ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 19-1085

THE IRREGULATORS, ET AL.,

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

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

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

All parties and amici appearing in this Court are listed in the opening Brief of Petitioner.

2. Rulings under review.

The order under review is *Jurisdictional Separations and Referral to the Federal-State Joint Board*, 33 FCC Rcd 12743 (2018) (JA__) (*"Order"*), released on December 17, 2018.

3. Related cases.

Respondents are not aware of any other related cases.

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

GLOSSARY

Joint Board	The Federal-State Joint Board on Jurisdictional Separations
NPRM	*Jurisdictional Separations and Referral to the Federal-State Joint Board*, 33 FCC Rcd 7261 (2018) (JA__)
Order	*Jurisdictional Separations and Referral to the Federal-State Joint Board*, 33 FCC Rcd 12743 (2018) (JA__)
Part 36 rules	The FCC's separations rules, 47 C.F.R. § 36.1 *et seq.*
Price cap carrier	A carrier whose rates must be at or below a cap set by the regulator, as opposed to a rate-of-return carrier
Rate-of-return carrier	A carrier whose rates are set by a regulator based directly on the carrier's costs, including a set rate for profit
Separations	A procedure that determines what proportion of jointly used plant should be allocated to the interstate and intrastate jurisdictions for ratemaking purposes
Separations rules	The FCC's rules for determining jurisdictional separations, also known as the Part 36 rules
USF	Universal Service Fund; a federal or state fund that subsidizes service to some groups, including customers who are expensive to serve, in order to promote service to all customers
VoIP	Voice over Internet Protocol; telephony carried over Internet connections

JURISDICTION

The *Order* on review was released on December 17, 2018. *Jurisdictional Separations and Referral to the Federal-State Joint Board*, 33 FCC Rcd 12743 (*"Order"*). A summary of the *Order* appeared in the Federal Register on February 15, 2019. *Jurisdictional Separations and Referral to the Federal-State Joint Board*, 84 Fed. Reg. 4351-01. Petitioners timely filed their petition for review on April 18, 2019. This Court has jurisdiction to review final orders of the FCC under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342. However, as explained below, the Court lacks jurisdiction here because Petitioners have not shown that they have Article III standing.

QUESTIONS PRESENTED

1. Whether Petitioners have established standing based only on their status as customers of "price cap" telecommunications carriers, which are not subject to the FCC's separations rules at issue in this proceeding.

2. Whether the FCC decision to extend the freeze of its separations rules for up to six years was arbitrary, capricious, unsupported by evidence, or otherwise contrary to law.

STATUTES AND REGULATIONS

The relevant statutes and regulations are attached in an addendum to this brief.

COUNTERSTATEMENT

A. The Role of Costs in Rate-of-Return and Price Cap Regulation

For most of the prior century, "incumbent local telephone companies were monopolies subject to rate-of-return rate regulation at both the federal and state levels." *Petition of AT&T Inc. For Forbearance Under 47 U.S.C. § 160 From Enforcement of Certain of the Commission's Cost Assignment Rules*, 23 FCC Rcd 7302, 7303 ¶ 2 (2008) (*"AT&T Forbearance Order"*). In rate-of-return regulation, a regulator sets rates based directly on a carrier's costs of providing regulated communications services. "Firms so regulated can charge rates no higher than necessary to obtain sufficient revenue to cover their costs and achieve a fair return on equity." *Nat'l Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 177-78 (D.C. Cir. 1993) (*"NRTA"*). Under rate-of-return regulation, costs and rates are linked: when a carrier's costs of providing service rise, so do its rates; conversely, when costs decline, rates decrease.

The Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* ("the Act"), directs the FCC to ensure that rates for *inter*state communications services are just, reasonable, and not unreasonably discriminatory. 47 U.S.C. §§ 203(b), 202(a). The Act, in turn, leaves regulation of rates for *intra*state services to state regulatory commissions rather than the FCC. 47 U.S.C. § 152(b). In the era of cost-based, rate-of-return ratesetting, state and federal regulators needed detailed

information about carriers' costs in order to set rates. Section 220 of the Act therefore directs the Commission to establish a uniform system of accounts to record costs and revenues, 47 U.S.C. § 220(a)(2), and the FCC exercised this authority to create "rules to assign or allocate the common costs to build and maintain the network, and the revenues derived from the array of services offered over the network." *AT&T Forbearance Order* ¶ 2.

Over approximately the past three decades, however, cost-based rate-of-return regulation has fallen into disfavor at both the federal and state levels. Beginning in 1990, the FCC largely eschewed rate-of-return regulation for interstate services and began to regulate prices within its jurisdiction for some carriers through "price cap" regulation. *NRTA*, 988 F.2d at 178. "Under a price cap scheme, the regulator sets a maximum price, and the firm selects rates at or below the cap." *Id.* This system offers several advantages. "Because cost savings do not trigger reductions in the cap, the firm has a powerful profit incentive to reduce costs. Nor is there any reward for shifting costs from unregulated activities into regulated ones, for the higher costs will not produce higher legal ceiling prices." *Id.* Finally, and importantly, "the regulator has less need to collect detailed cost data from the regulated firms or to devise formulae for allocating the costs among the firm's services." *Id.*

The FCC first applied price cap regulation to AT&T; it then extended it to

other large carriers and made it optional for smaller carriers. *Id.* at 178-79. By 2017, of the lines subject to price cap or rate-of-return regulation, 93.1% were subject to price cap regulation. *See* Federal and State Staff for the Federal-State Joint Board on Universal Service, *2018 Universal Service Monitoring Report* Table 6.13 ("*2018 Universal Service Report*").[1] (Wireless phone lines, which represent a substantial majority of end-user connections, are subject to no direct federal price regulation.)

A similar shift has taken place in the states for intrastate regulation. AT&T reports, for example, that all of its intrastate telephone services are under price cap regulation by the relevant state regulatory bodies, if the prices of those services are regulated at all. *AT&T Forbearance Order* ¶ 9. Similarly, by 2006, New York State had switched Verizon and other wireline carriers to price cap regulation for basic services. *See* N.Y. Pub. Serv. Comm'n, *Motion of the Commission to Examine Issues Related to the Transition to Intermodal Competition in the*

[1] *Available at* https://docs.fcc.gov/public/attachments/DOC-357769A1.pdf. The report does not directly list a percentage; it reports that approximately 49.5 million of 53 million "switched access" and Voice over Internet-Protocol lines from incumbent carriers are subject to price-cap regulation.

