UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

The Irregulators, New Networks Institute, Bruce A. Kushnick, Mark N. Cooper, Tom Allibone, Kenneth Levy, Fred Goldstein, and Charles W. Sherwood, Jr., Petitioners	Case No. 19-1085 Petition for Review of Order by the Federal Communications Commission
v.	
Federal Communications Commission and United States of America, Respondents	

PETITIONERS' STANDING ARGUMENT

I. PURPOSE

Circuit R. 15(c)(2) provides that the Docketing Statement "may include reference to arguments, evidence, or the administrative record supporting the claim of standing." This is particularly useful when the petitioner's standing is not apparent from the administrative record and additional evidence is necessary. *See e.g.*, *Sierra Club v. EPA*, 292 F.3d 895, 900-901 (D.C. Cir. 2002). Part 6(e) of the Court's Agency Docketing Statement form calls for this information. It requires a Petitioner seeking review of an agency order to "Identify the basis of appellant's/petitioner's claim of standing." Petitioners' entry on the form refers the Court to Affidavits submitted by each natural person listed in the caption as a

Petitioner and this Argument stating the legal foundation for standing after application of the pertinent evidence.

Petitioners acknowledge that the record below may not be adequate for a complete evaluation of Article III standing to seek judicial review of the agency action, and therefore the Court's subject matter jurisdiction. Some of the text and rationale in the order below suggest a potential challenge to Petitioners' standing in whole or in part.

The Petitioner Affidavits set out the particular individual facts and circumstances applicable to each named individual Petitioner. Three Affiants present the seminal underlying facts for their own situation only and then rely on the Affidavits of Bruce A. Kushnick, Mark N. Cooper and Fred Goldstein. The more expansive Kushnick, Cooper and Goldstein Affidavits present their own individual facts and then go on to explain why their own basic facts and the facts presented by the other Affiants demonstrate an (1) injury-in-fact (2) traceable to the Freeze Order (3) that could be redressed by an order from this Court holding unlawful, vacating, enjoining, and/or setting aside the Freeze Order and remanding the matter to the FCC for further consideration and action. The Affidavits, in total, demonstrate standing for every Petitioner.

II. DISCRETE PETITIONER FACT PATTERNS

The Affidavits reveal a variety of fact patterns. But there are commonalities among the Petitioners' individual circumstances. The following table summarizes the basic facts pertaining to each individual Petitioner that is a natural person, based on their Affidavits.

Petitioners' Basic Fact Patterns						
	Allibone	**Cooper**	**Goldstein**	**Kushnick**	**Levy**	**Sherwood**
ILEC area	Verizon	Verizon	Verizon	Verizon	CenturyLink	CenturyLink
Local Service	Verizon	Verizon	Comcast	Charter	None	Charter
IXC	Verizon	Verizon	Comcast	Charter	None	Charter
Broadband	Verizon	Comcast	Comcast	Charter	CenturyLink	Charter
Wireless	AT&T	Verizon	Verizon	Tracfone (AT&T)	Verizon	Sprint
State USF?	Yes	Yes	No	Yes	Yes	Yes
Competition Concerns?	Yes	Yes	Yes	Yes	No	Yes

H. Two of the listed Petitioners (The Irregulators and New Networks Institute) are not natural persons, do not have a separate corporate or other existence and do not purchase or use communications services in their own name. The Irregulators is an independent consortium of senior telecom experts, analysts, forensic auditors and lawyers who are former senior staffers from the FCC, state advocate and Attorneys General Office experts and lawyers, and former and current telecom consultants. Each Affiant belongs.

New Networks Institute was established in 1992 as a market research and consulting firm, and now acts as the Irregulators' managing director. These two

consortia are loose organizations that employ a "brand" owned by Bruce A. Kushnick to represent the Petitioners and other peoples' collaborative efforts in search of rational telecommunications policy. In that sense, the Irregulators and New Networks Institute are different from other more formal associations involved in the "organizational standing" cases.[1] But that does not matter here because this is not an "organizational standing" case. Individual members are express named participants to this matter and are championing their individual consumer and purchaser rights. They have just banded together and collectively employ a catchy name for the group.

Petitioners accept that the standing issue will be resolved entirely based on whether any of the named Petitioners that are natural persons have standing. If any one individual natural person named as a Petitioner has standing then the inquiry is complete and the remainder of the named petitioners, including the non-corporate associations, may remain in the case without further inquiry. *Del. Dep't of Nat. Res. &Envtl. Control v. EPA*, 785 F.3d 1, 8 (2015); *Consumer Federation of America*, 348 F.3d at 1012; *City of Waukesha v. EPA*, 320 F.3d 228, 235-37 (D.C. Cir. 2003) (*per curiam*); *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 636 (D.C. Cir.

[1]An association has standing to pursue litigation "on behalf of its members when its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires members' participation in the lawsuit." *Consumer Federation of America v. FCC*, 348 F.3d 1009, 1012 (D.C. Cir. 2003) *citing Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977).

2000); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996).

III. STANDING REQUIREMENTS

The "irreducible constitutional minimum" of standing has three parts: injury in fact, causation, and redressability. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016) (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). As the parties seeking to invoke the Court's jurisdiction, Petitioners bear the burden of establishing standing to sue. *Sierra Club v. E.P.A*., 292 F.3d 895, 900 (D.C. Cir. 2002).A petitioner must present a plausible claim – based on the agency records or through new evidence – of an injury in fact fairly traceable to the actions of the agency that is likely to be redressed by a favorable decision on the merits. *Humane Soc'y of the U.S. v. Vilsack*, 797 F.3d 4, 8 (D.C. Cir. 2015).

A. Petitioners suffer an injury in fact.

Part V of this document goes into more detail, but the Petitioners' injury can be summarized into several distinct types.

1. Five of the Petitioners pay more for intrastate basic local service than they should. The other Petitioner does not receive basic local service. The harm is especially acute for those that purchase from the incumbent LEC, but even those that use an alternative are impacted because the ILEC price often acts as an umbrella. If the ILEC's price is reduced the competitors will have to match

the reduction. The Kushnick Affidavit summarizes New York, New Jersey and Massachusetts data revealing that intrastate basic local service is significantly burdened and overpriced and shows how this data is representative of many other states. Most of this information was presented to the FCC in report form and is in the agency record.

