.) dated January 13, 2000, copy attached. As the latter case further holds, the general policy of universal service does not trump specific statutory provisions.

Further, the petition is based on an erroneous assumption as to universal service. As the Court held in Alenco Communications, Inc. v. FCC, 2000 W.L. 60255 (5th Cir.) dated January 26, 2000, copy attached, upholding the FCC's universal service order:

> The Act does not guarantee all local telephone service providers a sufficient return on investment; quite to the contrary, it is intended to introduce competition into the market. Competition necessarily brings the risk that some telephone service providers will be unable to compete. The Act only promises universal service, and that is a goal that requires sufficient funding of *customers*, not *providers*. So long as there is sufficient and competitively-neutral funding to enable all customers to receive basic telecommunications services, the FCC has satisfied the Act and is not further required to ensure sufficient funding of every local telephone provider as well. (Emphasis in original).

The information sought by this request is not relevant to any issue properly before the TRA under §253(b) or under the policies concerning universal service.

REQUEST NO. 2. Please identify the name and headquarters address of your corporate parent, your subsidiaries, and all of your corporate affiliates. For each of these entities, please provide the same information requested in Data Request No. 1.

RESPONSE: AT&T objects to this request on the ground that it is not relevant to the subject matter of this proceeding for the reasons stated as to Request No. 1.

REQUEST NO. 3. Please list every entry your company has made into any market since 1996. Please identify, on an annual basis, the geographic area of each market, the date of your entry, who was the incumbent local exchange carrier, the respective percentages of residential and business customers you obtained for each of those markets, and the respective revenues you have received from residential and business customers in those markets.

RESPONSE: AT&T objects to this request on the ground that it is not relevant to the subject matter of this proceeding for the reasons stated as to Request No. 1.

REQUEST NO. 4. Please identify any markets you have made plans to enter in the next five years. For each of those markets, state any projections you have made concerning your anticipated customer base, including the percentage of residential and business customers you project and the projected revenues from each.

RESPONSE: AT&T objects to this request on the ground that it is not relevant to the subject matter of this proceeding for the reasons stated as to Request No. 1.

REQUEST NO. 5. How does your company intend to provide services in the territories of the Petitioners (for example, resale, facilities bypass, and/or purchasing of UNE's) during the first calendar year? In subsequent calendar years? Please include a detailed discussion on the type of services your company intends to provide in Petitioners' exchanges over the next five years including whether service will be provided to both residential and business customers.

a. Please provide the estimated costs that your company intends to incur by providing these services in Petitioners' exchanges. Separately identify both costs capitalized and expenses.

b. Will your company install a switch or switches in Petitioners' exchanges? Please provide number, type and cut over dates.

c. Does your company intend to provide any enhancements to the services it purchases from Petitioners? If so, please describe in detail the enhancements it intends to provide in the first calendar year and subsequent four years? Please respond with specifics for each of the five years.

d. In which specific municipalities does your company intend to offer service in each of Petitioners' exchanges in the first calendar year and subsequent four years? Please respond with specifics for each of the five years.

e. What type of interconnection is your company requesting from the Petitioners and at what specific points within the Petitioners' network are you seeking interconnection?

RESPONSE: AT&T objects to this request on the ground that it is not relevant to the subject matter of this proceeding for the reasons stated as to Request No. 1.

REQUEST NO. 6. Please provide a detailed 5 year plan as to how many access lines your company expects to obtain from competing in Petitioners' exchanges using a facility-based basis, how many using a combination of CLEC and ILEC facilities through the purchase of UNE's and how many on a resale basis by completing each of the blank cells in the following table. Please provide detailed demand forecasts used to arrive at these projected figures including any associated spreadsheets (in MS Excel format), assumptions and rationale, and/or econometric models.

RESPONSE: AT&T objects to this request on the ground that it is not relevant to the subject matter of this proceeding for the reasons stated as to Request No. 1. In addition, AT&T objects to this request on the ground that this request does not seek existing information, but rather seeks to require AT&T to create work-product to serve the purposes of the Petitioners.

REQUEST NO. 7. Similar to the question above, please provide a detailed 5 year plan as to how much revenue your company expects to generate from competing in Petitioners' exchanges using a facility-based basis, how much using a combination of ILEC and CLEC facilities through the purchase of UNE's, and how much using a resale basis by completing each of the blank cells in the following table. Please provide detailed demand forecasts used to arrive at these projected figures including any associated spreadsheets (in MS Excel format), assumptions (such as resale discount rate and price for unbundled loops) and rationale, and/or econometric models.

RESPONSE: AT&T objects to this request on the ground that it is not relevant to the subject matter of this proceeding for the reasons stated as to Request No. 1. In addition, AT&T objects to this request on the ground that this request does not seek existing information, but rather seeks to require AT&T to create work-product to serve the purposes of the Petitioners.

REQUEST NO. 8. Have you conducted or are you aware of any evidence, forecasts, reports, analysis or studies of the economic impact of your entry into any of the markets serviced by rural carriers would be on customers in Tennessee or in other states and/or on universal service in Tennessee or in other states? If so, please detail the results of that analysis.

RESPONSE: AT&T objects to this request on the ground that it is an attempt to circumvent the schedule for the filing of testimony by the parties, i.e., the Petitioners are seeking to discover the Intervenors' testimony before it is filed.

Not waiving its foregoing objection, AT&T is not at this time aware of any such evidence, forecasts, reports, analysis, or studies.

REQUEST NO. 9. Upon entry into Petitioners' markets, what specific services do you intend to offer and what do you forecast your rates will be for those services for businesses and residential customers?

RESPONSE: AT&T objects to this request on the ground that it is not relevant to the subject matter of this proceeding for the reasons stated as to Request No. 1.

REQUEST NO. 10. Do you have or are you aware of any evidence, forecasts, reports, analysis, or studies as to the economic impact your entry into markets serviced by rural carriers would have or has had on the rural carriers in Tennessee or other states? If so, please describe what information you possess.

RESPONSE: AT&T objects to this request on the ground that it is an attempt to circumvent the schedule for the filing of testimony by the parties, i.e., the Petitioners are seeking to discover the Intervenors' testimony before it is filed. Not waiving its foregoing objection, AT&T is not at this time aware of any such evidence, forecasts, reports, analysis, or studies.

II. <u>REQUEST FOR PRODUCTION OF DOCUMENTS</u>

REQUEST NO. 1. Please provide a copy of your latest annual report and your latest quarterly report filed with the SEC for your or your parent company.

RESPONSE: AT&T objects to this request on the ground that it is not relevant to the subject matter of this proceeding for the reasons stated as to Request No. 1.

REQUEST NO. 2. Please produce any and all documents you have referred to in preparing answers to these data requests.

RESPONSE: AT&T has not referred to any documents in preparing answers to these data requests.

REQUEST NO. 3. Please produce any business plans or reports you have prepared pertaining to your actual or potential entry into any of Petitioners' or any other rural carriers' markets.

RESPONSE: AT&T objects to this request on the ground that it is not relevant to the subject matter of this proceeding for the reasons stated as to Request No. 1.

REQUEST NO. 4. Please produce any and all reports or documents your company has filed since 1996 with the Tennessee Regulatory Authority pertaining to tariffs, wire line activity, or any information concerning rates.

RESPONSE: AT&T has not referred to any documents in preparing answers to these data requests. In addition, the production of such documents would unduly burdensome having no relevance to the issues in this proceeding; and any filings made with the TRA are available to the Petitioners from the TRA except those under Protective Orders which would not be available in any event.

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Attorneys for AT&T Communications of the
South Central States, Inc.

CERTIFICATE OF SERVICE

I, Val Sanford, hereby certify that a copy of the foregoing Response of AT&T Communications of the South Central States, Inc. was served on the following via First Class Mail or Hand-Delivery, this 11th day of February, 2000.

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RT COMMUNICATIONS, INC.; Union Telephone Company, Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION; United States of America, Respondents.
SILVER STAR TELEPHONE CO., INC., Intervenor.

Nos. 98-9541, 98-9542.

United States Court of Appeals, Tenth Circuit.

Jan. 13, 2000.

On Petitions for Review from the Federal Communications Commission (CCB Pol. 97-1; FCC 97-336 & FCC 98-205).

Bruce S. Asay, Associated Legal Group, LLC, Cheyenne Wyoming, for Petitioners RT Communications, Inc. and Union Telephone Co. (Gay V. Woodhouse, Attorney General, Michael L. Hubbard, Kristin H. Lee, Stephen G. Oxley, Office of the Attorney General, Cheyenne, Wyoming, for Petitioner Wyoming Public Service Commission, with him on the brief).

James M. Carr, Counsel, (and Christopher J. Wright, General Counsel, and John E. Ingle, Deputy Associate General Counsel, Federal Communications Commission, Washington, D.C., and Joel I. Klein, Assistant Attorney General, Catherine G. O'Sullivan and Nancy C. Garrison, Attorneys, United States Department of Justice, Washington, D.C., with him on the brief), for Respondents.

John D. Seiver and John C. Dodge of Cole, Raywid & Braverman, LLP, Washington, D.C., for Intervenor.

Before KELLY, HOLLOWAY, and BRISCOE, Circuit Judges.

KELLY, Circuit Judge.

*1 This case involves an appeal from orders of the Federal Communications Commission (FCC) preempting a section of Wyoming telecommunications law. We have jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1) and uphold the FCC orders.