Provision of Telecommunications Services 57 (No. 05-C-0616, rel. April 11, 2006).[2]

B. Jurisdictional Separations

As noted above, the Act "establishes…a system of dual state and federal regulation over telephone service," *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 357 (1986), dividing the jurisdiction between intrastate and interstate service. In practice, "the realities of technology and economics belie such a clean parceling of responsibility" because "virtually all telephone plant that is used to provide intrastate service is also used to provide interstate service, and is thus conceivably within the jurisdiction of both state and federal authorities." *Louisiana PSC*, 476 U.S. at 357; *see Jurisdictional Separations and Referral to the Federal-State Joint Board*, 33 FCC Rcd 7261, 7262 ¶ 3 (2018) (JA__) (*"NPRM"*) ("Rate-of-return incumbent [local carriers] use their networks and other resources to provide both interstate and intrastate services.").

In order to "determine[] what proportion of jointly used plant should be allocated to the interstate and intrastate jurisdictions for ratemaking purposes," regulators developed a procedure known as "jurisdictional separations." *MCI*

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[2] *Available at* http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={DE5DAC8C-CB50-4CAE-90BE-A5A56DB6DE99}.

Telecomms. Corp. v. FCC, 750 F.2d 135, 137 (D.C. Cir. 1984). Section 221 of the Act gives the FCC the power to set separations, declaring that "the Commission may classify the property of any [telecommunications] carrier used for wire telephone communication, and determine what property of said carrier shall be considered as used in interstate or foreign telephone toll service." 47 U.S.C. § 221(c).

Section 221 permits, rather than requires, the Commission to set separations calculations, 47 U.S.C. § 221; but if the Commission does so, "FCC separations orders control the state regulatory bodies, because a nationwide telecommunications system with dual intrastate and interstate rates can operate effectively only if one set of separations procedures is employed" so that the total combined state and federal costs equal 100% of the carriers' costs. *Hawaiian Tel. Co. v. Pub. Utils. Comm'n*, 827 F.2d 1264, 1275 (9th Cir. 1987). Section 410(c) of the Act also directs the FCC to refer any jurisdictional separations rulemaking to a Federal-State Joint Board, made of up FCC and State regulators. 47 U.S.C. § 410(c). The Joint Board is charged with preparing "a recommended decision for prompt review and action" by the FCC. *Id.*

The Commission's jurisdictional separations rules—also referred to as "Part 36 rules" after their place in the Commission's rules, 47 C.F.R. Part 36—"were designed to ensure that rate-of-return incumbent [carriers] apportion the costs of

their regulated services between the interstate or intrastate jurisdictions in a manner that reflects the relative use of their networks to provide interstate or intrastate services." *NPRM* ¶ 3 (JA__). Carriers subject to these rules perform separations calculations in two steps relevant here: first, they map regulated costs from the FCC's uniform set of accounts over to Part 36 "cost categories." *Order* ¶ 6. For example, the FCC's uniform system has several accounts for cable and wire facilities investments, like poles, aerial cable, and underground cable. *See* 47 C.F.R. §§ 32.2410-32.2441. The separations rules explain how to map these to four different separations categories, such as "exchange line cable and wire facilities," often known as loop costs. *See* 47 C.F.R. §§ 36.153 & 36.154. In the second step of separations calculations, carriers calculate how much of each separations cost category is allotted to intrastate versus interstate jurisdiction. *Id.* For example, the Part 36 "loop costs" category is allocated by a fixed allocator, with 25% of the loop costs to the interstate jurisdiction and 75% of the costs to the intrastate jurisdiction. *See* 47 C.F.R. § 36.154(c).

Many of the separations categories and allocators in the Part 36 rules are not simple fixed mappings and percentages, but rather are based on variable factors, such as the percentage of time that equipment is used on tasks associated with interstate versus intrastate calls. *See, e.g.*, 47 C.F.R. § 36.123(b) (cost of one type of equipment apportioned based on "relative number of weighted standard work

seconds handled"). Before the separations formulas were "frozen," as described below, carriers made these calculations through elaborate annual cost studies. *See Jurisdictional Separations and Referral to Federal-State Joint Board*, 16 FCC Rcd 11382, 11390 ¶ 14 (2001) (*"2001 Freeze Order"*).

C. Separations Freeze

As the millennium approached, the Part 36 separations rules were increasingly out of date. The rules, "which [had] been largely unmodified for the past several decades, [were] developed when local telephone service was provided largely through circuit-switched networks operated by companies with monopoly power in the local market, with clear delineation between interstate and intrastate services." *2001 Freeze Order* ¶ 1.[3] However, as a result of increasing competition and technological change—including the growth of the Internet— the "telecommunications landscape ha[d] changed significantly," and the technology in use was "vastly different from the network and services used to define the cost categories appearing in the Commission's…Part 36 rules." *Id.* ¶¶ 1, 5.

In 2000, the Joint Board recommended an interim "freeze" of the separations rules "to provide simplicity and stability to the separations process while the

[3] "Circuit-switched" telecommunications technology was used by the Bell companies and their successors for many years. Modern communications, including the Internet and many phone calls, increasingly rely instead on a distinct "packet-switched" technology. *See Order* ¶¶ 1-2 (JA__).

Commission and the Joint Board continue to review comprehensive reform in light of legislative, technological, and market changes." *Id.* ¶ 7. In 2001, after notice and comment, the FCC adopted this recommendation and froze most of the Part 36 rules for five years, or until the Commission completed comprehensive separations reform, whichever came first. *Id.* ¶ 9.

Under the freeze, price cap carriers would calculate the category relationships and allocation factors, essentially performing the annual separations study once, and then freeze those category relationships and allocation factors in place for a set period of time. *Id.* ¶ 11. Rate-of-return carriers were required to freeze their allocation factors and had the option to freeze their category relationships. *Id.* The Commission found several benefits to the freeze. First, it would provide "stability" and "regulatory certainty" "by minimizing any cost shift impacts…as a result of circumstances not contemplated by the Commission's current Part 36 rules, such as growth in local competition and new technologies," including the increasing use of these networks for Internet service. *Id.* ¶ 12. Second, it would "reduce the Part 36 administrative burden" on carriers. Carriers would not need to "perform the analyses necessary to categorize annual investment changes for interstate purposes" nor "develop jurisdictional allocation factors for interstate purposes," and instead would carry these categories and factors forward each year. *Id.* ¶ 14.

No party challenged the *2001 Freeze Order* in court. Although the Commission referred separations reform to the Federal-State Joint Board for a recommended decision in 1997, the Joint Board has to date not reached an agreement on a proposal. *Order* ¶ 3 (JA__). In the absence of a recommended decision by the Joint Board, the Commission has extended the freeze several times, so that the same separations categories and allocation factors from the *2001 Freeze Order* are still in place for those carriers that are subject to them. *Id.* Before the *Order* on review, the freeze was due to expire on December 31, 2018. *See Jurisdictional Separations and Referral to the Federal-State Joint Board*, 32 FCC Rcd 4219 (2017).