2. Each Petitioner that uses an alternative local provider is impacted by virtue of the fact that the competitive supplier has to purchase inputs from the incumbent. Goldstein Affidavit ¶¶5. H, J, K. and L explains the injuries he and others suffer from call rating and reciprocal compensation issues and declining access to ILEC supplied loops. The Kushnick Affidavit shows that the current separations regime allows Verizon and other price cap carriers to subsidize their affiliated and unregulated competitive activities using revenues obtained from basic local service. Cooper Affidavit ¶7 then explains how this harms consumers and competition and reduces social welfare.

3. Five of the Petitioners have a wireline toll provider (IXC). When they make long distance calls to another area the IXC must pay access charges, especially when the terminating ILEC is a rate of return carrier whose interstate access rate is still controlled by interstate separated costs. The IXC passes through this cost along with its other costs, as part of the monthly bill. The separations freeze also impacts the input costs for higher capacity lines the IXCs

use to connect internal parts of their network and their network with the incumbents' networks. There are also competitive implications.

4. Each Petitioner uses some form of broadband, and the separations freeze also impacts the input costs for broadband service. There are also competitive implications.

5. All of the Petitioners purchase wireless service. When they make interMTA long distance calls to another area the CMRS provider must pay access charges, especially when the terminating ILEC is a rate of return carrier whose interstate access rate is still controlled by interstate separated costs. The CMRS provider passes through this cost along with its other costs, as part of the monthly bill. The separations freeze also impacts the input costs for higher capacity lines CMRS providers use for backhaul and to connect their network with the incumbents' networks. There are also competitive implications.

6. All Petitioners pay a monthly pass-through rate for interstate USF assessments incurred by their various communications providers. These monies go to the universal service fund and are distributed throughout the country. Rate of return carriers' USF entitlements are determined, at least in part, through separated costs.

7. Five of the Petitioners pay a monthly pass-through rate for intrastate USF assessments incurred by their various communications providers.

These monies go to the state universal service fund and are distributed throughout the state. Many state USF programs rely, at least in part, on intrastate separated costs to determine carrier entitlements. *Freeze Order* ¶18.

8. Cooper Affidavit ¶6 explains harms to himself and other consumers that consume communications while traveling, especially when the consumer goes to an area served by a rate of return carrier.

9. Cooper Affidavit ¶7 extensively addresses the negative social utility and competitive impacts from the freeze, the harm that is currently being imposed on consumers and the increase to that harm as a result of the "new investment" that is about to occur for "5G." It also demonstrates that extending the freeze is the worst possible outcome for consumers and taking even modest immediate steps to reform separations would significantly remediate the ongoing and increasing harm. Goldstein Affidavit ¶6 supplements these points.

10. In the aggregate each Petitioner suffers harm because the communications market is significantly skewed, in terms of prices for the various services and the availability and viability of actual and potential competition. A significant contributor to the current broken system is the entirely misaligned separations regime that leads to some services being overpriced and others being materially underpriced, with cross-subsidization running rampant between and within each jurisdiction. Pricing today does not at all resemble what would obtain

in a truly competitive market, and the market is not truly competitive. Frozen separations is a root cause of these evils.

B. Petitioners' injury was caused and exacerbated by the *Freeze Order.*

The Court has found that the "causation" prong for standing:

> ... is satisfied by a demonstration that an administrative agency authorized the injurious conduct. *See, e.g., Animal Legal Defense Fund (ALDF) v. Glickman*, 332 U.S. App. D.C. 104, 154 F.3d 426, 440-43 (D.C. Cir. 1998) (*en banc*); *Bristol-Myers Squibb Co. v. Shalala*, 320 U.S. App. D.C. 32, 91 F.3d 1493, 1499 (D.C. Cir. 1996); *Telephone and Data Sys., Inc. v. FCC*, 305 U.S. App. D.C. 195, 19 F.3d 42, 46-47 (D.C. Cir. 1994). In *ALDF v. Glickman*, we held that even agency action which implicitly permits a third party to behave in an injurious manner offers enough of a causal link to support a lawsuit against the agency. *See* 154 F.3d at 440-43. In short, our precedents suggest that an agency does not have to be the direct actor in the injurious conduct, but that indirect causation through authorization is sufficient to fulfill the causation requirement for Article III standing.

America's Cmty. Bankers v. FDIC, 200 F.3d 822, 827 (D.C. Cir. 2000).[2]

In the case at bar the Commission's rules in issue govern the conduct, rights, duties and obligations of, and the rates charged by, the carriers that provide wholesale and retail telecommunications products directly and indirectly consumed, and paid for, by all consumers – including the Petitioners. This link between impact on consumers and the rules binding carriers is more than sufficient to establish causation.

---

[2] *See also Consumer Federation of America*, *supra*, 348 F.3d at 1012 ("When an agency order permits a third party to engage in conduct that allegedly injures a person, the person has satisfied the causation aspect of the standing analysis.")

Petitioners challenge the specific action taken by the FCC below due to the harm it causes by maintaining the freeze for all but a few carriers that choose to "unfreeze." But Petitioners also contest the agency's *inaction* – its refusal to end the Freeze and require that separations reform benefiting consumers finally occur. This distinction does not lead to a material outcome difference on any standing test prong. *Center for Auto Safety v. NHTSA*, 793 F.2d 1322-1336 (D.C. Cir. 1986); *Competitive Enterprise Institute v. NHTSA*, 901 F.2d at 112. Petitioners also contend that the harm will soon be compounded, since the industry is about to incur large future costs to facilitate "5G" wireless service. These immense additional costs will also be misallocated under the freeze, thus leading to future harm. This too demonstrates standing. *See Air All. Hous. v. EPA*, 906 F.3d 1049, 1058 (D.C. Cir. 2018), *citing Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014) *and Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414, n.5 (2013) ("An allegation of future injury may suffice" to show injury in fact "if the threatened injury is 'certainly impending' or there is a 'substantial risk that the harm will occur.'").