Background

In 1993, the Wyoming Public Service Commission (PSC) conducted an extensive review of the state's telecommunications infrastructure. It concluded that modern basic telecommunications service was not being adequately provided in many rural areas of the state and ordered extensive improvements. U.S. West, the primary telecommunications provider in Wyoming, decided to sell off certain local exchanges to independent providers rather than incur the expense of upgrading the existing infrastructure. It entered into an agreement to sell the Afton, Wyoming Exchange to Union Telephone Company (Union) and the Wyoming PSC subsequently granted Union a certificate of public convenience and necessity (CPCN) to serve the Afton Exchange. [FN1]

Based partly on the findings of the PSC, the state enacted the Wyoming Telecommunications Act of 1995, designed to provide a smooth transition from monopolistic industry to a competitive market. In order to induce the development of telecommunications infrastructure in rural areas, the Act provided small incumbent telephone companies with a ten year period of protection from competition until each had "substantially recover[ed] its investment for upgraded services" in that particular area. Wyo. Stat. Ann. § 37-15-201(c), (d). A competing company could only receive a concurrent CPCN in one of these exchanges if they were able to provide adequate service and the incumbent LEC: (1) consented; (2) was unwilling or unable to provide adequate service; (3) failed to protest the concurrent application; (4) had applied for or was providing concurrent service in another exchange; or (5) was providing cable radio or video services. Wyo. Stat. Ann. § 37-15-201(c).

In February 1996, Silver Star Telephone Company applied for a concurrent CPCN to provide competing local phone service in the Afton Exchange. Union protested this application. In a December 1996 decision, the Wyoming PSC determined that Union was the incumbent LEC of the Afton Exchange (even though the sale from U.S. West had not been completed) and denied Silver Star's application pursuant to Wyo. Stat. § 37-15-201(c).

Silver Star petitioned the Federal Communications Commission (FCC) to preempt the PSC's decision and the Wyoming statute as conflicting with the Telecommunications Act of 1996, specifically 47 U.S.C. § 253. In a September 24, 1997 order (hereinafter "Order"), the FCC granted the petition, finding that the Wyoming statute was not "competitively neutral" as required by § 253(b). See Addendum to Pet. Br.; 12 F.C.C.R. 15639.

A month later, the PSC filed a petition asking the FCC to reconsider its preemption of the statute. Before the FCC could rule on this petition, however, the proposed sale of the Afton Exchange from U.S. West to Union fell through. The Wyoming PSC determined that U.S. West did not qualify for the protection of § 37-15-201(c) and granted Silver Star a concurrent CPCN. Since Silver Star's requests had been met, the PSC argued that the issue was moot and the FCC should withdraw its order and refuse to further address the claim. The FCC disagreed and upheld the preemption of the Wyoming statute in an August 24, 1998 order (hereinafter "Reconsideration Order"). See Addendum to Pet. Br.; 13 F.C.C.R. 16356. This appeal followed.

Discussion

A. Mootness

*2 Petitioners argue that the FCC petition became moot when the Wyoming PSC granted Silver Star a concurrent CPCN and, therefore, the FCC should have dismissed the issue. However, this argument confuses the jurisdictional requirements of the FCC with those of an Article III court. "[A]n administrative agency is not bound by the constitutional requirement of a 'case or controversy' that limits the authority of article III courts to rule on moot issues." Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447, 451 (10th Cir.1983). See also Metropolitan Council of NAACP Branches v. FCC, 46 F.3d 1154, 1161 (D.C.Cir.1995) (noting that 'case or controversy' rules of Article III do not apply to administrative agencies). Rather, an agency has "substantial discretion" to decide whether to hear issues which might be precluded by mootness. See Climax, 703 F.2d at 451. In exercising this discretion, the agency should be guided by two factors: (1) whether resolution of the issue is the proper role of the agency as an adjudicatory body; and (2) whether concerns for judicial economy weigh in favor of present resolution. Id.

In this case, the FCC clearly meets both factors. First, 47 U.S.C. § 253(d) specifically designates preemption as a proper action of the FCC when dealing with state statutes which conflict with § 253(a) or (b). Secondly, the FCC noted that the Wyoming PSC's decision to grant Silver Star a concurrent CPCN was based upon changed factual circumstances and not upon a finding that the Wyoming statute was invalid. The FCC determined that its first order was necessary because otherwise "the Wyoming Commission would continue to follow [§ 37-15-201(c)] and deny any future concurrent CPCN application to which an eligible incumbent LEC duly objected." Reconsideration Order at 13. The FCC's decision to preempt the Wyoming statute was an act of the proper government agency based upon principles of judicial economy. We cannot say that this decision was an abuse of discretion.

B. Competitively Neutral

47 U.S.C. § 253(a) provides: "No State or local statute or regulation ... may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." The Wyoming statute clearly has the effect of prohibiting telecommunications companies from obtaining a concurrent CPCN to provide intrastate phone service. However, petitioners argue that the Wyoming statute is saved by § 253(b).

> Nothing in this section shall affect the ability to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

*3 47 U.S.C. § 253(b). The FCC found that the Wyoming statute could not be saved under this provision because it was not competitively neutral. Petitioners disagree and argue that the Wyoming statute is competitively neutral because it treats all new telecommunication entrants the same.

In reviewing a final FCC order interpreting the Telecommunications Act, we utilize the two-step approach announced in Chevron USA Inc. v. Natural Resources Defense Council, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). See U.S. West v. FCC, 182 F.3d 1224, 1231 (10th Cir.1999). If the statute speaks clearly to the precise question at issue, we must give effect to the express intent of Congress. See Chevron, 467 U.S. at 842-43. When the statute is silent or ambiguous, however, deference is due to the agency's interpretation, so long as it is reasonable and not otherwise arbitrary, capricious or contrary to the statute. See id. at 843-44. Since the FCC's order in this case involved the interpretation of the ambiguous phrase "competitively neutral," we review with deference. [FN2]

In its Reconsideration Order, the FCC noted that the "Wyoming legal requirements are not 'competitively neutral' within the meaning of § 253(b), because they award certain incumbent LECs the ultimate competitive advantage-- preservation of monopoly status--and simultaneously saddle potential new entrants with the ultimate competitive disadvantage--an insurmountable barrier to entry." Reconsideration Order at 3. The FCC specifically rejected the claim that a statute was neutral if it treated all new carriers the same. "Neither the language of section 253(b) nor its legislative history suggests that the requirement of competitive neutrality applies only to one portion of a local exchange market--new entrants--and not to the market as a whole, including the incumbent LEC." Id. at 6.

Petitioners argue that the Wyoming statute is not an "insurmountable" or "absolute" barrier to competition, and therefore, it must be competitively neutral. The problem with this argument is that it simply does not speak to the question of competitive neutrality. First, the FCC's view that this is an absolute bar to prospective LECs is correct. "[A] potential new entrant cannot do anything to avoid or hurdle the rural incumbent protection provision's bar. The incumbent LEC, instead, has essentially unfettered discretion to determine whether the rural incumbent protection provision will operate to preclude competitive entry in its territory." FCC Reconsideration Order at 5.

Second, even assuming Petitioners' argument to be true, the extent to which the statute is a "complete" bar is irrelevant. § 253(a) forbids any statute which prohibits or has "the effect of prohibiting" entry. Nowhere does the statute require that a bar to entry be insurmountable before the FCC must preempt it.

*4 Support for the FCC's definition of "competitively neutral" can be drawn from recent cases discussing the term as used in other sections of the Telecommunications Act. In U.S. West v. MFS Intelenet, Inc., 193 F.3d 1112 (9th Cir.1999), the Ninth Circuit noted that "[t]he FCC has ruled that a mechanism assigning costs based on each exchange carrier's active local numbers is 'competitively neutral' [under § 251(e)(2)] but a mechanism requiring new entrants to bear all the costs of number portability is not." Id. at 1120. The court then prohibited a collateral attack on this order since plaintiffs had not sought a determination of validity directly with the court of appeals.

In Cablevision of Boston, Inc. v. Public Improvement Comm'n, 184 F.3d 88 (1st Cir.1999), a carrier challenged city policy regarding the use of underground cable and circuit conduits. In examining the "competitively neutral" requirements of § 253(c), the court held:

> that the term "competitively neutral" in § 253(c) imposes--at most--a negative restriction on local authorities' choices regarding the management of their rights of way. This means that the statute would not require local authorities to purposefully seek out opportunities to level the telecommunications playing field. If, however, a local authority decides to regulate for its own reasons ..., § 253(c) would require that it do so in a way that avoids creating unnecessary competitive inequities among telecommunications providers.

Id. at 105. The court assumed that the city's oral policy which resulted in "equivalent notice obligations for all market participants" satisfied the competitively neutral requirement. Id. at 103 (emphasis added).

Petitioners spend the majority of their briefs arguing that the Wyoming statute should not be preempted because it accords with the universal service policy of the federal Telecommunications Act. However, it is a well established rule of statutory construction that general policy does not trump specific legislative provisions. While we empathize with Wyoming's desire to achieve statewide modern telecommunications service, § 253 governs this case and requires preemption.

Petitioners further argue (1) that preemption is only possible when Congress has passed legislation occupying an entire field of regulation; (2) the FCC failed to give proper notice of the proceedings; and (3) the FCC exceeded its authority by preempting more than was "necessary" to enforce § 253. These arguments are meritless.

First, "[p]re-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law...." Louisiana Pub. Serv. Comm. v. FCC, 476 U.S. 355, 368, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986). § 253 is a clear example of this. See 47 U.S.C. § 253(d) ("the Commission shall preempt the enforcement of such statute") (emphasis added). Second, the FCC gave proper notice of its contemplated action in two Public Notices, which specifically stated that the FCC was contemplating preempting both the Wyoming PSC's Denial Order and "certain provisions of the Wyoming Telecommunications Act of 1995 (i.e., Wyo. Stat.