D. Separations Forbearance for Price Cap Carriers

When the FCC switched AT&T and other carriers from rate-of-return to price cap regulation, it still required the carriers to continue to comply with its cost assignment rules, including the separations rules. *Policy & Rules Concerning Rates for Dominant Carriers*, 4 FCC Rcd 2873, 2896 ¶ 45 (1989); *id.* ¶ 544 ("our decision to implement incentive regulation for AT&T does not require overhaul of the separations rules").

The FCC's first implementation of price cap regulation used data from its cost assignment rules for several functions, such as setting a productivity factor by which rates were to be gradually reduced. In the ensuing decades, however, the

agency simplified its approach, using cost data in fewer and fewer aspects of price cap regulation. *AT&T Forbearance Order* ¶ 19. Thus, in 2007, AT&T petitioned the agency under Section 10 of the Act to forbear from enforcing a number of cost assignment rules, including the separations rules. *See id.*

Section 10 of the Act states that the Commission "shall forbear from applying any regulation or any provision of this chapter to a…carrier" if the Commission determines that the law is not necessary to ensure just and reasonable rates or to protect consumers, and that forbearance is in the public interest. 47 U.S.C. § 160(a). The FCC found these factors satisfied and so forbore from requiring AT&T to comply with the accounting rules in question, including the Part 36 separations rules.

As the agency explained, these rules "were developed in a time when the incumbent [local carriers'] interstate rates and many of their intrastate rates were set under rate-based, cost-of-service regulation. The rules therefore are quite detailed, designed to parallel the level of detail in the cost-of-service calculations that [local carriers] performed to develop their rates for interstate access services." *AT&T Forbearance Order* ¶ 17. By 2007, however, federal and state ratemaking methods had "evolved considerably," especially because "price cap regulation severs the direct link between regulated costs and prices." *Id.* And regarding the separations rules in particular, the Commission explained that "jurisdictional

separations…have reduced significance under price caps because price cap regulation reduces a [carrier's] incentives to allocate costs improperly." *Id.* ¶ 25 (citations and internal quotation marks omitted).

Some commenters argued that the separations rules were still useful to state rate makers, but the Commission found that, because the separations rules were no longer necessary for federal regulation of AT&T, the agency was required to forbear. As the agency explained, it lacked authority "to maintain federal regulatory requirements…in order to maintain regulatory burdens that may produce information helpful to state commissions for intrastate regulatory purposes solely." *Id.* ¶ 32.

As the FCC pointed out, under Section 10(e) of the Act, "[a] State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying." *Id.* ¶ 33 (quoting 47 U.S.C. § 160(e)). However, the Commission made clear that it was not preempting "any state accounting requirements *adopted under state authority*." *Id* (emphasis added). Thus, "[a]lthough states [would] not have authority to enforce the federal Cost Assignment Rules as they apply to AT&T once this relief is effective," the FCC did "not read section 10(e) to prevent states from adopting similar provisions to the extent that they have authority under state law." *Id.* The Commission thus expected that "any states that may rely on the Cost Assignment Rules and resulting data for

state regulatory purposes would assert their jurisdiction to obtain the needed information from AT&T." *Id.*

While this 2007 order applied only to AT&T, by 2017, the Commission had forborne under Section 10 from applying the Part 36 separations rules to all price cap incumbent carriers, under similar logic. *Order* n.20 (JA__). The FCC has recently extended this forbearance to many rate-of-return carriers that have elected certain forms of cost support and price regulation for "business data services." *Order* ¶ 16 (JA__). As a result, the FCC only applies the separations rules to carriers representing approximately 3.1% of wireline and Voice over Internet Protocol (VoIP") phonelines, and only 0.8% of all phone connections, including wireless.[4]

E. *The July 2018 Notice of Proposed Rulemaking*

Before the *Order*, the separations freeze then in effect was set to expire on December 31, 2018. With this deadline looming, and with the Joint Board still unable to reach consensus on a reform proposal, the Commission in July 2018

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[4] As of December 2017, rate-of-return carriers served approximately 3.6 million phone lines. *See 2018 Universal Service Report* at Table 6.13. At that time, all wireline and VoIP carriers provided approximately 116 million phone lines, and wireless carriers provided approximately 340 million connections, for a total of approximately 456 million connections. *See* FCC, Office of Economics and Analytics, *Voice Telephone Services: Status as of December 31, 2017*, 2 & Fig. 1, *available at* https://docs.fcc.gov/public/attachments/DOC-359343A1.pdf. 3.6/116 = 3.1% of phonelines. 3.6/456 = 0.8% of all connections.

issued a Notice of Proposed Rulemaking, seeking comment on a proposal to extend the freeze for another 15 years. *See NPRM* ¶ 2 (JA__). As the Commission explained, because it had granted price cap carriers forbearance from the Part 36 jurisdictional separations rules, "the separations freeze applies only to rate-of-return carriers." *Id.* ¶ 9 (JA__); *see also id.* ¶ 10 (JA__) ("rate-of-return incumbent [local carriers] [are] the only carriers required to comply with the separations rules"). Specifically, all rate-of-return carriers had frozen allocation factors, and those rate-of-return carriers that chose to freeze their category relationships in 2001 also had frozen category relationships, using the relationships from 2000. *Id.* ¶ 9 (JA__). The *NPRM* focused only on whether and how to extend the freeze; it did not seek comment on substantive proposals to reform the separations rules.

Although the State Members of the Joint Board has "filed policy papers setting out options for reform" on which the Commission and the Joint Board have sought comment, the Joint Board still has not recommended comprehensive reforms. *Id.* ¶ 14 (JA__). Indeed, FCC Commissioner Michael O'Rielly, Chairman of the Joint Board, recently observed that "the viewpoints within the Joint Board are so vastly different on this complex issue that finding commonality is not going to [be] possible in the near term." *Id.* ¶ 17 (JA__) (quotation marks omitted). Because comprehensive separations reform before the expiration of the freeze was "highly unlikely," the agency explained that it "must choose between extending the

separations freeze and allowing long-unused separations rules to take effect on January 1, 2019." *Id.*

The FCC therefore proposed extending the freeze for 15 years and "invite[d] comment on this proposal and on the relative costs and benefits of continuing the separations freeze." *Id.* ¶¶ 19-20 (JA__). The Commission cited its finding in a previous freeze extension that "letting the freeze expire and allowing largely outmoded separations rules to be reinstated would impose significant burdens on rate-of-return carriers and create undue instability," "would require substantial training and investment by rural incumbent [local carriers], and could cause significant disruptions in regulated rates, cost recovery, and other operating conditions." *Id.* ¶ 18 (JA__).