C. The requested judicial relief will redress the injury.

The Court noted in *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 n.1 (D.C. Cir. 2017), "[c]ausation and redressability typically 'overlap as two sides of a causation coin.'" Remediating the action or inaction through *vacatur* and/or

remand for further consideration and new action will usually will redress the claimed. injury *See also Dynalantic Corp. v. Dep't of Defense*, 115 F.3d 1012, 1017 (D.C. Cir. 1997)). Article III does not demand a demonstration that victory in court will without doubt cure the identified injury, *Teton Historic Aviation Found. v. U.S. Dep't of Def.*, 785 F.3d 719, 727 (D.C. Cir. 2015), but only that it is likely to do so, *Estate of Boyland v. USDA*, 913 F.3d 117, 123 (D.C. Cir. 2019). There is standing if judicial relief would remove an "absolute barrier" to the ultimate regulatory desires sought by the complainant, even if success is not certain. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977); *W. Va. Ass'n of Cmty Health Ctrs., Inc. v. Heckler*, 734 F.2d 1570, 1574, 1575 (D.C. Cir. 1984). The judicial relief does not have to fully "entitle" the complainant to relief, it merely needs to "constitute a 'necessary first step'" "on a path that could ultimately lead to relief fully redressing the injury." *Consumer Fed'n of Am. v. FCC*, 348 F.3d at 1012 *citing Tel. & Data Sys., Inc. v. FCC*, 19 F.3d 42, 47 (D.C. Cir. 1994) and *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 270, 273 (D.C. Cir. 1988). An injury is redressable when "the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury" alleged. *Am. Sports Council v. United States Dep't of Educ.*, 850 F. Supp. 2d 288, 292

(D.D.C. 2012), *citing Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663-64 (D.C. Cir.1996).[3]

There is a "substantial likelihood that the judicial relief requested" will force the FCC to take at least some steps to reduce the harms inflicted on Petitioners, who are before the Court "championing their own rights." *Duke Power Co. v. Carolina Environmental Study Group*, Inc., 438 U.S. 59, 79, 80 (1978).

One of Petitioners' main complaints is the Commission's holding that its action below is irrelevant to price cap carriers and the freeze extension does not impact intrastate rate-setting for price cap carriers. Petitioners contest this conclusion, which is belied by other parts of the same order, and seek remand and a requirement that the FCC reevaluate the impact of extension on price cap carriers that are still subject to some form of intrastate cost based ratemaking. This relief would redress Petitioners' injury on this point. The Cooper (¶8) and Goldstein (¶6)

---

[3] In contrast to *Am Sports*, however, the Petitioners are not here protesting a mere procedural matter such as a refusal to institute a rulemaking or denial of some other procedural right *in vacuo*. The Commission initiated the proceeding below and Petitioners fully participated. They opposed the proposed rule and sought concrete substantive action in the Commission-initiated rulemaking. Petitioners asked the Commission to *not* extend the freeze. They advocated a complete thaw. They showed, and the record and *Freeze Order* agree, that extension perpetuates significant misallocations that cause severe cost mismatches *Freeze Order* ¶43 agrees "necessarily" flow from the present rules. Petitioners may not prevail in their effort to obtain a complete and immediate unfreeze even if the order is vacated and remanded, but they cannot prevail unless the Court does so. "[T]hat is enough to ensure that the relief requested "will produce tangible, meaningful results in the real world." *Tel. & Data Sys., supra*, 19 F.3d at 47, *citing Common Cause v. DOE*, 702 F.2d 245, 254 (D.C. Cir. 1983).

Affidavits explain how relief from this court will redress the harm suffered by Petitioners and all consumers.

D. Petitioners are "aggrieved"; their consumer interests are within the zone of interests Congress sought to protect through the Communications Act.

"Under the zone-of-interest test, 'the essential inquiry is whether Congress intended for a particular class of plaintiffs to be relied upon to challenge agency disregard of the law" The test "is not meant to be especially demanding." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987). "The Supreme Court has 'always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012). As a result, 'the test forecloses suit only when a [petitioner]'s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that [petitioner] to sue." *Lexmark*, 134 S. Ct. at 1389 (internal quotation marks omitted). This forgiving version of the test applies in the context of the Administrative Procedure Act ('APA'), *see Bennett v. Spear*, 520 U.S. 154, 163, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997)." *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 275-76 (D.C. Cir. 2015).

Consumers are at the heart of the "zone of interests" the Communications Act was enacted to protect through regulation. 47 U.S.C. §151(a) declares that 47

U.S.C Chapter 5 (which covers all of Titles II, III, IV-A and VI and thus common carrier, wireless, cable, information rates and services, including separations matters and universal service) is

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications,

Congress wanted to protect "the people" and ensure they have reasonable prices and universal service and there is adequate public safety and an effective national defense. The FCC is <u>supposed to be</u> a consumer protection agency.

Each individual petitioner is a consumer of interstate and intrastate telecommunications. Each is required to pay toward the interstate Universal Service Fund ("USF") and all but one are required to contribute to a state USF. The FCC's action below directly and indirectly impacts the amount each Petitioner pays for telecommunications and materially impacts availability of desired intrastate and interstate telecommunications products and services. They have a personal financial interest and face current and future monetary injury. "Certainly he who is 'likely to be financially' injured, *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477, may be a reliable private attorney general to litigate the issues

of the public interest in the present case." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970).

This Court "has permitted consumers of a product to challenge agency action that prevented the consumers from purchasing a desired product" under the doctrine of "purchaser standing." *Coal. for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1281 (D.C. Cir. 2012). In *Consumer Federation of America*, 348 F.3d at 1012, the Court held that a subscriber to Comcast's cable service had standing to challenge the merger between AT&T Broadband and Comcast because the merger would affect his ability to continue to use Comcast and still select his own internet service provider – an injury in fact even if, as the defendants posited, the plaintiff could have still "obtain[ed] high-speed internet access using technologies other than cable." *See also Chamber of Commerce of U.S. v. SEC*, 412 F.3d 133, 138 (D.C. Cir. 2005)[4];*Competitive Enterprise Institute v. NHTSA*, 901 F.2d 107, 112-113 (D.C. Cir. 1990)[5]; *Orangeburg, South Carolina v. Federal Energy Regulatory Commission*, 862 F.3d 1071, 1074, 1078 (D.C. Cir., 2017).[6] Consumers adversely affected by an FCC rule have standing to seek judicial review.