Ann. §§ 37-15-201(c)-(f))." R. at tab. 17, 37. Third, the FCC order was "necessary" within the meaning of § 253(d) to afford new LECs a competitive opportunity in the telecommunications market. Petitioners have not asserted, nor are we aware of, any alternative besides complete preemption which would have guaranteed across the board competitive neutrality.

*5 The FCC's Orders preempting the Wyoming statute were based on a reasonable interpretation of § 253(b) and are not otherwise unconstitutional.

AFFIRMED.

FN1. Wyoming law requires that providers of local phone service--also known as "local exchange carriers" (LECs)--obtain a CPCN from the Wyoming PSC for each exchange before providing service in that area. Wyo. Stat. Ann. § 37-15-201(a). A LEC may not provide service in areas for which it is not authorized in its CPCN.

FN2. The phrase "competitively neutral" is used in only three sections of the United States Code, and all three of those references were added by the Telecommunications Act of 1996. See 47 U.S.C. §§ 251, 253, 254. Nowhere is the phrase defined.

END OF DOCUMENT

ALENCO COMMUNICATIONS, INC.; Amana Society Service Company; Arrowhead Communications Corporation; Ayersville Telephone Company; Baraga Telephone Company; Barry County Telephone Company; Bay Springs Telephone Company, Inc.; Bentleyville Telephone Company; Benton Ridge Telephone Company; Bloomingdale Home Telephone Company; Blue Earth Valley Telephone Company; Bruce Telephone Company; Casey Mutual Telephone Company; CFW Communications Company; Citizens Telephone Company of Kecksburg; Citizens Telephone Company of Hammond; Citizens Telephone Corporation; Clements Telephone Company; Climax Telephone Company; Community Service Telephone Company; Craigville Telephone Company, Inc.; Crockett Telephone Company; Dixville Telephone Company; Doylestown Telephone Company; Dunbarton Telephone Company, Inc.; Dunkerton Telephone Cooperative; Eagle Valley Telephone Company; Easton Telephone Company; Eckles Telephone Company; Elkhart Telephone Company; Eustis Telephone Exchange; Farmers Coop Telephone Company; Farmers Mutual Telephone Company-Ohio; Farmers Mutual Telephone Company-Minnesota; Flat Rock Mutual Telephone Company; Fort Jennings Telephone Company; Frontier Communications of Depue; Geetingsville Telephone Company, Inc.; Gervais Telephone Company; Graceba Total Communications, Inc.; Granada Telephone Company; Granby Telephone & Telegraph Company-Massachusetts; Gulf Telephone Company; Hartington Telephone Company; Hickory Telephone Company; Hinton Telephone Company of Hinton, Oklahoma, Inc.; Hollis Telephone Company; Home Telephone Company-Nebraska; Home Telephone Company-Minnesota; Hot Springs Telephone Company; Huxley Cooperative Telephone Company; Indianhead Telephone Company; Ironton Telephone Company; Jefferson Telephone Company, Inc.; Kadoka Telephone Company; Kaleva Telephone Company; Kalida Telephone Company, Inc.; Laurel Highland Telephone Company; Ligonier Telephone Company; Mankato Citizens Telephone Company; Manti Telephone Company; Marianna & Scenery Hill Telephone Company; Marseilles Telephone Company; McClure Telephone Company; McDonough Telephone Coop, Inc.; Mebtel Communications; Merchants & Farmers Telephone Company; Metamora Telephone Company; Mid Century Telephone Coop, Inc.; Mid Communications Telephone Company; Mid-Iowa Telephone Coop Association; Middle Point Home Telephone Company; Midstate Telephone Company-North Dakota; Midwest Telephone Company; Miles Cooperative Telephone Association; Millry Telephone Company, Inc.; Minford Telephone Company, Inc.; Minnesota Lake Telephone Company; Mt. Angel Telephone Company; National Telephone of Alabama, Inc.; New Lisbon Telephone Company; North-Eastern Pennsylvania Telephone Company; North English Coop Telephone Company; Northwestern Indiana Telephone Company, Inc.; Nova Telephone Company; Odin Telephone Exchange, Inc.; Orwell Telephone Company; Osakis Telephone Company; Palmerton Telephone Company; Panhandle Telephone Coop, Inc.; Panora Cooperative Telephone Association; Pattersonville Telephone Company; Pennsylvania Telephone Company; Peoples Mutual Telephone Company; Peoples Telephone Company, Inc.; Pierce Telephone Company, Inc.; Pine Island Telephone Company; Pinnacle Communications; Prairie Grove Telephone Company; Pymatuning Independent Telephone Company; Redwood County Telephone Company; Roanoke Telephone Company, Inc.; Roberts County Telephone Coop Association; Ronan Telephone Company; Schaller Telephone Company; Searsboro Telephone Company; Shell Rock Telephone Company; SouthCanaan Telephone Company; Southern Montana Telephone Company; State Long Distance Telephone Company; State Telephone Company; Stayton Cooperative Telephone Company; Stockholm-Strandburg Telephone Company; Summit Telephone Company; Swayzee Telephone Company; Sycamore Telephone Company; Tri County Telephone Company, Indiana; Tri-County Telephone Membership Corporation; Valley Telephone Cooperative, Inc.; Van Horne Cooperative Telephone Company; Venus Telephone Corporation; Volcano Telephone Company; West Iowa Telephone Company; West Liberty Telephone Company; West Side Telephone Company; West Side

Telephone Company-Pennsylvania; West Tennessee Telephone Company, Inc.; Western Telephone Company-South Dakota; Wikstrom Telephone Company, Inc.; Wilton Telephone Company-New Hampshire; Yadkin Valley Telephone Membership Corporation; Yukon-Waltz Telephone Company; and United States Telephone Association, Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents.

No. 98-60213.

United States Court of Appeals, Fifth Circuit.

Jan. 25, 2000.

Local exchange carriers (LECs) serving predominantly small towns and rural areas petitioned for review of orders of the Federal Communications Commission (FCC) making various changes to universal telecommunications service program. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that: (1) the Telecommunications Act of 1996 is intended to introduce competition into the market and does not guarantee all local telephone service providers a sufficient return on investment; (2) promise of universal service is a goal that requires sufficient funding of customers, not providers; (3) LECs failed to show various changes to the universal service support fund for high-cost loops unreasonably failed to provide sufficient funding for universal service; (4) provision that subsidy for high-cost loops is to be portable does not violate the statutory principle of predictability or the statutory command of sufficient funding; (5) LECs failed to show that changes in the treatment of switching equipment costs, in determining access charges paid by interexchange carriers, unreasonably failed to provide sufficient and explicit funding for universal service; (6) takings clause challenge was premature; (7) orders complied with the Regulatory Flexibility Act (RFA); and (8) the RFA does not require economic analysis.

Petitions denied.

Weiner, Circuit Judge, concurred in the judgment only.

[1] TELECOMMUNICATIONS ⚷267

372k267

Unlike the express statutory requirement of sufficient support of universal telecommunications service imposed by the Telecommunications Act of 1996, section of the Act stating that "[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public"is merely a broad statement of policy conferring substantial discretion on the Federal Communications Commission (FCC) to determine how best to provide for new technologies and services, and a universal service program that satisfies the specific statutory requirements of sufficient support necessarily satisfies the broad policy statement. Communications Act of 1934, § 7(a), as amended, 47 U.S.C.A. § 157(a); Telecommunications Act of 1996, 47 U.S.C.A. § 254(e).

[2] TELECOMMUNICATIONS ⚷267
372k267
Under the Telecommunications Act of 1996, the Federal Communications Commission (FCC) must see to it that both universal service and local competition are realized; one cannot be sacrificed in favor of the other, and the Commission therefore is responsible for making the changes necessary to its universal service program to ensure that it survives in the new world of competition. Telecommunications Act of 1996, 47 U.S.C.A. §§ 251-253, 254(e).

[3] TELECOMMUNICATIONS ⚷263
372k263
Congress has conferred broad discretion on the Federal Communications Commission (FCC) to negotiate the dual mandates of the Telecommunications Act of 1996 to promote both universal service and competition, and thus courts ought not lightly interfere with its reasoned attempt to achieve both objectives. 5 U.S.C.A. § 706(2)(A); Telecommunications Act of 1996, 47 U.S.C.A. §§ 251-253, 254(e).

[3] TELECOMMUNICATIONS ⚷267
372k267
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[4] TELECOMMUNICATIONS ⚷267

372k267
The Telecommunications Act of 1996 requires that all universal service support be explicit rather than by implicit subsidies, and the universal support program must treat all market participants equally so that, for example, subsidies must be portable. Communications Act of 1934, § 214(e)(1), as amended, 47 U.S.C.A. § 214(e)(1); Telecommunications Act of 1996, 47 U.S.C.A. § 254(e).

[5] TELECOMMUNICATIONS ⚷263
372k263
Where orders of the Federal Communications Commission (FCC) under review, relating to the universal service requirement of the Telecommunications Act of 1996, were merely transitional, in the shift from monopoly to competition, review was especially deferential. Telecommunications Act of 1996, 47 U.S.C.A. §§ 251(d)(1), 254(a)(2).

[6] STATUTES ⚷219(2)
361k219(2)
Court reviews agency interpretation of its statutory authority under the Chevron two-step inquiry: (1) where Congress has directly spoken to the precise question at issue, court must give effect to the unambiguously expressed intent of Congress, reversing an agency's interpretation that does not conform to the statute's plain meaning; but (2) in situations in which the statute is either silent or ambiguous, the question for the court is whether the agency's answer is based on a permissible construction of the statute, and court reverses only if the agency's construction is arbitrary, capricious or manifestly contrary to the statute, while if the interpretation is based on a permissible construction of the statute, court defers to the agency's construction.