F. The *Order* on Review

On December 12, 2018, "consistent with the recommendation of the State members of the Joint Board and the overwhelming consensus among the commenters," the FCC extended the freeze for up to six years (rather than the 15 years proposed in the *NPRM*). *Order* ¶ 20 (JA__). The agency found that this action was in the public interest "so that the Commission and the Joint Board can devote their resources to substantive reform, rather than to extending artificial deadlines." *Id.* ¶ 4 (JA__). As the Commission explained:

> [T]his impending deadline compels us to make a choice between extending the freeze further or allowing long-unused separations rules

> to take effect on January 1, 2019. We find that permitting the freeze to expire would impose significant burdens on rate-of-return carriers that would far exceed the benefits, if any, of requiring those carriers to comply with rules that they have not implemented since 2001.

Id. ¶ 20 (JA__).

The Commission observed that "[o]ver the course of the last decade, the jurisdictional separations rules have become irrelevant to the carriers that provide most Americans with telecommunications services," because they do not apply to price cap carriers, or to VoIP and wireless carriers. *Id.* ¶ 16 (JA__). "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." *Id.* Again, this represents some 3.1% of wireline and VoIP phone lines, and 0.8% of all phone connections including wireless. See above at p. 13.

The FCC agreed with commenters who argued "that rate-of-return carriers, particularly smaller rural carriers, would find it extremely difficult, if not impossible, to perform all of the studies needed for full compliance." *Order* ¶ 21 (JA__). As the Commission explained, performing the studies necessary to calculate categories and allocation factors under the pre-2000 rules is "an arcane science" which carriers had not performed for 17 years, and "carriers would be required to incur substantial training and other costs to reestablish the expertise necessary to perform them." *Id.* ¶ 22 (JA__). Moreover, "reinstating these largely outmoded rules in full measure could produce negative consequences by causing

significant disruptions in carriers' regulated rates, cost recovery, and other operating conditions." *Id.* ¶ 23 (JA__). Because "[t]his expense would hit smaller, rural carriers with limited resources the hardest," the agency could not "justify imposing such a burden on small carriers particularly given that the impact of such traffic factors is continuing to diminish as investment in voice services decreases due to growing deployment of broadband services." *Id. ¶* 22 (JA__).

The FCC "reject[ed] the Irregulators' argument that we should not extend the freeze." *Id.* ¶ 24 (JA__). The agency noted the Irregulators' claim that "the freeze has led 'to improper decision-making at various levels,' with, for example, State governments basing policy on obsolete numbers that over-allocate costs to the intrastate jurisdiction." *Id.* The FCC expressed some skepticism, noting that these "comments appear to focus on State treatment of Verizon's and other price cap carriers' intrastate offerings." *Id.* n.65 (JA__). As the Commission explained, "[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." *Id.*

In any case, the Commission found that the Irregulators "fail[ed] to explain how ending the freeze would alleviate any such misallocation." *Id.*¶ 24 (JA__). Instead of arguing for ending the freeze and resuming cost studies under the old rules—as would presumably occur if the freeze expired—the Irregulators instead

briefly "propose[d] two options for completely revamping the jurisdictional separations process." *Id.* Specifically, the Irregulators contended that "instead of restarting 'the entire study process' the Commission or the Joint Board either 'should undertake a study to arrive at a more accurate representative set of numbers, which would become a new benchmark for state and federal use' or 'reset the separations percentages based upon the actual percentages of revenue generated in each jurisdiction.'" *Id.* n.66 (JA__) (quoting Irregulators Comments at 8 (JA__)). The Irregulators' comments set out these general proposals in less than a page, and no other party commented on them. *See* Irregulators Comments at 8 (JA__). The FCC explained that these suggestions for new mechanisms to set separations, while potentially useful "to the Joint Board's consideration of comprehensive separations reform," were "beyond the scope of the question before us today of whether we should extend the separations freeze before it expires at the end of this year." *Order* ¶ 24 (JA__).

The Commission adopted the suggestion of the State members of the Joint Board to extend the freeze by six years rather than the 15-year extension proposed in the *NPRM*, finding that this "balances the competing considerations…better than a longer or shorter extension period." *Id.* ¶ 25 (JA__). And, "because previous attempts at comprehensive reform have failed," the agency asked the Joint Board to approach the challenge "incrementally," first focusing "on how best to amend

the separations rules to recognize that they impact only rate-of-return carriers" and making any possible modification or simplifications in that light. *Id.* ¶ 4 (JA__). The Commission explained that these steps would "reduce the Joint Board's work over the longer term as it seeks to replace the existing jurisdictional separations process." *Id.*

Finally, the FCC allowed "rate-of-return carriers operating under the category relationships freeze the opportunity to opt out of it and update their category relationships," which could allow them to "better recover network upgrade costs from ratepayers that benefit from those upgrades" and to "take greater advantage of universal service programs that incent broadband deployment." *Id.* ¶ 29 (JA__).

SUMMARY OF ARGUMENT

Despite a long-pending referral from the FCC to the Federal-State Joint Board to develop a proposal for comprehensive reform of the FCC's jurisdictional separations rules, the Joint Board has been unable to produce a recommended decision for FCC consideration, as contemplated by Section 410(c) of the Communications Act. Given that reality, and facing the impending expiration of the rule freeze, the FCC confronted a choice between extending the freeze or allowing it to expire—which would require small, rural carriers to expend substantial money and resources to comply with outdated separations rules. The

Commission opted to extend the freeze in order to allow the Joint Board to continue its deliberations in a more incremental, focused manner. In these circumstances, the FCC's decision was reasonable and reasonably explained.

Petitioners ("The Irregulators") challenge the *Order*, but their arguments on both standing and the merits suffer from the same flaws: They never substantiate their claim that the separations rules harm consumers, and they never explain how letting the freeze expire would help.

I.A. As a threshold matter, the Court should dismiss the petition for review for want of jurisdiction because the Petitioners have failed to establish Article III standing to challenge the *Order*. The Irregulators lack standing because they have not demonstrated that the *Order* has injured them, or that the grant of their petition for review will redress any purported injury. Petitioners are not carriers subject to the FCC's separations rules. Instead, they base their standing on their status as customers. But they are only customers of either interstate price cap carriers—which are not subject to the separations rules because the FCC forbore from requiring these carriers to comply with the rules—or other service providers that were never subject to the separations rules. There is therefore no legal link between the freeze at issue in the *Order* and Petitioners' status as telecommunications customers.