---

[4] Chamber had standing because the rule in issue limited its ability to engage in transactions with mutual funds that failed to meet those certain conditions.

[5] Consumer group had standing to challenge NHTSA's fuel-economy standards because members of the group sought to purchase "large size" cars "in a price range they could afford," and the fuel-economy standards restricted "the production of such vehicles."

[6] City government had standing to challenge the Federal Energy Regulatory Commission's approval of an agreement between two utilities because that approval prevented the city from

Each Petitioner is a consumer of various communications products regulated by a state or the FCC, and the prices the petitioners pay are affected by the separations rules in several ways. Each desires competitive options that come with reasonable and rational prices, and competition also relies, at least in part, on proper separations. Each Petitioner therefore has standing.

IV. BACKGROUND AND INTRODUCTION TO SEPARATIONS

A. Action under review.

The agency action under review is the Report and Order and Waiver, *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, FCC 18-182, CC Docket No. 80-286, __ FCC Rcd __ (rel. Dec. 17, 2018), published at 84 FR 4351 (Feb., 15, 2019), and effective March 1, 2019 (84 FR 6997 (Mar. 1, 2019)) ("*Freeze Order*"). A copy of the *Freeze Order* was attached to the Petition for Review and is also provided as part of the package of filings by Petitioner in response to the Clerk's April 18, 2019 Order.

The FCC first instituted a separations "freeze" in 2001, when the Commission imposed "an interim freeze of the Part 36 category relationships and jurisdictional cost allocation factors. Specifically, pending comprehensive reform of the Part 36 separations rules, we adopt a freeze of all Part 36 category

purchasing "a desired product (reliable and low cost wholesale power)" even though the city could and did "purchase wholesale power from another source."

relationships and allocation factors for price cap carriers, and a freeze of all allocation factors for rate-of-return carriers. The interim freeze will be in effect for five years or until the Commission has completed comprehensive separations reform, whichever comes first." *Jurisdictional Separations and Referral to the Federal-State Joint Board*, 16 FCC Rcd 11382, 11383, ¶2 (2001) ("*2001 Separations Freeze Order*") (notes omitted). Despite the passage of more than twenty years since efforts began in 1997 the promised "comprehensive separations reform" has yet to occur. The deadline in the rule has approached eight different times without much progress. The first seven times the Commission serially extended the freeze for periods ranging from one to three years.

The agency action before the Court is the eighth and most recent time the FCC has kicked the separations reform can down the road through an amendment to its 47 C.F.R. Part 36 rules by extending the freeze. This time they kicked out the deadline by six years, double the longest time they had previously bought for themselves.

As can be seen from the FCC's "final rule" summary at 84 FR 4351, the *Freeze Order* promulgated a set of final rules amending the then-current "separations category relationships freeze" end dates. For the most part "December 31, 2018" was replaced with "December 31, 2024" – thus "extending" the "freeze" for six years. The *Freeze Order* also granted a "one-time opportunity" for certain

"rate of return" carriers to unilaterally "unfreeze" and "update" their category relationships if they perceived a private benefit from doing so.

Along the way the *Freeze Order* denied alternative requests and proposals submitted by several parties, including Petitioners. The Petitioners' main request and proposal was to *not* change the end date and thus allow the "freeze" to expire. This would have resulted in a requirement that all carriers – not just those that perceived a private benefit – "update" their "category relationships" and thereby go through the process of reallocating costs between jurisdictions and, ultimately interstate service categories. For the most part this would lead to significant *reductions* to the carriers' costs assignments to intrastate and increases to interstate. It would have also ultimately required cost assignment adjustments between interstate rate categories. Generally speaking, the amounts presently allocated to certain interstate switched access elements (carrier common line and end user common line) would go down and the amount assigned to interstate "Business Data Service" ("BDS"; also known as "special access") would increase.

B. "Jurisdictional Separations" impact both interstate and intrastate telecommunications pricing and service availability.

Some of what follows is more akin to "merits" argument, but it is pertinent to standing as well. Standing inquiry is issue-specific: a putative petitioner must have standing to raise each individual desired claim for relief. The court assumes the petitioner is correct on the merits and the court will grant the requested relief,

Air All. Hous. v. EPA, 906 F.3d 1049, 1057-58 (D.C. Cir. 2018); *Banner Health v. Price*, 867 F.3d 1323, 1334 (D.C. Cir. 2017), but in order to assess whether Petitioners have standing to raise an issue the Court must first understand the nature of the merits claim.

One of Petitioners' main complaints is that current frozen separations over-allocate costs to intrastate and require higher intrastate prices for basic local service whereas they under-allocate costs to interstate, thereby allowing for artificially low interstate rates. Within the interstate jurisdiction (after the initial under-allocation) the End User Common Line (paid by consumers) and carrier common line switched access (paid by the consumer's toll provider) elements receive an artificially high allocated amount, whereas interstate BDS prices are too low because their cost basis was and is far too low.

"Part 36" is the portion of the FCC rules that address "jurisdictional separations." "'Jurisdictional separation' is a procedure that determines what proportion of jointly used plant should be allocated to the interstate and intrastate jurisdictions for ratemaking purposes." *MCI Telecomm. Corp. v. FCC*, 750 F.2d 135, 137 (D.C. Cir. 1984). "Jurisdictional separation" "separates" each carrier's "regulated" "costs" and "revenues" between the intrastate and interstate "jurisdictions." "Intrastate" costs and revenues are subject to oversight by the

relevant "state commission" as defined by 47 U.S.C. §153(48). "Interstate" costs and revenues are controlled by the FCC under Title II of the Communications Act.

Some regulated costs are "directly assigned" because they relate to activity in only one jurisdiction, while others are "jointly" used to support services in both jurisdictions and must be separated using "allocation factors." The "separated" costs are then used to develop or at least inform the development of the ultimate rates charged by users of intrastate and interstate telecommunications services. Thus, the separations rules drive, or at least materially inform, the rates charged to consumers that are overseen by both state and federal regulators. The FCC sets rates designed to recover interstate separated costs and the states set rates designed to recover intrastate separated costs. The affected company thereby recovers 100% of its costs from the sum of both jurisdictions. Separations is in this respect a zero sum game.