[6] STATUTES ⚷219(4)
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[7] ADMINISTRATIVE LAW AND PROCEDURE ⚷763
15Ak763
The Chevron step-two analysis focuses on the agency's interpretation of its statutory power, while arbitrary-and-capricious review under the Administrative Procedure Act (APA) focuses on the reasonableness of the agency's decision- making process pursuant to that interpretation. 5 U.S.C.A. § 706(2)(A).

[7] STATUTES ⚷219(1)
361k219(1)
The Chevron step-two analysis focuses on the agency's interpretation of its statutory power, while arbitrary-and-capricious review under the Administrative Procedure Act (APA) focuses on the reasonableness of the agency's decision- making process pursuant to that interpretation. 5 U.S.C.A. § 706(2)(A).

[8] ADMINISTRATIVE LAW AND PROCEDURE ⚷763
15Ak763
Review under the Administrative Procedure Act (APA) to determine whether agency decision is arbitrary and capricious is narrow and deferential, requiring only that the agency articulate a rational relationship between the facts found and the choice made. 5 U.S.C.A. § 706(2)(A).

[9] TELECOMMUNICATIONS ⚷267
372k267
The Telecommunications Act of 1996 is intended to introduce competition into the market and does not guarantee all local telephone service providers a sufficient return on investment. Telecommunications Act of 1996, 47 U.S.C.A. §§ 251-253.

[10] TELECOMMUNICATIONS ⚷267
372k267
The promise of universal service under the Telecommunications Act of 1996 is a goal that requires sufficient funding of customers, not providers, and so long as there is sufficient and competitively-neutral funding to enable all customers to receive basic telecommunications services, the Federal Communications Commission (FCC) has satisfied the Act and is not further required to ensure sufficient funding of every local telephone provider as well. Telecommunications Act of 1996, 47 U.S.C.A.

§ 254.

[11] TELECOMMUNICATIONS ⚿267
372k267
Excessive funding of universal service support under the Telecommunications Act of 1996 may itself violate the sufficiency requirements of the Act. Telecommunications Act of 1996, 47 U.S.C.A. § 254.

[12] TELECOMMUNICATIONS ⚿267
372k267
Local telephone exchange carriers serving predominantly small towns and rural areas failed to show that the Federal Communications Commission's (FCC's) various changes to the universal service support fund for high-cost loops, including continuation of a cap on growth in the fund and introduction of a cap on the amount of corporate operations expenses that may be reported to determine eligibility for high-cost loop support, unreasonably failed to provide sufficient funding for universal service or otherwise constituted an arbitrary and capricious regulation under the Telecommunications Act of 1996. Telecommunications Act of 1996, 47 U.S.C.A. § 254.

[13] TELECOMMUNICATIONS ⚿267
372k267
Federal Communications Commission (FCC) order providing that the universal telecommunications service subsidy for high-cost loops is to be portable so that it moves with the customer, rather than staying with the incumbent local exchange carrier (LEC), whenever a customer makes the decision to switch local service providers does not violate the statutory principle under the Telecommunications Act of 1996 of predictability, or the statutory command of sufficient funding. Communications Act of 1934, § 214(e), as amended, 47 U.S.C.A. § 214(e); Telecommunications Act of 1996, 47 U.S.C.A. § 254(b)(3, 5), (e).

[14] TELECOMMUNICATIONS ⚿4
372k4
Under the Telecommunications Act of 1996, predictability is only a principle, not a statutory command, and thus, to satisfy a countervailing statutory principle, the Federal Communications Commission (FCC) may exercise reasoned discretion to ignore predictability. Telecommunications Act of 1996, 47 U.S.C.A. § 254(b)(5).

[15] TELECOMMUNICATIONS ⚿267
372k267
The sufficiency requirement of the Telecommunications Act of 1996 is intended to benefit the customer, not the provider, and "sufficient" funding of the customer's right to adequate telephone service can be achieved regardless of which carrier ultimately receives the subsidy. Telecommunications Act of 1996, 47 U.S.C.A. § 254(b)(3).

[16] TELECOMMUNICATIONS ⚿267
372k267
Even assuming that inflation adjustments to historical average loop costs would render fewer local exchange carriers (LECs) eligible for universal telecommunications service subsidies than would be the case under the former approach, LECs failed to show how this interim approach was unreasonable; given the eventual transition, under the Telecommunications Act of 1996, from historic cost to forward-looking cost, as required by competition, the Federal Communications Commission (FCC) reasonably concluded that the effort of collecting historic cost data no longer was justified. Telecommunications Act of 1996, 47 U.S.C.A. § 254.

[17] TELECOMMUNICATIONS ⚿267
372k267
Interim order of the Federal Communications Commission (FCC) denying additional universal telecommunications service support in cases in which a rural local exchange carrier (LEC) purchases another exchange was within the discretion of the FCC to combat the opportunity for gaming the different universal service support regimes for rural and non-rural LECs by transferring ownership to a rural LEC. Telecommunications Act of 1996, 47 U.S.C.A. § 254.

[18] ADMINISTRATIVE LAW AND PROCEDURE ⚿390.1
15Ak390.1
A provision for waiver of an administrative rule is legitimate if the underlying rule is rational, and cannot save a rule that on its own has no rational basis.

[19] TELECOMMUNICATIONS ⚿267
372k267
Local telephone exchange carriers serving predominantly small towns and rural areas failed to show that the Federal Communications Commission's (FCC's) changes in the treatment of switching equipment costs, in determining access charges paid by interexchange carriers, unreasonably failed to provide sufficient and explicit funding for universal service or otherwise constituted an arbitrary and

capricious exercise of agency powers under the Telecommunications Act of 1996; the FCC determined that the assumption that it is more costly to switch long-distance calls than local calls, which had initially supported special weighting of the former, was obsolete, and mandate of the Act that all universal service support be "explicit" required that the special weighting be eliminated. Telecommunications Act of 1996, 47 U.S.C.A. § 254(e).

[20] TELECOMMUNICATIONS ⚷267
372k267
The fact that universal telecommunications support fund is subsidized by contributions from all telecommunications providers, including local exchange carriers (LECs), does not make it an "implicit subsidy" of interexchange carriers in violation of the Telecommunications Act of 1996, even if it effectively redistributes resources among telecommunications providers, and the Federal Communications Commission (FCC) reasonably applied the principle of equitable and nondiscriminatory contribution by requiring contributions from all telecommunications providers. Telecommunications Act of 1996, 47 U.S.C.A. § 254(b)(4), (d, e).
See publication Words and Phrases for other judicial constructions and definitions.

[21] TELECOMMUNICATIONS ⚷267
372k267
Predictability principle of the Telecommunications Act of 1996 requires only predictable rules that govern distribution of universal service subsidies, and not predictable funding amounts, which would run contrary to one of the primary purposes of the Act, to promote competition. Telecommunications Act of 1996, 47 U.S.C.A. §§ 251-253, 254(b)(5).

[22] EMINENT DOMAIN ⚷2(1)
148k2(1)
The Fifth Amendment takings clause protects utilities from regulations that are so unjust as to be confiscatory, but it is not enough that a party merely speculates that a government action will cause it harm; rather, a taking must necessarily result from the regulatory actions, and such a showing cannot be made until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular property right in question. U.S.C.A. Const.Amend. 5.

[22] EMINENT DOMAIN ⚷277
148k277
The Fifth Amendment takings clause protects utilities from regulations that are so unjust as to be confiscatory, but it is not enough that a party merely speculates that a government action will cause it harm; rather, a taking must necessarily result from the regulatory actions, and such a showing cannot be made until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular property right in question. U.S.C.A. Const.Amend. 5.

[23] EMINENT DOMAIN ⚷2(1.1)
148k2(1.1)
Local telephone exchange carriers serving predominantly small towns and rural areas, challenging under the takings clause changes in universal telecommunications support subsidies, had to show that the challenged orders would jeopardize the financial integrity of the companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital, or they had to demonstrate that the reduced subsidies were inadequate to compensate current equity holders for the risk associated with their investments under a modified prudent investment scheme. U.S.C.A. Const.Amend. 5.

[24] TELECOMMUNICATIONS ⚷263
372k263
Court of Appeals could not seriously entertain a takings clause challenge to Federal Communications Commission (FCC) order changing universal telecommunications support subsidies until it was known what level of universal service funding each rural or small town local exchange carrier (LEC) would receive under the order, and under what circumstances the FCC would grant a waiver, particularly where the LECs did not present credible evidence that the order ever will cause drastic consequences for rural LECs; the mere fact that, for many rural carriers, universal service support provides a large share of the carriers' revenues is not enough to establish that the orders constitute a "taking." U.S.C.A. Const.Amend. 5; Telecommunications Act of 1996, 47 U.S.C.A. § 254.
See publication Words and Phrases for other judicial constructions and definitions.

[25] EMINENT DOMAIN ⚷2(1.1)
148k2(1.1)
The Fifth Amendment protects against takings but does not confer a constitutional right on utilities to government-subsidized profits. U.S.C.A.

Const.Amend. 5.

[26] ADMINISTRATIVE LAW AND PROCEDURE ⚿797
15Ak797
Court of Appeals reviews agency compliance with the Regulatory Flexibility Act (RFA) only to determine whether an agency has made a reasonable, good-faith effort to carry out the mandate of the RFA. 5 U.S.C.A. §§ 604, 611(a)(1).

[27] ADMINISTRATIVE LAW AND PROCEDURE ⚿381
15Ak381
The Regulatory Flexibility Act (RFA) is a procedural rather than substantive agency mandate. 5 U.S.C.A. § 604(a).