The Irregulators claim that the freeze raises their intrastate rates directly because state regulators are in some way bound by the FCC's separations rules for interstate regulation, despite the FCC's forbearance from applying the rules to price cap carriers, but they never explain how this is so. And that claim is directly contrary to the forbearance provision in the Communications Act, the FCC's own understanding of its forbearance, and common sense. They also claim that the freeze raises their rates indirectly by raising the costs of small rate-of-return carriers, who then charge inflated wholesale costs to the Petitioners' long distance and wireless providers. This attenuated chain of logic is insufficient to demonstrate that Petitioners have suffered an injury traceable to the *Order*, especially given that such a small fraction of phone connections are subject to rate-of-return regulation. Moreover, Petitioners' price cap carriers are not required to set their rates directly on costs, and Petitioners have not shown a substantial likelihood that any purported change in those costs would lead directly to lowered rates. The Irregulators have thus failed to show that the rates they pay are actually affected by the *Order*.

I.B. The Irregulators also fail to show that this Court can redress any purported injury. The *Order* simply kept in place the freeze of the separations rules. If this Court were to vacate the *Order*, the freeze would expire and those small rate-of-return carriers that are still subject to the rules would be forced to carry out elaborate cost studies to comply with the outdated rules. Even Petitioners

do not contend that would be a good outcome. They instead urge that the Commission should "revise the separations rules." Br. 76. But that option was never proposed in the *NPRM* and, especially in the absence of a recommended decision from the Joint Board, it was not properly before the agency at this point in the rulemaking. The only relief the Court could order, vacatur and remand of the *Order*, would provide Petitioners no benefit.

II.A. Even if the Irregulators had standing, their petition would fail because the agency acted reasonably. With less than six months remaining before the freeze expired, it was highly unlikely that the Joint Board and the FCC could comprehensively update the separations rules. The agency therefore faced a choice between extending the freeze and letting it lapse. Letting it lapse "would impose significant burdens on rate-of-return carriers that would far exceed the benefits, if any, of requiring those carriers to comply with rules that they have not implemented since 2001." *Order* ¶ 20 (JA__). Extending the freeze instead was clearly a reasonable choice, one that was supported by "the overwhelming consensus among the commenters," including the State Members of the Joint Board, state regulators, and both price cap and rate-of-return carriers. *See Order* ¶ 20 (JA__). Indeed, groups representing the carriers actually subject to the rules appear here as amici in support of the Commission.

II.B. The agency was also reasonable in rejecting the Irregulators' skeletal proposals for reform. Before the Commission, they suggested, in three sentences, that the FCC or Joint Board should establish "a more accurate…set of numbers" or otherwise "reset the separations percentages based upon the actual percentages." *Order* n.66 (JA__); *see* Br. 48-49. The agency concluded this was "beyond the scope" of the question then before it—whether or not to extend the freeze. *Order* ¶ 24 (JA__). Given the complexity of separations reform and the short time remaining before the freeze would expire, this was reasonable and well within the agency's discretion.

II.C. Petitioners' main attack on the order is premised on their assertion that the separations rules affect state regulation of all carriers, including price cap carriers not subject to the rules. Br. Part II. Many parts of this argument were not raised before the Commission and so are waived now. 47 U.S.C. § 405(a). In any case, the argument fails. First, Petitioners have never made clear the purported link between the Part 36 rules and state regulation of price cap carriers. To be sure, they have described at length why they feel the rules do not accurately describe the costs of large price cap carriers like Verizon, but they do not explain, here or to the FCC, how that actually affects the rates of price cap carriers. Second, even if they were right that the rules matter in this way, they do not explain why simply letting

the freeze expire would help. They therefore fail to show why the agency's action was unreasonable.

STANDARD OF REVIEW

The Court reviews Petitioners' standing *de novo*. *E.g.*, *Affum v. U.S.*, 566 F.3d 1150, 1158 (D.C. Cir. 2009). Assuming that the Court has jurisdiction, Petitioners bear a heavy burden to establish that the Order on review are "arbitrary, capricious [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). Under this "highly deferential" standard, this Court presumes the validity of agency action. *E.g.*, *Nat'l Tel. Co-op. Ass'n v. FCC*, 563 F.3d 536, 541 (D.C. Cir. 2009). The reviewing court "may not 'substitute its judgment for that of the agency,' but must instead evaluate whether the agency's decision considered relevant factors and whether it reflects a clear error of judgment." *NTCH, Inc. v. FCC*, 841 F.3d 497, 502 (D.C. Cir. 2016) (quoting *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

ARGUMENT

I. PETITIONERS LACK ARTICLE III STANDING.

"To establish constitutional standing, a petitioner must show an actual or imminent injury in fact, fairly traceable to the challenged agency action, that will likely be redressed by a favorable decision." *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1219 (D.C. Cir. 2009) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

The Irregulators fail to show standing for two reasons. First, they do not establish that they are injured by the *Order*. Although they have submitted several affidavits establishing that they are telecommunications customers, they fail to draw the link between that status and concrete injuries from the *Order*. Second, they do not attempt to explain how vacatur of the *Order* could redress any purported injury.[5] Their failure to demonstrate standing deprives the Court of jurisdiction and, hence, the Court should dismiss the petition for review.

A. Petitioners Fail to Show a Concrete Injury Caused by the FCC's *Order*

"[A]llegations of possible future injury are not sufficient" to establish standing; a "threatened injury" must be "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (citations and internal quotation marks omitted). This Court has repeatedly cautioned that an uncertain chain of events, which "stacks speculation upon hypothetical upon speculation,…does not establish

[5] The Cooper and Kushnik affidavits present new arguments, not made in Petitioners' brief, about the specifics of state regulation. *See* Cooper Aff. ¶ 7 (Pet. App. 166-71); Kushnik Aff. ¶¶ 9-18 (Pet. App. 217-23). These are ultimately inconclusive and unpersuasive for the reasons explained here, but the Court also need not consider arguments made only in these affidavits. *See Al-Tamimi v. Adelson*, 916 F.3d 1, 6 (D.C. Cir. 2019) (parties must make arguments in opening briefs; courts frown on "incorporation by reference," which "can be used to evade word limits").

an 'actual or imminent' injury." *New York Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011).