Several Supreme Court decisions from the 1800s pointed up the need for federal regulation of jurisdictionally interstate services. *See, e.g., Wabash, St. Louis & Pacific Railway Company v. Illinois*, 118 U.S. 557 (1886). Congress created the Interstate Commerce Commission in 1887. After then it became clear that

> The interstate service of the Illinois Company, as well as that of the American Company, is subject to the jurisdiction of the Interstate Commerce Commission, which has been empowered to pass upon the rates, charges, and practices relating to that service. Interstate Commerce Act, § 1(1)(c), (3), (5); § 15(1); § 20(5). In the exercise of this jurisdiction, the Interstate Commerce Commission has authority

> to estimate the value of the property used in the interstate service and to determine the amount of the revenues and the expenses properly attributable thereto. By § 20(5) of the Interstate Commerce Act, that Commission is also charged with the duty of prescribing, as soon as practicable, the classes of property for which depreciation charges may properly be included in operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property.

Smith v. Illinois Bell Telephone Co., 282 U.S. 133, 149 (1930).

The cost accounting rules and the separation of costs between the state and interstate jurisdictions was a foundational part of the federalism based "fence" between state authority over intrastate matters and federal control over interstate services. Accounting is addressed in 47 U.S.C. §220 and 47 C.F.R. Part 32 while "separations" is treated in 47 U.S.C. §221 and 47 C.F.R. Part 36.

In 1986 the Supreme Court held that 47 U.S.C. §152(b) "fences off from FCC reach or regulation intrastate matters – indeed, including matters "in connection with" intrastate service. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986). *Louisiana PSC* involved cost accounting under Part 32, and specifically depreciation rates and whether certain costs should be "expensed in a single year" rather than depreciated over several years as with capital investment. The FCC had decided these questions for interstate purposes and the question became whether the states were bound by this determination or could instead require different accounting treatment for intrastate ratemaking and rates notwithstanding the provisions of 47 U.S.C §220. The Supreme Court ultimately

held that §152(b) allowed and §220 did not prohibit states from applying different cost accounting treatment – even for "joint" assets and activity. 476 U.S. 355 at 378-379. But it did so only after observing that this is practically possible only after "the correct allocation between interstate and intrastate use has been made." 476 U.S. 355 at 375. In other words, the Supreme Court recognized that while the states have "accounting" leeway they are bound to FCC decisions relating to "jurisdictional separations." Stated another way, while §220 did not preempt state flexibility §221 *is* preemptive and binding on the states, even for intrastate purposes.[7] The Supreme Court hearkened back to *Smith* as support for this differing outcome. *Louisiana PSC*, 476 U.S. 355 at 378-379 (*citing Smith*, 282 U.S. 133 at 159). The Ninth Circuit expressly so ruled in *Hawaiian Tel. Co. v. Pub. Utils. Comm'n*, 827 F.2d 1264, 1276 (9th Cir. 1987) ("Thus, it is only *after* a uniform separations formula has been applied that a state's independent

[7] This differing outcome is both logical and practical. A different depreciation schedule or capitalization rather than expensing does not threaten or preclude ultimate cost recovery. It merely affects the manner and timing of recovery. On the other hand, "separations" treatment that does not sum to 100% from both jurisdictions would necessarily lead to over-recovery or under-recovery to the detriment of consumers in the former instance and the carrier in the latter. The FCC ago recognized the importance of uniform separations treatment. *See American Telephone & Telegraph Co. & Associated Bell System Cos*., 9 FCC 2d 30, 90-91 (1967):

> ...a fundamental principle to be observed in making jurisdictional separations is the need for uniformity in the procedures applied by both Federal and State authorities for ratemaking purposes. We subscribe fully to this objective, as we have in the past. Such uniformity obviates the danger that certain amounts of plant investment and expenses may be assigned to more than one jurisdiction to the detriment of ratepayers. Equally important, it obviates the risk that certain amounts of plant and expenses will be recognized in neither jurisdiction, to the economic detriment of the company and its owners.

depreciation rule for intrastate ratemaking can be protected from federal preemption."). As a consequence, the FCC's <u>separations</u> rules "bind and control state regulatory bodies," *Hawaiian Tel.*, *supra* at 1275, and "affect state ratemaking authority to the extent such rules apply to the telephone companies within their jurisdiction." *Crockett Tel. Co. v. FCC*, 963 F.2d 1564, 1567 (D.C. Cir. 1992). *See also* id at 1573.[8] The FCC has also adopted this view. "[S]eparations procedures are binding on carriers, the states, and ourselves." *American Telephone & Telegraph Co. (Manual and Procedures for Allocation of Costs)*, 84 FCC 2d 384, 391 (1981), *aff'd sub nom. MCI Telecommunications Corp. v. FCC*, 675 F.2d 408 (D.C. Cir. 1982).

The significant changes to the Communications Act wrought by the Omnibus Budget Reconciliation Act of 1993 and Telecommunications Act of 1996 punched some holes in the jurisdictional fence. They allowed the FCC to arrogate more control to itself and thereby derogate some state authority over purely intrastate matters. *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 380 (1999). It also took the "surpassing strange" step of delegating initial determinations regarding some interstate matters to state commissions. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd

---

[8] "*Hawaiian Telephone* merely instructs that when the Commission has prescribed an applicable separation methodology, states are not free to ignore it."

15,499, ¶ 84 (1996), *vacated in part on other grounds, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part*, 525 U.S. 366, 378 n. 6 (1999).

The Commission can, under the proper circumstances, preempt state action pursuant to the "forbearance" authority in 47 U.S.C. §§160 and in order to remove state level barriers to entry under 47 U.S.C. §253. *See also e.g.*, 47 U.S.C. §332(c)(1)(A), (c)(3). These changes did not directly overrule, and indeed tend to reaffirm, the previous judicial gloss holding that the states are bound by the Commission's separations rules.