[28] TELECOMMUNICATIONS ⚿267
372k267
Orders of the Federal Communications Commission (FCC) making various changes in universal telecommunications support under the Telecommunications Act of 1996 complied with the Regulatory Flexibility Act (RFA), where the orders were accompanied by substantial discussion and deliberation, including consideration and reasoned rejection of significant alternatives which, in the Commission's judgment, would not have achieved with equivalent success its twin statutory mandates of universal service and local competition. 5 U.S.C.A. § 604(a); Telecommunications Act of 1996, 47 U.S.C.A. §§ 251-254.

[29] ADMINISTRATIVE LAW AND PROCEDURE ⚿404.1
15Ak404.1
The Regulatory Flexibility Act (RFA) does not require economic analysis, but mandates only that the agency describe the steps it took "to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes." 5 U.S.C.A. §§ 604(a)(5), 607.

James U. Troup (argued), Brian D. Robinson, Arter & Hadden, Washington, DC, for Petitioners.

John E. Ingle, Daniel M. Armstrong, Laurence H. Schecker, Willliam E. Kennard, Laurence Nicholas Bourne, Christopher Joseph Wright, James Michael Carr, F.C.C., Washington, DC, for Federal Communications Commission, Respondent.

Nancy C. Garrison, Catherine G. O'Sullivan, U.S. Dept. of Justice, Antitrust Division, Appellate Section, Washington, DC, for United States of America, Respondent.

Robert B. McKenna, U.S. West, Denver, CO, William T. Lake, John Henry Harwood, David M. Sohn, Matthew Aaron Brill, Wilmer, Cutler & Pickering, Washington, DC, for U.S. West, Inc., Intervenor.

Jules M. Perlberg, Chicago, IL, James P. Young, Washington, DC, for AT&T Corp., Intervenor.

Charles C. Hunter, Catherine M. Hannan, Hunter Communications Law Group, Washington, DC, for Telecommunications Resellers Association, Intervenor.

Sue D. Blumenfeld, Thomas C. Jones, Willkie Farr & Gallagher, Washington, DC, for Sprint Corporation, Intervenor.

Paul March Smith, William Mark Hohengarten, Jenner & Block, Washington, DC, for MCI Telecommunications Corp., Intervenor.

Michael E. Glover, Lawrence W. Katz, Edward Harold Shakin, Bell Atlantic Network Services, Inc., Arlington, VA, for Bell Atlantic, Intervenor.

Petitions for Review of Orders of the Federal Communications Commission.

Before SMITH, WIENER and EMILIO M. GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

*1 This is a consolidated challenge to two orders of the Federal Communications Commission (the "FCC," the "Commission," or the "agency") [FN1] promulgated to satisfy the twin Congressional mandates articulated in the Telecommunications Act of 1996 (the "Act") [FN2] of providing universal telecommunications service in the United States and injecting competition into the market for local telephone service. Petitioners--local telephone service providers who serve predominantly small towns and rural areas--challenge the orders as inconsistent with the statutory requirements of the Act; arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A); violative of the Takings Clause, U.S. Const. amend. V; and in noncompliance with the Regulatory Flexibility Act, 5 U.S.C. § 604. Having jurisdiction to review the orders pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a), we deny the petitions for review.

I. THE STATUTORY MANDATES.

Universal service has been a fundamental goal of federal telecommunications regulation since the passage of the Communications Act of 1934. Indeed, the FCC's very purpose is "to make available, so far as possible, to all the people of the United States ... a rapid, efficient, Nation-wide, and world-wide wire and communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151 (as amended). See also Texas Office of Pub. Util. Counsel v. FCC, 183 F.3d 393, 405-06 & n. 2 (5th Cir.1999) ("TOPUC "), petition for cert. filed (Dec. 23, 1999) (No. 99-1072).

[1] Specifically, the Act requires that universal service support be "explicit and sufficient," 47 U.S.C. § 254(e), and it articulates several guiding principles to govern universal service--including, for example, that "access ... be provided in all regions of the Nation ... including low-income consumers and those in rural, insular, and high cost areas," that services and rates be "reasonably comparable" to those offered "in urban areas," that "[a]ll providers of telecommunications services ... make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service," and that universal service support be "specific" and "predictable," id. § 254(b)(2)-(5); Order ¶ 21. While the FCC is required to obey statutory commands, the guiding principles reflect congressional intent to delegate difficult policy choices to the Commission's discretion. See TOPUC, 183 F.3d at 411-12. [FN3]

[2][3] Alongside the universal service mandate is the directive that local telephone markets be opened to competition. See 47 U.S.C. §§ 251-253; AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371, 119 S.Ct. 721, 142 L.Ed.2d 835; TOPUC, 183 F.3d at 406, 412. The FCC must see to it that both universal service and local competition are realized; one cannot be sacrificed in favor of the other. The Commission therefore is responsible for making the changes necessary to its universal service program to ensure that it survives in the new world of competition. [FN4] Because Congress has conferred broad discretion on the agency to negotiate these dual mandates, courts ought not lightly interfere with its reasoned attempt to achieve both objectives. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); 5 U.S.C. § 706(2)(A).

II. THE UNIVERSAL SERVICE ORDERS.

*2 The orders under review make various changes to universal service deemed necessary achieve universal service within a competitive environment. We describe the general principles guiding the Commission's judgment, then detail the provisions specifically at issue in petitioners' various challenges.

A. COMMISSION PRINCIPLES.

To analyze the purpose and effect of the FCC's numerous regulatory changes to its universal service program, we find it useful first to articulate three principles the Commission has followed in making the transition from monopolistic to competitive universal service. First, rates must be based not on historical, booked costs, but rather on forward-looking costs. After all, market prices respond to current costs; historical investments, by contrast, are sunk costs and thus ignored.

> [I]t is current and anticipated cost, rather than historical cost[,] that is relevant to business decisions to enter markets and price products. The business manager makes a decision to enter a new market by comparing anticipated additional revenues (at a particular price) with anticipated additional costs. If the expected revenues cover all the costs caused by the new product, then a rational business manager has sound business reasons to enter the new market. The historical costs associated with the plant already in place are essentially irrelevant to this decision since those costs are "sunk" and unavoidable and are unaffected by the new production decision. This factor may be particularly significant in industries such as telecommunications which depend heavily on technological innovation, and in which a firm's accounting, or sunk, costs may have little relation to current pricing decisions.

MCI Communications Corp. v. American Tel. & Tel. Corp., 708 F.2d 1081, 1116-17 (7th Cir.1983). [FN5]

[4] Second, the old regime of implicit subsidies--that is, "the manipulation of rates for some customers to subsidize more affordable rates for others"-- must be phased out and replaced with explicit universal service subsidies-- government grants that cause no distortion to market prices--because a competitive market can bear only the latter.

TOPUC, 183 F.3d at 406.

For obvious reasons, this system of implicit subsidies can work well only under regulated conditions. In a competitive environment, a carrier that tries to subsidize below-cost rates to rural customers with above-cost rates to urban customers is vulnerable to a competitor that offers at-cost rates to urban customers. Because opening local telephone markets to competition is a principal objective of the Act, Congress recognized that the universal service system of implicit subsidies would have to be re-examined.

Id. Indeed, the Act requires that all universal service support be explicit. See 47 U.S.C. § 254(e).

Finally, the program must treat all market participants equally--for example, subsidies must be portable--so that the market, and not local or federal government regulators, determines who shall compete for and deliver services to customers. Again, this principle is made necessary not only by the economic realities of competitive markets but also by statute. See 47 U.S.C. § 214(e)(1) (requiring that all "eligible telecommunications carrier[s] ... shall be eligible to receive universal service support").

*3 [5] The FCC additionally defends the orders as reasonable interim regulations. The shift from monopoly to competition is indeed dramatic. Congress thus expressly contemplated that the Commission would adopt an incremental approach to retooling universal service for a world of competition. [FN6] Because the provisions under review are merely transitional, our review is especially deferential. [FN7]

B. PROVISIONS.

Telephone service is jointly provided by two sets of carriers. Local exchange carriers ("LEC's") provide local telephone service in a given geographical calling area through monopoly networks, or "exchanges," each comprising a series of "local loops" allowing for interconnection within the exchange. [FN8] Interexchange carriers ("IXC's") provide long distance service by connecting callers served by different LEC's; such service is called "exchange access." [FN9]

Petitioners are LEC's serving predominantly small towns and rural areas. [FN10] Intervenor Bell Atlantic, supporting the FCC and opposing petitioners, is also an LEC. Intervenor MCI is an IXC and also supports the FCC.

The FCC has established a number of universal service programs involving LEC's and IXC's. The Order implements a myriad of amendments to bring those programs into compliance with competition in the LEC market, but petitioners object to amendments to two of them.

First, they oppose various changes to the universal service support fund for high cost loops. Second, before issuing the Order, the FCC allowed certain small, generally rural LEC's to weight specially the amount of time spent by their telephone switching equipment on switching long distance calls, for purposes of calculating the access charges those LEC's may collect from IXC's. The Order would eliminate this effective subsidy and replace it with a new, explicit support fund.

1. HIGH-COST LOOPS.

Rural LEC's face special obstacles. The cost of providing telephone service varies with population density, because dispersed populations require longer wires and permit lesser economies in installation, service, and maintenance. Also relevant are geographic characteristics, for climate and certain types of terrain make service calls and repairs more costly. Rural areas where telephone customers are dispersed and terrain is unaccommodating are therefore the most expensive to serve.

To meet its historic mandate of universal service, the FCC has established a universal service fund to subsidize high-cost rural LEC's to reduce the rates they must charge their customers. An LEC is eligible for a subsidy if its operating expenses--its "loop costs"--are fifteen percent or more above the national average. Loop costs include the costs of the depreciated cable, wire, and circuit equipment used to provide local service, the depreciation and maintenance expenses associated with that local plant, and the corporate operations expenses related to the provision of local service.