Petitioners fail to make such a showing. None of them is a carrier or state regulator directly affected by the *Order*. Indeed, groups representing carriers and state regulators supported an extension of the freeze, *Order* n.54 (JA__), and amici representing smaller carriers appear here in support of the Commission. And Petitioners have not attempted to show that "The Irregulators" or the "New Networks Institute"—described by Petitioners as "consortia" or "information organizations" (Br. 3)—have standing, either by themselves or via organizational standing. Instead, their standing claim rests on the six individuals who are petitioners in their individual capacities. *See* Br. 37. All of Petitioners' purported injuries stem from these persons' status as "telecommunications consumer[s]." *Id.*

Critically, as they concede, none of the Petitioners is actually the customer of a rate-of-return carrier. *Id.* Several get their phone service from wireless and VoIP carriers who are not subject to any form of federal price regulation. *See* Levy Aff. ¶ 4 (Pet. Add. 151); Sherwood Aff. ¶ 4 (Pet. Add. 154); Goldstein Aff. ¶ 4 (Pet. Add. 158); Kushnick Aff. ¶ 6 (Pet. Add. 215). A few are customers of Verizon, a price cap carrier, in Pennsylvania and Maryland. *See* Allibone Aff. ¶ 4 (Pet. Add. 148); Cooper Aff. ¶ 5 (Pet. Add. 164). But again, only rate-of-return carriers are required to comply with the separations regulations at issue. *Order*

n.20 (JA__). Therefore, none of Petitioners' carriers is subject to separations rules or the freeze, and no Petitioner is a customer of any carrier that is actually subject to the *Order*. Petitioners allege they are nonetheless injured by the *Order* as telecommunications consumers in two ways. Neither is convincing.

1. Petitioners do not show a direct injury from increased intrastate retail rates.

First, they allege they are forced to "pay higher prices for basic intrastate telephone service because of inflated cost attribution." Br. 37. While Petitioners do not make clear how they are forced to "pay higher prices," their theory seems to be that Petitioners' long distance or wireless providers must in some instances pay wholesale charges for calls to rate-of-return carriers: for example when one of the Petitioners makes a call to a party served by a rate-of-return carrier, so that the called-party's carrier charges a cost to that Petitioner's carrier to complete the call. Br. 38; *see also id.* at 69.

That chain of events is far too speculative to constitute Article III injury. *See Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1292 (D.C. Cir. 2007) ("alleged injury 'must be concrete in both a qualitative and temporal sense'" (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990))). They present no evidence, apart from their own assertions, that these wholesale fees charged by rate-of-return carriers are actually raised by the freeze. Moreover, given that rate-of-return carriers represent only 0.8% of customer phone lines, *see above*

at p. 13, they present no evidence that any alleged rate inflation in wholesale charges would have a substantial effect on the rates Petitioners pay. Finally, Petitioners do not show that if their long distance and wireless providers are forced to pay higher wholesale fees, then the carriers are passing this along in higher retail rates, and that if these costs were later lowered, then the carriers would lower retail rates concomitantly. In contrast to rate-of-return regulation based directly on costs, price cap carriers like those that serve Petitioners have far more leeway in setting their rates. *See NRTA*, 988 F.2d at 178 (if a price cap carrier can lower its costs "it can keep the savings"). Such a highly tenuous and indirect chain of events, which "stacks speculation upon hypothetical upon speculation,…does not establish an 'actual or imminent' injury." *New York Reg'l Interconnect*, 634 F.3d at 587.

The Irregulators also mention very briefly the Universal Service Fund ("USF") as a cost purportedly passed on to price cap consumers. Br. 38; *see id.* at 69-70. This Court has cautioned that "[m]entioning an argument in the most skeletal way, leaving the court to do counsel's work," as the Irregulators do here, "is tantamount to failing to raise it." *Al-Tamimi*, 916 F.3d at 6. In any case, they do not carry their burden to establish injury here.

The federal USF includes a program of high-cost support, funded by all telecommunications customers, to carriers with expensive-to-serve customers. *See generally Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 56-57 (D.C. Cir. 2011).

Petitioners' argument is presumably that misallocations raise the reported costs and rates of rural rate-of-return carriers, who then receive inflated payments from a Universal Service Fund, raising the fund contributions paid by other customers. But as the Irregulators point out (Br. 69-70), separate USF programs are administered by both the FCC and some states. If it is true that carriers are allocating too many costs to intrastate service and too little to interstate, this would presumably raise costs to a state fund, but *lower* costs to the federal fund. It is thus far from clear that consumers would see a net increase in USF contributions.

Moreover, any injury, if it existed, would be vanishingly small. For example, in 2016 the federal USF disbursed some $4.7 billion in high-cost support. *See* Federal and State Staff for the Federal-State Joint Board on Universal Service, *2017 Universal Service Monitoring Report* at Table 3.1.[6] The estimated average monthly contribution for a residential customer to this high-cost support fund was

[6] *Available at* https://www.fcc.gov/sites/default/files/2017_universal_service_monitoring_report.pdf. We use the 2017 version of this report because the 2018 version does not break out average customer contributions.

about $1.36.[7] In short, the federal fund is very large, and individual contributions are very small. The Irregulators do not attempt to show that any alleged misallocation for the carriers still subject to the separations rules is sufficiently large to meaningfully affect either a state or federal fund, much less raise the USF fees paid by individual customers by even a single cent. Such brief and "conclusory assertions of injury" are insufficient to establish "specific, concrete facts demonstrating…harm." *Twin Rivers Paper Co. LLC v. SEC*, No. 18-1213, 2019 WL 3849576, at *2 (D.C. Cir. Aug. 16, 2019) (citations and internal quotation marks omitted).

2. Petitioners do not show an indirect injury through anti-competitive effects.

Petitioners' second argument for injury is that the freeze "under-allocates costs to [Incumbent Local Exchange Carrier] services used by wireless broadband Internet Service providers" and "harms insurgent competitive providers" "because it allows and obscures anti-competitive cross-subsidization." Br. 37. While

[7] The FCC has estimated the average household monthly federal USF contribution in 2016 in a range from $2.27 to $2.77. *See id.* at Table 1.12. Here, we use an average of those figures for a $2.52 monthly contribution to the federal USF. The USF includes four types of support, one of which is "high-cost" support, the type at issue in the Irregulators' claim. (Other types include support for low-income customers, schools and libraries, and healthcare.) The high-cost support program accounts for roughly 54% of the total USF. *See id.* at Table 1.10 ($4.7 billion of $8.7 billion). 54% x $2.52 = $1.36.

Petitioners do not develop this argument in any detail, they assert that the "misaligned separations regime…leads to some services being overburdened and others receiving artificially low cost attribution." Br. 38. This may be related to Petitioners' merits claim that state regulators rely on the Part 36 rules in some way for the regulation of intrastate service, including for price cap providers like Verizon. *See*, *e.g.*, Br. 52-53. But this argument fails twice over.