At least this is how it used to work, and Petitioners contend should and must still work for so long as state or federal rates depend on embedded costs. The Commission's interest and reliance on cost accounting, however, has waned over recent years. The FCC has taken action – including under §160 – that it claims renders separations and cost accounting increasingly "irrelevant," unnecessary and no longer useful, at least for interstate purposes:

> 16. Over the course of the last decade, the jurisdictional separations rules have become irrelevant to the carriers that provide most Americans with telecommunications services. The separations rules were never applicable to wireless carriers. In 2008, the Commission granted price cap carriers forbearance from the separations rules; and recently the Commission extended this forbearance to rate-of-return carriers that receive fixed or model-based high-cost universal service support (fixed support carriers) and that elect incentive regulation for their business data services. As a result, by the middle of next year, the separations rules will apply only to rate-of-return carriers serving about 800 study areas.

> 17. Even for the carriers that remain subject to the separations rules, separations results have only limited applicability because of recent reforms by the Commission. As part of comprehensive reform and modernization of the universal service and intercarrier compensation systems, the Commission adopted rate caps (including a transition to bill-and-keep for certain rate elements) for switched access services for rate-of-return carriers, thereby severing the relationship between costs and switched access rates. In addition, in 2016, the Commission gave rate-of-return carriers the option of receiving high-cost universal service support based on the Alternative Connect America Cost Model (A CAM). More than 200 carriers opted to receive A CAM support, which eliminated the need for those carriers to perform cost studies that required jurisdictional separations to quantify the amount of high-cost support for their common line offerings. Also as part of universal service reform, the Commission established rules to provide support for loop costs associated with broadband-only services offered by rate-of-return carriers.
>
> 18. As a result of these reforms, the Commission currently uses separations results only for carriers subject to rate-of-return regulation and only for the following limited purposes of calculating: (a) business data services rates; (b) the charge assessed on residential and business lines, known as a subscriber line charge, allowing carriers to recover part of the costs of providing access to the telecommunications network; (c) the rate for Consumer Broadband-Only Loop service; and (d) the interstate common line and Consumer Broadband-Only Loop support for non-fixed support carriers. The administrator of the universal service support program, the Universal Service Administrative Company (USAC), also uses separations categorization results for calculating high-cost loop support for certain non-fixed support carriers, but without applying jurisdictional allocations. States also use separations results to determine the amount of intrastate universal service support and to calculate regulatory fees, and some states perform rate-of-return ratemaking using intrastate costs.

Freeze Order ¶¶16-18 (notes omitted).

The Commission obviously believes that "cost accounting" (including separations) should be consigned to the dustbin of regulatory history. But at the

same time it has not – at least so far – decided to completely let go of its authority to make binding determinations over assignment of telecommunications carriers costs' to each side of the fence. It has not yet freed the states to do their own separations thing.

Each time the FCC has granted forbearance from enforcement of the separations rules for one or more carriers it has expressly noted that the states retain the right to obtain cost information, classify costs and set rates. When states rely on costs to establish or review rates they can demand "separated" cost information, even if the carrier has been bestowed forbearance from enforcement of the separations rules for interstate regulatory purposes. *See Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160 From Enforcement of Certain of the Commission's Cost Assignment Rules*; *Petition of BellSouth Telecommunications, Inc. for Forbearance Under 47 U.S.C. § 160 From Enforcement of Certain of the Commission's Cost Assignment Rules*, 23 FCC Rcd 7302, 7322, ¶33 (2008); *Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering et al.*, 23 FCC Rcd 13647, 13665, ¶31 (2008); *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Certain Legacy Telecommunications Regulations et al.*, 28 FCC Rcd 7627, 7646-54, ¶49 and n. 154 (2013), *pet. for rev. denied sub nom. Verizon v. FCC,* 770 F.3d 961 (D.C. Cir. 2014).

The forbearance actions freed the grantee carriers and the FCC from "enforcement." But the states are still bound by the separation methods and resulting assignments, even for "price cap carriers" that have won forbearance from the cost accounting rules for interstate purposes.[9] The FCC's forbearance orders do not allow the states to devise their own separations methods for any carrier that has received forbearance or operates under interstate price caps. They are still shackled with current "frozen" separations for intrastate ratemaking purposes for all carriers that have interstate operations.

The *Freeze Order* wildly understates the scope and importance of the separations rules on both interstate and interstate telecommunications. *See, e.g.*, ¶16 ("as a result, by the middle of next year, the separations rules will apply only to rate-of-return carriers serving only about 800 study areas"); ¶28 ("we agree that the separations rules are irrelevant to price cap carriers). Note 65 (contained in ¶24, which directly addresses Petitioners' arguments before the agency) asserts that

---

[9] It is true that "[a] State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a)." 47 U.S.C. §160(e). But this does not mean the forbearance orders unshackled the states to the point any one of them can unilaterally devise its own method to identify jurisdictionally intrastate costs. To the contrary. "[T]he absence of any Federal rule defining the appropriate period for actual use measurements does not automatically free the States to roam unfettered across the separations terrain. ... the present absence of specific Federal rules regarding time periods for actual use measurements does not clear the path for unilateral State actions" *In the Matter of Establishment of Interstate Toll Settlements and Jurisdictional Separations Requiring the Use of Seven Calendar Day Studies by the Florida Public Service Commission*, 93 FCC2d 1287, 1298-1299, ¶¶25, 26 (FCC 1983).

"[b]ecause our separations rules do not apply to price cap carriers, expiration or extension of the freeze will not affect State or federal treatment of price cap carriers." Paragraph 4 suggests "that, in the short term, the Joint Board focus on how best to amend the separations rules to recognize that they impact only rate-of-return carriers and on whether any other separations rules or recordkeeping requirements can be modified or eliminated in light of that limited application."

The Commission's assertion that the separations rules are "irrelevant" and have little continuing import is simply not true, even for price-cap carriers. If the FCC really believed this claim it would have withdrawn the referral to the Joint Board on Separations and instead used the biennial review process in 47 U.S.C. 161 to get rid of these purportedly unnecessary legacy relics. They did not; instead they extended the "separations freeze," maintained the referral and asked the Joint Board to keep working on the "extremely complex" issues involved in "comprehensive" "separations reform." *Freeze Order* ¶¶8-9, 14, 41-59.