*4 "Corporate operations expenses" include the costs incurred in formulating corporate policy, providing overall administration and management, and hiring accountants, consultants, and lawyers to understand and comply with FCC, state, and local regulations. To determine the amount of corporate operations expense that is properly chargeable to the provision of local service (and therefore included in total loop costs for purposes of determining eligibility for a subsidy), an LEC must reduce its total corporate operations expenses to correspond to the proportion of its entire plant that is local exchange plant.

Petitioners object to a variety of changes the Order effects to the administration of the fund. First, they oppose the continued imposition of a cap on growth in fund expenditures, which cap limits total available support to the previous year's level, adjusted for growth in the number of working loops. See Order ¶ 302. Second, they object to a new cap on the amount of corporate operations expenses that can be included in the loop cost calculation. The Order allows LEC's to report corporate operations expenses only up to 115% of the industry average for LEC's of like size. See Order ¶¶ 283-285, 307.

Third, the Order makes the subsidy portable, following the customer who switches service from one LEC to another. Petitioners claim that portability violates the principle of predictable funding. See Order ¶ 311. Fourth, beginning January 1, 2000, the Order imposes an annual inflation index on the loop cost eligibility benchmark--the minimum amount a loop must cost to be awarded a subsidy--replacing the former approach of recalculating a fresh benchmark periodically, based on updated estimates of industry averages. See Order ¶¶ 300-301; 47 C.F.R. § 36.622(d) (1997). Finally, the Order disallows additional universal service support when a rural LEC acquires and upgrades another exchange, see Order ¶ 308, despite petitioners' claim that such mergers are efficient and should be encouraged.

The cumulative result of all these changes, petitioners say, is that the Commission has rendered LEC's unable to earn a fair return and has discouraged future investment in telecommunications, and thereby has acted arbitrarily and capriciously and has violated the Act's sufficient funding requirement and the Takings Clause.

2. SWITCHING COSTS.

IXC's pay "access charges" to LEC's for the right to have access to an LEC's local exchange to connect long-distance calls to and from that exchange. Jurisdiction to regulate access charges is shared between federal and state governments. To implement rate-of-return regulation, state and federal regulators must allocate the costs of operating an LEC between the delivery of intrastate, interexchange telephone service (which is regulated by state entities) and the provision of interstate service (which is subject to the FCC's jurisdiction). To determine how the allocations are to be made, the agency has promulgated a number of cost separation rules.

*5 The separation rules for costs associated with connecting calls--a process known as "switching"--are based on "dial equipment minutes of use" ("DEM's"). Under the rules, an LEC divides its total DEM's between those used to switch interstate calls and those used to switch intrastate calls.

Before the orders under review, the FCC allowed certain small, generally rural LEC's to weight their DEM totals with a "toll weighting factor," thereby providing LEC's with a higher cost basis on which their federal access charge would be based. Petitioners maintain that the practice of DEM weighting reflects the higher cost of switching a long distance or "toll" call than that of switching a local call, because certain network functions required by interexchange carriers--such as equal access, intra-LATA toll dialing parity, toll screening, toll blocking, Signaling System 7(SS7), expanded carrier identification codes, and 800 number portability--require additional central processing hardware and software.

The FCC has long held, however, that the disparity between intrastate and interstate call switching is a relic of old, electromechanical technology and that modern digital switching equipment largely eliminates the cost differential. [FN11] Toll-weighting continues today, not out of adherence to principles of cost causation--which provide that costs be charged to the source of the cost--but rather to provide an implicit subsidy for rural LEC's. [FN12]

The Order replaces toll-weighting with a new universal service fund (separate from the fund for high-cost loops). See Order ¶¶ 303-304. Petitioners object for three reasons.

First, they claim the Order arbitrarily and capriciously abandons cost- causation principles. Second, because it would be financed by all telecommunications carriers, including small LEC's such as petitioners, the new fund constitutes an unlawful subsidy by small LEC's in favor of IXC's because it effectively saves IXC's from having to pay for the more expensive cost of switching their long-distance calls. Finally, just as they do with respect to the high-cost loop fund, petitioners object on the ground that portability violates the principle of predictability and the statutory command of sufficient funding. Specifically, they claim that if just 25% of the revenue that the FCC has made portable is lost by a typical small LEC, the annual rate of return for interstate access service will, in many cases, fall to minus 10.53%.

III. COMMUNICATIONS ACT AND ADMINISTRATIVE PROCEDURE ACT CHALLENGES.

Petitioners' main challenge is that the orders are inconsistent with the statutory mandates of the Act. Therefore, they claim, the orders constitute arbitrary and capricious regulation.

A. STANDARD OF REVIEW.

[6] Courts review agency conduct in two ways. First, we review agency interpretation of their statutory authority under the familiar Chevron two- step inquiry. See Chevron, 467 U.S. at 842-44, 104 S.Ct. 2778.

*6 Under step one, where "Congress has directly spoken to the precise question at issue," we must "give effect to the unambiguously expressed intent of Congress," reversing an agency's interpretation that does not conform to the statute's plain meaning. Id. at 842-43, 104 S.Ct. 2778. Under step two, which addresses situations in which the statute is either silent or ambiguous, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843, 104 S.Ct. 2778. We reverse only if the agency's construction is "arbitrary, capricious or manifestly contrary to the statute." Id. at 844, 104 S.Ct. 2778. If, on the other hand, the interpretation "is based on a permissible construction of the statute," we defer to the agency's construction.

[7][8] In addition, the Administrative Procedure Act ("APA") empowers courts to reverse agency action that is arbitrary and capricious. See 5 U.S.C. § 706(2)(A); Harris v. United States, 19 F.3d 1090 (5th Cir.1994). Chevron step-two focuses on the agency's interpretation of its statutory power, while APA arbitrary-and-capricious review focuses on the reasonableness of the agency's decision-making process pursuant to that interpretation. See TOPUC, 183 F.3d at 410. Like Chevron step-two, APA arbitrary and capricious review is narrow and deferential, requiring only that the agency "articulate[ ] a rational relationship between the facts found and the choice made." Harris, 19 F.3d at 1096 (quoting Motor Vehicle Mfrs. Ass'n of United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). "[T]he agency's decision need not be ideal." Id. Moreover, our review here is especially deferential, because the provisions under review are merely transitional, as expressly contemplated by the Act. [FN13]

B. ANALYSIS.

Petitioners assert two general themes. First, the challenges go directly to the heart of FCC expertise--whether the Commission has sufficiently and explicitly supported universal service in an open, competitive market--and thus must overcome substantial judicial deference. Examining the Act through the lens of Chevron, we note that Congress obviously intended to rely primarily on FCC discretion, and not vigorous judicial review, to ensure satisfaction of the Act's dual mandates. As we noted in a prior challenge to an FCC universal service regulation,

> [t]o be sure, the FCC's reason for adopting this methodology is not just to preserve universal service. Rather, it is also trying to encourage local competition.... As long as it can reasonably argue that the methodology will provide sufficient support for universal service, however, it is free, under the deference we afford it under Chevron step-two, to adopt a methodology that serves its other goal of encouraging local competition.

*7 TOPUC, 183 F.3d at 412. Petitioners do not satisfy the high evidentiary standard necessary to establish that the Commission acted arbitrarily and capriciously when it produced its interim rules.

[9][10] Second, petitioners' sufficiency challenge fundamentally misses the goal of the Act. The Act does not guarantee all local telephone service providers a sufficient return on investment; quite to the contrary, it is intended to introduce competition into the market. Competition necessarily brings the risk that some telephone service providers will be unable to compete. The Act only promises universal service, and that is a goal that requires sufficient funding of customers, not providers. So long as there is sufficient and competitively-neutral funding to enable all customers to receive basic telecommunications services, the FCC has satisfied the Act and is not further required to ensure sufficient funding of every local telephone provider as well.

[11] Moreover, excessive funding may itself violate the sufficiency requirements of the Act. Because universal service is funded by a general pool subsidized by all telecommunications providers--and

thus indirectly by the customers--excess subsidization in some cases may detract from universal service by causing rates unnecessarily to rise, thereby pricing some consumers out of the market.

1. HIGH-COST LOOPS.

[12] Petitioners fail to show that the FCC's various changes to the universal service support fund for high-cost loops unreasonably fails to provide sufficient funding for universal service or otherwise constitutes an arbitrary and capricious regulation under the Act. First, they object to the agency's continuation of a cap on growth in the fund, adjusted only for changes in the total number of working loops. The cap's track record, however, reflects a reasonable balance between the Commission's mandate to ensure sufficient support for universal service and the need to combat wasteful spending. The agency's broad discretion to provide sufficient universal service funding includes the decision to impose cost controls to avoid excessive expenditures that will detract from universal service. Petitioners do not show how the FCC has abused that discretion.

Second, petitioners object to the introduction of a cap on the amount of corporate operations expenses that may be reported to determine eligibility for high-cost loop support. The Order limits LEC's to 115% of the industry average for corporate operations expenses accrued by carriers of like size. See Order ¶¶ 283-285, 307.

Petitioners claim that corporate operations expenses are already capped and that there is no need for a second cap. [FN14] It is true that, even before the Order, the amount of reportable corporate operations expenses was determined by multiplying an LEC's total corporate operations expenses by the percentage of its total plant that is local exchange plant. This is no cap, however, but rather a reasonable method of allocating costs. The proposed 115% rule is thus a wholly reasonable exercise of the Commission's legitimate power to combat abusive spending; absent the proposed rule, the regulations provide no incentive to keep costs down. Moreover, given its legitimate cost concerns, the agency was well within its discretion to impose a cap rather than to undertake the more costly alternative of intensive auditing.