First, as explained below in Part II.C.1, if state regulators are referring to Part 36 rules in their regulation of price cap carriers that have received forbearance from the FCC, that is purely a matter of state law, and not a result of the *Order* or any FCC action. The agency clearly explained that state regulators do not have the authority to make carriers comply with Part 36 once the FCC has forborne from enforcing those rules, and if those state regulators have "adopt[ed] similar provisions," they have done so "under state law." *AT&T Forbearance Order* ¶ 33. There is thus no legal link between the federal Part 36 rules, including the agency's freeze of those rules, and whatever separations requirements state regulators impose on price cap carriers under state law.

Second, Petitioners do not show how "misaligned separations" actually have any impact on rates of the vast majority of carriers, including their own carriers, that are not subject to rate-of-return regulation at the federal or state level. Again, the rates of price cap carriers like Verizon are not set by a regulator based directly

on costs. *See NRTA*, 988 F.2d at 177-78. Instead, "price cap regulation severs the direct link between regulated costs and prices." *AT&T Forbearance Order* ¶ 8. Petitioners explain at some length why they feel Verizon's report of costs filed with the New York regulator does not accurately reflect the true costs of its various lines of business. Br. 51-53. But they do not explain, and they did not explain before the agency, why this purported cost misalignment has a concrete effect on the intrastate rates charged by Verizon or similar carriers. Petitioners allege that these cost reports lead to cross-subsidization and anti-competitive effects, but they nowhere explain how that would happen for price cap carriers, much less VoIP and wireless carriers who have never been subject to separations rules. *See Order* ¶ 16 (JA__).

B. Petitioners Fail to Show Redressability

Even if Petitioners could show that they suffer an Article III injury based on misallocated costs caused by the extended freeze of the FCC's separations rules, they do not attempt to show that an order from this Court would redress it. The sole relevant effect of the *Order* was to keep the freeze in place. *See Order* ¶ 59 (JA__) & App. A (JA__) (extending date of freeze). If this Court were to vacate and remand the *Order*, the freeze would be lifted, and the small rate-of-return carriers still subject to the Part 36 rules would presumably be forced to perform new traffic factor studies to calculate separations categories and allocation factors under

"outdated" rules, essentially forcing these carriers "to return to a regulatory environment that last operated in full nearly two decades ago." *Order* ¶¶ 22-23 (JA__) (citations and internal quotation marks omitted).

Even Petitioners do not argue this would alleviate their purported injuries. They argue instead that the Commission "must revise the separations rules so they once again obtain their primary purpose." Br. 76; *see id.* at 48-49 (arguing that the agency should have instituted new "representative benchmarks" and "new revenue-based percentages" in place of the existing rules). But in the absence of a recommended decision by the Joint Board, a wholesale revision of the rules was not a realistic option at the time. And vacatur of the *Order* and remand would not lead to such a revision—it would simply make matters worse by subjecting small rate-of-return carriers to the un-frozen Part 36 rules as the rules stand, including the obligation to perform outdated cost studies. Because relief from this Court would not address any purported injury, Petitioners have not shown they have standing.

II. THE FCC'S DECISION TO EXTEND THE FREEZE WAS REASONABLE.

Even if the Irregulators had standing, they fail to show the agency erred.

A. The Extension Was Reasonable And Reasonably Explained.

In this rulemaking, the agency faced a binary choice: let the freeze expire on December 31, 2018, or extend it. When the agency issued the *NPRM* on July 18,

2018, less than six months remained before the deadline. The agency recognized "that the issues before the Joint Board are extremely complex," and the Joint Board had not issued a recommended decision on comprehensive separations reform "in the two decades since the Commission originally proposed such reform." *NPRM* ¶ 21 (JA__). It was thus "highly unlikely" that the Joint Board and the agency would complete comprehensive separations reform before the freeze expired, and the FCC was forced to "choose between extending the separations freeze and allowing long-unused separations rules to take effect on January 1, 2019." *Id.* ¶ 17 (JA__).

The Commission's choice to extend the freeze in these circumstances was reasonable. As the agency explained, "permitting the freeze to expire would impose significant burdens on rate-of-return carriers that would far exceed the benefits, if any, of requiring those carriers to comply with rules that they have not implemented since 2001." *Order* ¶ 20 (JA__). Specifically, if the freeze expired, rate-of-return carriers still subject to the rules would need to perform cost studies to re-calculate the separations categorizations and allocations. This was "an arcane science" that carriers had not performed for some 17 years, and relearning to perform that work would require substantial training. *Id.* ¶ 22 (JA__). And this type of expense would hit smaller, rural carriers—the main carriers still subject to

the separations rules—the hardest. *Id.* Price cap carriers, who have forbearance from complying with the separations rules, would not be affected.

Of course, this effort might be worthwhile if it would lead to a substantial benefit, but as the agency explained, "the impact of such traffic factors is continuing to diminish as investment in voice services decreases due to growing deployment of broadband services" *Id.* ¶ 22 (JA__). That is, the separations rules centered on an increasingly minor area of service, even for the increasingly small portion of traffic still subject to them.

Moreover, the agency found it unclear that requiring new studies under the existing rules would lead to more accurate separations, or indeed have any concrete benefit. *Id.* ¶ 23 (JA__). Because the cost categories and allocation factors are based on technology and a regulatory environment "that last operated in full nearly two decades ago," "reinstating these largely outmoded rules in full measure could produce negative consequences by causing significant disruptions in carriers' regulated rates, cost recovery, and other operating conditions." *Id.* For example, NTCA–The Rural Broadband Association, which represents independent, community-based telecommunications companies, explained that even smaller carriers were increasingly investing in the transition to broadband services—a migration the Commission has done much to encourage—but that this "ongoing evolution rests precariously atop the current separations foundation" as

"investments are being made and services delivered based upon the current [separations] framework." NTCA Comments 2-4 (JA__); *see Order* n.63 (JA__) (citing NTCA Comments). Suddenly overhauling the separations formulas without considering the impact it would have on these investments was thus very likely to do more harm than good. *See Order ¶* 23 (JA__).

In short, allowing the freeze to expire without an updated separations framework in place would have caused significant costs with little if any benefit. *Order* ¶ 20 (JA__). Extending it instead was reasonable.

B. The Agency Reasonably Rejected the Irregulators' Skeletal Suggestions For Separations Reform As Outside The Scope Of The Rulemaking.