The finding that the separations rules only impact a few small carriers is similarly incorrect, as is evident from the words contained in the amended separations rules. These rules on their face still expressly apply to both price cap carriers and rate of return carriers. A large number of the specific separations rules amended by the *Freeze Order* changed "June 30, 2014" or "December 31, 2018" to "December 31, 2024"but they still contain express language controlling price cap

carriers' separations obligations. The best example is the one quoted in full by the *Freeze Order* on page 22. But many others still do as well. A short and non-exhaustive list includes 47 C.F.R. §§36.3(b), 36.123(a)(5), 36.124(c), 36.125(h), 36.126(b)(6), 36.141(c) and 36.154(g).

It is true the "price cap" carriers that have received forbearance no longer have to abide by these rules on the *interstate* side, but Petitioners' point is the separations rules still operate to determine the carrier's intrastate costs state commissions must use to establish intrastate rates, and therefore the intrastate rates consumers must pay in those states where costs still matter. That is because – just as the Commission recognized in the 1981 *AT&T* separations case affirmed by this Court in *MCI Telecommunications Corp.*, *supra* – the separations rules independently bind each of the carriers, the FCC and each state. The Ninth Circuit in *Hawaiian* and this Court in *Crockett* also both directly ruled that the states are bound by the separations rules. The FCC forbearance orders gave relief to the carriers for interstate purposes but none expressly or impliedly let the states loose to do their own separations thing.

Consider, for example,47 C.F.R. 36.154 (a), (c) and (g). Rule 36.154(c) requires that 25% of the "costs assigned to "Subcategory 1.3—Subscriber or common lines that are jointly used for local exchange service and exchange access for state and interstate interexchange services" "shall be allocated to the interstate

jurisdiction." The inverse or residue that falls to intrastate under this rule is 75%. *See Freeze Order* ¶6, n.12.

Suppose a state commission that retains cost of service ratemaking authority over a price-cap carrier wants to use only 25% (rather than the current 75%) of common line costs for intrastate ratemaking purposes, in direct defiance of Rule 36.154. Petitioners strongly suspect that the affected price-cap carrier would immediately claim confiscation and preemption notwithstanding the fact it received forbearance from enforcement of this very rule from the FCC. The carrier would have a point: the result of any such state commission separations decision would be that 50% of the carrier's regulated common line costs could not be recovered in rates from either jurisdiction. Petitioners can fairly predict that the price-cap carrier would fiercely cling to its interstate forbearance cake but also take vigorous action to ensure that intrastate consumers could not partake too.

The *Freeze Order* obviously has a direct impact on intrastate rates and the rates paid by intrastate consumers. It also has a direct and discernible impact on competition and competitive alternatives. This is so for consumers interacting with price cap carriers or rate of return carriers and even consumers that obtain or want to obtain service from alternative providers that are not an incumbent or its affiliate. Consumers that pay interstate rates are also affected, and negatively so.

This is not some minor thing; it involves billions of dollars in consumer-supplied funds. Absent action by this court consumers will have to suffer in the cold of the "freeze" for another six years. In fact, it is about to get even more frigid. The industry is poised to embark on a brand new round of massive investment to get ready for "5G" and this involves technological changes that will even more severely skew present misallocations and lead to even higher intrastate local rates even though most of the additional cost will support jurisdictionally interstate BDS services used by CMRS, CMDS, video and information service providers. The freeze extension provides cold comfort to intrastate basic local consumers. It could well be the worst possible outcome for them. Cooper Affidavit ¶7.O.

V. THE FREEZE ORDERIMPOSED SEVERAL DISTINCT INJURIES ON PETITIONERS

A. The Commission Denied the Petitioners' Requests.

The Petitioners filed comments below identifying their concerns and laying out the factual basis for those concerns. Petitioners provided requests and recommendations for substantive action. The FCC expressly refused the some of the requested relief. The remaining requests were implicitly denied because the final rule action was entirely incompatible with them.

Petitioners expressly opposed any extension, especially one that involved several years. They contended that the current language in the rule should not be

changed and the Freeze should end. Petitioners suggested various short-term steps to mitigate the compliance burdens that would flow from expiration. Specifically, Petitioners indicated that representative benchmarks could be used on an interim basis. In the alternative, Petitioners suggested that the current frozen category relationships could be replaced with new revenue-based percentages. Any of these approaches would take material steps toward reducing the current extreme mismatches because they would lead to separated cost results that more closely resemble actual relative jurisdictional use. The carriers would not be forced to conduct rushed full-blown studies, and the Joint Board could – hopefully – complete its recommendation on overall reform in short order. *Freeze Order* ¶¶20 and 24 (and their associated footnotes) mischaracterized but still expressly rejected these Petitioner requests, and incorrectly asserted that Petitioners' "failed to explain how ending the freeze would alleviate any such misallocation."

The Petitioners also offered another "solution" that would have removed any need for separations at all, and thus moot the issue of whether to end or extend the freeze. Specifically, they suggested that all reliance on embedded costs and separations be entirely eliminated. Petitioners advocated a move to exclusively incremental cost pricing for interstate services and a declaration that the states were no longer bound by separations so they too could employ incremental costs

alone. This *Freeze Order* did not mention this alternative solution, but the action taken is wholly inconsistent with it.

Submitting rulemaking comments with substantive requests and then suffering an adverse decision on those requests confers "party aggrieved" status. 5 U.S.C. §702; 28 U.S.C. §2344; *ACA Int'l v. FCC*, 885 F.3d 687, 711-12 (D.C. Cir. 2018); *Prof'l Reactor Operator Soc'y v. U.S. Nuclear Regulatory Comm'n*, 939 F.2d 1047, 1049 n.1 (D.C. Cir. 1991); *Water Transp. Asso. v. Interstate Commerce Commerce*, 819 F.2d 1189, 1192-1194 (1987). Thus it is clear that Petitioners meet the "aggrieved" standing test prong.