*8 Petitioners additionally claim that the cap on review is excessively burdensome, driving interstate rates of return to 2.81% for rural LEC's. Even assuming that this statistic proves that customers have failed to receive sufficient universe service support, this statistic is based on the experience of only a single provider--the Bay Springs Telephone Company--and not a statistically valid sample. Petitioners' evidence therefore does not establish that the cap unreasonably fails to provide sufficient service; at most it presents an anomaly that can be addressed by a request for a waiver. [FN15]

Moreover, the statistic ignores the Fourth Reconsideration Order, in which the FCC responded to petitioners' concerns by, inter alia, establishing a minimum cap of $300,000. See Fourth Reconsideration Order ¶¶ 85-109. Petitioners present no evidence disputing the sufficiency of the currently operative cap.

[13] Third, the order provides that the universal service subsidy be portable so that it moves with the customer, rather than stay with the incumbent LEC, whenever a customer makes the decision to switch local service providers. Petitioners claim that portability violates the statutory principle of predictability, see 47 U.S.C. § 254(b)(5), and the statutory command of sufficient funding.

[14] We reiterate that predictability is only a principle, not a statutory command. To satisfy a countervailing statutory principle, therefore, the FCC may exercise reasoned discretion to ignore predictability. See TOPUC, 183 F.3d at 411-12.

[15] Moreover, petitioners cannot even show that portability violates sufficiency or predictability. The purpose of universal service is to benefit the customer, not the carrier. [FN16] "Sufficient" funding of the customer's right to adequate telephone service can be achieved regardless of which carrier ultimately receives the subsidy. [FN17]

The methodology governing subsidy disbursements is plainly stated and made available to LEC's. What petitioners seek is not merely predictable funding mechanisms, but predictable market outcomes. Indeed, what they wish is protection from competition, the very antithesis of the Act.

To the extent petitioners argue that Congress recognized the precarious competitive positions of rural LEC's, their concerns are addressed by 47 U.S.C. § 214(e), which empowers state commissions to regulate entry into rural markets. [FN18] Furthermore, portability is not only consistent with predictability, but also is dictated by principles of competitive neutrality and the statutory command that universal service support be spent "only for the provision, maintenance, and upgrading of facilities and services for which the [universal service] support is intended." 47 U.S.C. § 254(e).

[16] Fourth, rather than continue to determine the eligibility threshold for high-cost loop support by recalculating the national average loop cost, the FCC now simply will adjust the previously-calculated national average by an annual inflation index. Even assuming, as petitioners contend, that inflation adjustments to historical averages in fact would render fewer LEC's eligible for universal service subsidies than would be the case under the former approach, petitioners nevertheless fail to show how this interim approach is unreasonable. Given the eventual transition from historic cost to forward- looking cost, as required by competition, the FCC reasonably concluded that the effort of collecting historic cost data no longer was justified.

*9 [17] Finally, petitioners claim that sales and transfers of exchanges by rural providers are efficient and ought to be encouraged and subsidized. The Order, by contrast, denies additional universal service support in cases in which a rural LEC purchases another exchange.

When the permanent rules for universal access within the context of local competition are in place, all exchanges will be governed by uniform rules with respect to universal service support, without regard to the rural or non-rural status of the LEC. In the interim, however, the rules continue to treat rural and other LEC's differently, in recognition of the continued greater need of rural LEC's. The opportunity thus exists for gaming the different universal service support regimes by transferring ownership to a rural LEC. The FCC acted within its discretion to combat such gaming by keying regulatory treatment to an exchange's original ownership status, without regard to any subsequent transfer in ownership.

[18] The Commission argues that, as a last resort, the availability of waivers cures its orders of any deficiency with respect to sufficiency and predictability. [FN19] Even if the waiver provisions were debatable as a policy matter, they are not an issue for judicial review. For our purposes, a waiver provision is legitimate if the underlying rule is rational, see National Rural Telecom Ass'n v. FCC, 988 F.2d 174, 181 (D.C.Cir.1993), and cannot save a rule that on its own has no rational basis, see ALLTEL Corp., 838 F.2d at 561-62. We therefore can uphold these amendments relating to the high-cost loop fund without addressing the wisdom of allowing waivers.

2. SWITCHING COSTS.

[19] Petitioners also fail to show that the FCC's various changes to the treatment of switching equipment costs unreasonably fail to provide sufficient and explicit funding for universal service or otherwise constitute an arbitrary and capricious exercise of agency powers under the Act. First, petitioners claim that the changes arbitrarily and capriciously abandon cost-causation principles. They insist on retaining special weighting on the assumption that it is in fact more costly to switch long-distance calls than local calls. Therefore, under cost-causative principles, IXC's should pay higher access charges, because they are responsible for a greater proportion of switching costs.

As we have said, however, the Commission has long abandoned this assumption. Instead, special weighting has been allowed to continue solely to provide an additional subsidy to rural LEC's, an interest that would be equally served by the new universal service support fund. Indeed, the Order makes plain that the new fund shall provide support "corresponding in amount to that generated formerly by DEM weighting." Order ¶ 303. Moreover, by mandating that all universal service support be "explicit," 47 U.S.C. § 254(e) requires that this special weighting be eliminated.

*10 [20] Petitioners' second objection simply misconstrues the requirement of "explicit" funding. They argue that, because the new fund would be financed by all telecommunications carriers, including small LEC's such as petitioners, the new fund constitutes an unlawful subsidy in favor for IXC's.

Again, petitioners rest their argument on the same assumption deemed obsolete by the FCC--that long-distance switching is more costly than local switching. Even so, we made clear in TOPUC that the implicit/explicit distinction turns on the difference between direct subsidies from support funds and recovery through access charges and rate structures. "The statute provides little guidance on whether 'explicit' means 'explicit to the consumer' ... or 'explicit to the carrier' ... [but it] does state, however, that all universal service support should be 'explicit.' ... By forcing GTE to recover its universal service contributions from its access charges, the FCC's interpretation maintains an implicit subsidy for ILEC's such as GTE." 183 F.3d at 425.

Petitioners thus misconstrue the meaning of the explicit funding requirement. The fact that the fund is subsidized by contributions from all telecommunications providers, including LEC's, does not make it an implicit subsidy under § 254(e), even if it effectively redistributes resources among telecommunications providers.

Moreover, § 254(b)(4) requires "[a]ll providers of telecommunications services [to] make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service." 47 U.S.C. § 254(b)(4) (emphasis added); see also 47 U.S.C. § 254(d). The Commission reasonably applied the principle of equitable and nondiscriminatory contribution by requiring contributions from all telecommunications providers.

Finally, petitioners object on the ground that portability violates the principle of predictability and the statutory command of sufficient funding. Specifically, they claim that, if just 25% of the revenue that the FCC has made portable is lost by a typical small LEC, the annual rate of return for interstate access service will, in many cases, fall to minus 10.53%.

[21] As we have said, the Commission reasonably construed the predictability principle to require only predictable rules that govern distribution of the subsidies, and not to require predictable funding amounts. Indeed, to construe the predictability principle to require the latter would amount to protection from competition and thereby would run contrary to one of the primary purposes of the Act.

Moreover, petitioners' approach to the predictability principle would prohibit also the current subsidy effect of weighting switching costs. Under the current plan, LEC's receive the subsidy implicitly through access charges--costs that are realized only when customers make telephone calls. The old system of implicit subsidies is no less portable than is the explicit subsidies contemplated by the new fund, for an LEC cannot assess access charges against IXC's for the costs of a customer who has left that LEC for another provider. We therefore uphold the Order over petitioners' APA and Chevron challenges.

IV. TAKINGS CHALLENGE.

*11 Notwithstanding the above analysis, petitioners request us to read the Act to avoid a violation of the Takings Clause. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988). We see no reason to invoke the canon of avoidance, however, because we are simply not presented with a constitutional violation.

[22][23] The Fifth Amendment protects utilities from regulations that are "so unjust as to be confiscatory." Duquesne Light Co. v. Barasch, 488 U.S. 299, 307, 109 S.Ct. 609, 102 L.Ed.2d 646 (1989). Petitioners therefore must show that a regulation will "jeopardize the financial integrity of the companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital," or they must demonstrate that the reduced subsidies "are inadequate to compensate current equity holders for the risk associated with their investments under a modified prudent investment scheme." Duquesne, 488 U.S. at 312, 109 S.Ct. 609.

It is not enough that a party merely speculates that a government action will cause it harm. Rather, a taking must " 'necessarily' result from the regulatory actions." TOPUC, 183 F.3d at 437 (citing United States v. Riverside Bayview Homes, 474 U.S. 121, 128 n. 5, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985)). Such a showing cannot be made here "until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular [property right] in question." Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 191, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

[24] At the very least, therefore, petitioners must wait to experience the actual consequences of the Order before a court may even begin to consider whether the FCC has effected a constitutional taking. Until it is known what level of universal service funding each petitioner will receive under the Order, and under what circumstances the Commission will grant a waiver, we cannot seriously entertain a Takings Clause challenge.

[25] Furthermore, petitioners do not present credible evidence that the Order ever will cause the drastic consequences for rural LEC's articulated in Duquesne. The mere fact that, "[f]or many rural carriers, universal service support provides a large

share of the carriers' revenues," Order ¶ 294, is not enough to establish that the orders constitute a taking. The Fifth Amendment protects against takings; it does not confer a constitutional right to government-subsidized profits. The Takings Clause thus erects no barrier to our Chevron and APA analysis.

V. REGULATORY FLEXIBILITY ACT CHALLENGE.

[26] Under the Regulatory Flexibility Act ("RFA"), final agency rules must contain a "final regulatory flexibility analysis" ("FRFA"), 5 U.S.C. § 604(a), which must include

> *12 a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

5 U.S.C. § 604(a)(5). In 1996, Congress provided for judicial review of agency compliance with the RFA. See 5 U.S.C. § 611(a)(1). We review only to determine whether an agency has made a "reasonable, good-faith effort" to carry out the mandate of the RFA.Associated Fisheries, Inc. v. Daley, 127 F.3d 104, 114 (1st Cir.1997).

[27][28] Petitioners' RFA argument amounts to little more than a redressing of its earlier Chevron and APA claims. The RFA is a procedural rather than substantive agency mandate, to be sure, [FN20] but petitioners fail to articulate specific procedural flaws in the FCC's promulgation of the orders. In fact, both orders are accompanied by substantial discussion and deliberation, including consideration and reasoned rejection of significant alternatives which, in the Commission's judgment, would not have achieved with equivalent success its twin statutory mandates of universal service and local competition. The RFA requires no more. [FN21]

[29] Petitioners come closest to stating a meritorious procedural objection when they assert that the FCC failed either to undertake or to present economic analysis. Even assuming that that were so, the RFA plainly does not require economic analysis, but mandates only that the agency describe the steps it took "to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes." 5 U.S.C. § 604(a)(5).

The RFA specifically requires "a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule." Id. Nowhere does it require, however, cost-benefit analysis or economic modeling. Indeed, the RFA expressly states that, "[i]n complying with [section 604], an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable." 5 U.S.C. § 607. [FN22] We therefore conclude that the FCC reasonably complied with the requirements of the RFA.

CONCLUSION.

Petitioners' various challenges fail because they fundamentally misunderstand a primary purpose of the Communications Act--to herald and realize a new era of competition in the market for local telephone service while continuing to pursue the goal of universal service. They therefore confuse the requirement of sufficient support for universal service within a market in which telephone service providers compete for customers, which federal law mandates, with a guarantee of economic success for all providers, a guarantee that conflicts with competition.

*13 The FCC interim orders are reasonably tailored to achieving universal service and competition in local markets. They do not effect a cognizable, unconstitutional taking. And they were promulgated in reasonable compliance with the requirements of the RFA. We therefore DENY the petitions for review.

Judge WIENER concurs in the judgment only.

FN1. In re: Federal-State Joint Board on Universal Serv.; Report and Order in CC Docket No. 96-45, 12 FCC Rcd. 8776 (1997) ("Order"); Fourth Order on Reconsideration in CC Docket No. 96-45; Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd. 5318 (1997); Errata, 13 FCC Rcd. 2372 (1998) ("Fourth Reconsideration Order").

FN2. Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (to be codified as amended in scattered sections of title 47, United States Code).

FN3. The Act additionally states that "[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public." 47 U.S.C. § 157(a). Cf. 47 U.S.C. §

254(b)(2) (providing that universal service programs be guided by principle of providing access to advanced telecommunications and information services in all regions). Petitioners argue that the orders violate § 157(a).

Unlike the express statutory requirement of sufficient support of universal service support imposed by 47 U.S.C. § 254(e), § 157(a) is merely a broad statement of policy conferring substantial discretion on the Commission to determine how best to provide for new technologiesand services. To our knowledge, § 157(a) has never been used to invalidate an FCC action. We conclude, therefore, that a universal service program that satisfies the specific statutory requirements of § 254(e) necessarily satisfies the broad policy statement of § 157(a).

FN4. See Order ¶¶ 1-4, 20 (stating that it "ensure[s] that this system is sustainable in a competitive marketplace, thus ensuring that universal service is available at rates that are 'just, unreasonable, and affordable' for all Americans").

FN5. See also TOPUC, 183 F.3d at 407 (stating that "the FCC decided to use the 'forward-looking' costs to calculate the relevant costs of a carrier.... To encourage carriers to act efficiently, the agency would base its calculation on the costs an efficient carrier would incur (rather than the costs the incumbent carriers historically have incurred)").

FN6. It requires the Commission to adopt rules opening the local services market to competition "within 6 months." 47 U.S.C. § 251(d)(1). By contrast, the Commission need only adopt rules establishing a "specific timetable for implementation" of universal service, and even then, it has "15 months" to do so. 47 U.S.C. § 254(a)(2). See also TOPUC, 183 F.3d at 436 ("By instructing the FCC to establish a 'timetable for implementation' by the statutory deadline, Congress assumed the implementation process would occur over a transition period after the fifteen-month deadline.").

FN7. See TOPUC, 183 F.3d at 437 ("Where the statutory language does not explicitly command otherwise, we defer to the agency's reasonable judgment about what will constitute 'sufficient' support during the transition period from one universal service system to another."); id. at 440 n. 85 (acknowledging that "we extend the FCC greater discretion in deciding what will be 'sufficient' during the transition period"); MCI Telecomm. Corp. v. FCC, 750 F.2d 135, 140 (D.C.Cir.1984) (noting that "substantial deference by courts is accorded to an agency when the issue concerns interim relief").

FN8. See 47 U.S.C. § 153(26) (defining "local exchange carrier"); 47 U.S.C. § 153(47) (defining "telephone exchange service").

FN9. See 47 U.S.C. § 153(16) (defining "exchange access"); 47 U.S.C. § 153(48) (defining "telephone toll service").

FN10. See 47 U.S.C. § 153(37) (defining "rural telephone company").

FN11. As the Commission stated in 1987,

The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, Pacific Northwest Bell Telephone Company (U.S. West), which originally supported the use of weighted DEM in its comments, changed its position to support measured DEM in reply comments because it believes the ongoing process of replacing older technology with digital switches will eliminate the need for any toll weighting. We believe that modern digital switching equipment has greatly reduced, if not eliminated, the additional cost of toll switching.... [W]e believe that the need for toll weighting will continue to diminish and will eventually be eliminated as the exchange carriers continue to replace older technology equipment with digital switches.

In the Matter of Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, Recommended Decision and Order in CC Docket No. 80-286, 2 FCC Rcd. 2551, ¶ 49 (1987). See also In the Matter of MTS and WATS Market Structure, Amendments of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board, Report and Order in CC Docket Nos. 78-72, 80-286, 86-297, 2 FCC Rcd. 2639, ¶ 5 (1987).

FN12. See TOPUC, 183 F.3d at 425 (noting "the sorts of implicit subsidies currently used by the FCC in its [DEM] weighting program").

FN13. See note 7, supra.

FN14. See ALLTEL Corp. v. FCC, 838 F.2d 551, 561 (D.C.Cir.1988) ("A regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.").

FN15. See 47 C.F.R. § 1.3; Fourth Reconsideration Order ¶¶ 93, 102, 108.

FN16. See, e.g., 47 U.S.C. § 254(b)(3) (stating that "Consumers in all regions of the Nation" shall receive comparable telephone service).

FN17. Petitioners estimate that the introduction of competition will result in a loss of approximately 25% of the customer base. The FCC counters with historical trends that would predict market share losses of only 3%. Because we conclude that the sufficiency requirement is intended to benefit the customer, not the provider, we need not resolve this particular dispute.

FN18. See 47 U.S.C. § 254(e)(2) ("Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.").

FN19. See 47 C.F.R. § 1.3 (general waiver provision for all FCC regulations); Fourth Reconsideration Order ¶ 38 (providing for waiver of indexed cap on growth in high cost loop fund); Id. at ¶¶ 93, 102, 108 (providing for waiver of cap on corporate operations expenses).

FN20. See Associated Fisheries, 127 F.3d at 114 (stating that "section 604 does not command an agency to take specific substantive measures, but, rather, only to give explicit consideration to less onerous options").

FN21. See Associated Fisheries, 127 F.3d at 115 (noting that "section 604 does not require that an FRFA address every alternative, but only that it address significant ones.").

FN22. See also Associated Fisheries, 127 F.3d at 115 ("Section 604 prescribes the content of an FRFA, but it does not demand a particular mode of presentation.").

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

'00 FEB 11 AM 9 57

IN RE: ***Petition of The Tennessee Small Local Exchange Company Coalition for Temporary Suspension of 47 U.S.C. §251(b) and 251(c) Pursuant to 47 U.S.C. §251(f) and 47 U.S.C. §253(b)***

Docket No. 99-00613

OBJECTIONS OF AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC. TO REPORT AND RECOMMENDATION OF PRE-HEARING OFFICER

AT&T Communications of the South Central States, Inc. ("AT&T") makes the following objections to the Report and Recommendation of the Pre-Hearing Officer dated February 8, 2000:

1. The statement as to stipulations in the first full paragraph on page 4 is not accurate. Neither AT&T nor the other intervenors stated that they would stipulate "that the Coalition met the two percent (2%) requirement of Section 251(f)(2) if the Coalition would submit data on its members' access lines." As the transcript shows (pages 26-27) counsel for intervenors referred to "they" and "you all," with the intent being clear that, not the Coalition but each member was intended. The Coalition is not a carrier and a stipulation as to "the Coalition" in this regard would be meaningless.

2. The statement of issue number 3 does not include the FCC's definitive and binding interpretation of "unduly economically burdensome" as that term is used in Section 251(f)(2). 47 C.F.R §51.405(d) provides:

> In order to justify a suspension or modification under section 251(f)(2) of the Act, a LELC must offer evidence that the application of section 251(b) or section 152(c) of the Act would be likely to cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry.

At a minimum, Issue 3(b) should be amended by adding the following parenthetical language after the word "burdensome": "(beyond the economic burden that is typically associated with efficient competitive entry)."

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CERTIFICATE OF SERVICE

I, Val Sanford, hereby certify that a copy of the foregoing Objections of AT&T Communications of the South Central States, Inc. was served on the following via First Class Mail or Hand-Delivery, this 11th day of February, 2000.

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