B. The Commission is Wrong: the Separations Freeze Does Apply to Price-Cap Carriers for Some Purposes; Ending the Freeze Would Alleviate Current Misallocations

The *Freeze Order* repeatedly contends that its action did not impact price cap carriers since they had received forbearance from enforcement of the separations rules. It is likely the Commission will assert on review that since Petitioners do not purchase any service from the carriers that were affected they lack standing to contest the agency action. Petitioners strongly disagree. Although these disputes go to the merits, they also bear on "harm" and "redressability" for standing purposes, so Petitioners will address them now.

Petitioners already explained above that the price-cap carriers who enjoy forbearance from separations for interstate purposes are still governed by them in

those states that still rely on costs as a basis to assess the rate reasonableness of the intrastate services regulated by the relevant state commission. The Commission tries to deny this is so, but *Freeze Order* ¶18 ultimately admits there is still some continuing impact on the intrastate side.

Freeze Order ¶24 implies that ending the freeze would have not "alleviate any misallocation" but that is not correct. "Ending the freeze" would manifest through expiration and effective repealer of 47 C.F.R. §36.3 and each of the other sections that "froze" assignments to their December 21, 2000 category relationships. All carriers would be required to "update their category relationships" so as to "more closely align their business data services and Consumer Broadband-Only Loop service rates with the underlying costs of these services." The Commission found that doing so would "encourage [] carriers to expand and upgrade their networks, thus enhancing their capability to provide these services" and "enable these carriers to take better advantage of universal service programs that promote broadband growth." *Freeze Order* ¶¶31-32.

The difference between the *Freeze Order* result and Petitioners' result (including Petitioner's interim recommendations) is that *all carriers* would have to change their current frozen category relationships rather than just those that perceive a private individual benefit. This lead to significant steps toward ending the current "residual" intrastate cost dumping. For *all carriers*. Costs would begin

to move from intrastate to interstate, and then between interstate service categories. They would start to go where they actually belong. Goldstein Affidavit ¶6; Cooper Affidavit ¶¶7.M, 7.O, 8.

C. Maintaining the Freeze Does Harm the Petitioners Because it Impacts the Rates They Pay for Communications Service

The Cooper, Goldstein and Kushnick Affidavits demonstrate several past, current and ongoing harms from the Freeze. The FCC's decision to extend the Freeze for another six years will repeat and magnify the harms. As already explained, jurisdictional separations dictate how regulated carriers "separate" their costs between jurisdictions. The separated costs are then distributed to discrete jurisdictional services. *Freeze Order* ¶18 admits that separated costs are still used for several important purposes:

> ... the Commission currently uses separations results only for carriers subject to rate-of-return regulation and only for the following limited purposes of calculating: (a) business data services rates; (b) the charge assessed on residential and business lines, known as a subscriber line charge, allowing carriers to recover part of the costs of providing access to the telecommunications network; (c) the rate for Consumer Broadband-Only Loop service; and (d) the interstate common line and Consumer Broadband-Only Loop support for non-fixed support carriers. The administrator of the universal service support program, the Universal Service Administrative Company (USAC), also uses separations categorization results for calculating high-cost loop support for certain non-fixed support carriers, but without applying jurisdictional allocations. States also use separations results to determine the amount of intrastate universal service support and to calculate regulatory fees, and some states perform rate-of-return ratemaking using intrastate costs.

(notes omitted)

The Commission's claim that separations only affects prices and practices of "rate of return" carriers is incorrect. But even if this contention is accepted for purposes of argument the Freeze still impacts all communications consumers, even those that do not directly purchase service at retail from an affected rate of return carrier. That is because all IXCs and wireless providers must pay certain wholesale rates that still rely on separated interstate costs, and the providers pass the wholesale costs on to their own retail customers. For example, a consumer that makes or receives long distance calls using either wireline or wireless service will ultimately be impacted by the prices their long distance provider or CMRS provider must pay rate of return carriers for the business data service and interstate common line switched access rates the IXC or CMRS provider uses to build out their network or originate and terminate individual calls.

As noted by the Commission, separations data is also used for both state and interstate USF purposes. Every telecommunications provider must "contribute" to the interstate USF program and the state USF program if there is one. *See* 47 C.F.R. §54.709. The rules then allow each "contributor" to recover its pro-rata "contribution" amount from each end user via a line item on the customer's bill. 47 C.F.R. §54.712. This means <u>every</u> telecommunications consumer – even those served by non-regulated entities – is an indirect contributor to the program and supplies the money that goes to carriers that receive USF support. Urban

consumers of all stripes supply monies that are then given to rural and high-cost carriers throughout the country, including "non-fixed support carriers" that receive high-cost loop support.

The Commission also admits that separated costs are used for state USF programs. State USF programs are similar to the federal program, in that consumers of intrastate services supply the funds that are used by the state program via a "pass-through" line item on their monthly bill. The state program then distributes the funds to support various carriers that provide rural and high-cost communications services and networks. As the Commission notes in *Freeze Order* ¶18, the state program support amounts are determined using reported intrastate separated costs. Thus, a Verizon end user in New York pays money that is redistributed to other carriers in New York. Every end user in a state that has its own separate USF program is therefore directly impacted by separations, and the Freeze.

CONCLUSION

Each Petitioner has suffered one or more injuries in fact that were caused and by the *Freeze Order*. The injuries will be magnified when the industry begins the "investment" for "5G." The injuries are redressable. The Petitioners are "aggrieved" and within the zone of interests sought to be protected by the regulatory regime in issue. The Petitioners have standing to pursue this matter.

Respectfully Submitted,

/s/ W. Scott McCollough
W. Scott McCollough
McCollough Law Firm, P.C.
2290 Gatlin Creek Rd.
Dripping Springs, TX 78620
Texas Bar. No. 13434100
DC Circuit Bar No. 53446
wsmc@dotlaw.biz
TEL: 512.888.1112
Attorney for Petitioners

Dated: May 20, 2019

CERTIFICATE OF SERVICE

I, W. Scott McCollough, hereby certify that on May 20, 2019, I electronically filed this Document with the Clerk of the Court for the United States Court of the Appeals for the District of Columbia Circuit by using the CM/ECF system.

/s/ *W. Scott McCollough*