Petitioners challenge this decision to extend the freeze, but they do not contend that simply allowing the freeze to expire would be a good idea. *See Order* ¶ 24 (JA__) (Irregulators "fail to explain how ending the freeze would alleviate" alleged misallocations). Instead, they argue that the FCC should have ended the freeze and also "mov[ed] to factors and assignments that reflect reality." Br. 50; *see id.* at 75-76 ("The Commission must revise the separations rules so they once again obtain their primary purpose."). This argument presumably refers to the suggestions in their comments that "the Commission or the Joint Board" "should undertake a study to arrive at a more accurate representative set of numbers" or

"reset the separations percentages based upon the actual percentages of revenue generated in each jurisdiction." *Order* n.66 (JA__); *see* Br. 48-49.[8]

It was reasonable for the FCC to conclude that these inchoate suggestions, while perhaps "useful to the Joint Board's consideration of comprehensive separations reform," were "beyond the scope of the question before us today of whether we should extend the separations freeze before it expires at the end of this year." *Order* ¶ 24 (JA__). Separations reform is an "extremely complex" problem with which the Commission and Joint Board have struggled for some 20 years. *Order* ¶ 14 (JA__). The Irregulators seem to contemplate that the Commission would act on this problem unilaterally. But the Act first requires a referral to the Joint Board, 47 U.S.C. § 410(c), and attempting reform on this matter that directly affects state regulation without the Joint Board's recommendation would deprive the FCC of valuable input. In any case, it is hard to imagine how the agency or the Joint Board, in the less than six months that remained before the freeze would expire, could gather sufficient information on carriers' costs, form a new "set of

[8] The Irregulators assert they also "advocated a declaration that the states are no longer bound by separations outcomes." Br. 49. But the comments in question seem to argue instead that the states are already not bound by the agency's accounting rules. *See* Irregulators Comments at 8 (JA__) ("But with the removal of the accounting rules the states are now free to set the rates using 'incremental' pricing and immediately lower rates and remove the cross-subsidies that had been artificially created over the last decade.").

numbers" or an "actual percentage," release this for comment and response, and propound these new benchmarks. The Irregulators' comments, which run three sentences on this point, offer little guidance. Irregulators Comments at 8 (JA__).

At root, Petitioners seem to feel that the agency should institute a new rulemaking to formulate benchmark percentages, even though it has already referred separations reform to the Joint Board. But parties cannot "unilaterally expand the scope of the [rulemaking] through their comments." *Sec. Indus. & Fin. Markets Ass'n v. U.S. Commodity Futures Trading Comm'n*, 67 F. Supp. 3d 373, 429 (D.D.C. 2014); *see Nat'l Min. Ass'n v. Mine Safety & Health Admin.*, 116 F.3d 520, 549 (D.C. Cir. 1997) (agency was reasonable in finding suggestion "beyond the scope of the rulemaking"). Indeed, it is far from clear that the *NPRM*—which did not propose any substantive reforms—would have provided sufficient notice for the agency to take up the Irregulators' suggestions.

Petitioners did not petition the agency for a new rulemaking, let alone petition this Court for mandamus to order the agency to do so. But even if they had taken such an action, "[i]t is only in the rarest and most compelling of circumstances that this court has acted to overturn an agency judgment not to institute rulemaking." *WWHT, Inc. v. FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981). Here it was reasonable to keep this rulemaking focused on the freeze and leave the question of reform to the Joint Board, as the Act contemplates. 47 U.S.C. § 410(c);

see FCC v. Fox Television Stations, Inc., 556 U.S. 502, 522 (2009) ("Nothing prohibits federal agencies from moving in an incremental manner."); *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007) ("Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop."). This is especially so because the agency made concrete suggestions to the Joint Board for short-term and long-term stages of reform in the hope that the Joint Board and agency will finally tackle this complex project. *See Order* ¶ 42 (JA__).

C. The Agency Adequately Considered Petitioners' Arguments.

Again, the separations rules at issue in the *Order* only apply to rate-of-return carriers, representing a very small fraction of consumers. Perhaps in tacit acknowledgment that the agency reasonably balanced the costs and benefits of the freeze as applied to those rate-of-return carriers, Petitioners' main attack on the merits of the *Order* is rooted in their claim that the separations rules still apply in some way to price cap carriers—in particular, that "the separations rules still apply to states overseeing price-cap carriers." Br. 48 (title of section II, capitalization altered). Contrary to Petitioners' claim (Br. 48), the Commission fully acknowledged this argument. *Order* ¶ 24 & nn. 64-65 (JA__). The agency's response was twofold. It disagreed that the Part 36 rules are relevant to price cap carriers, and it explained that, even if there were misallocations for price cap

carriers somehow relevant to state regulators, the Irregulators did not explain how expiration of the freeze would help.

1. Petitioners have never made clear the purported link between the Part 36 rules and state regulation of price cap carriers.

As the FCC noted, "the Irregulators' comments appear to focus on State treatment of Verizon's and other price cap carriers' intrastate offerings." *Order* n.65 (JA__). However, "[b]ecause [the FCC's] 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." *Id.* n.65 (JA__). Petitioners dispute this and claim here that they "made an exhaust[ive] showing that New York and other states still use Part 36 outcomes for intrastate purpose," including for price cap carriers. Br. 60. But that is not so. To be sure, their comments document at some length why they believe the cost reports filed by Verizon in New York do not accurately represent Verizon's true costs. *See* Irregulators Comments, Annex, 10-12 (JA__); Br. 52. But, critically, nowhere in their comments did the Irregulators attempt to explain how this leads to higher intrastate rates or anti-competitive

outcomes. Given that New York applies price cap regulation for intrastate rates, see above at pp. 4-5 & n.2, the link is far from obvious.[9]

Before this Court, the Irregulators now argue that, even though the agency forbore from requiring price cap carriers to comply with the Part 36 rules, these "rules still bind the states for intrastate purposes." Br. 55. Because the Irregulators never made this argument below, they cannot make it here. Section 405(a) of the Act provides that filing a petition for reconsideration before the Commission is "a condition precedent to judicial review" if the party relies on questions of fact or law upon which the "Commission…has been afforded no opportunity to pass." 47 U.S.C. § 405(a). This Court has "strictly construed § 405(a), holding that [it] generally lack[s] jurisdiction to review arguments that have not first been presented to the Commission." *Globalstar, Inc. v. FCC*, 564 F.3d 476, 483 (D.C. Cir. 2009) (citations and internal quotation marks omitted); *see Environmentel, LLC v. FCC*,

[9] The requirement to file the cost reports in New York may be a vestige of previous regulatory regimes. The FCC required cost reports for decades after it moved to price cap regulation before concluding they were no longer necessary. *See AT&T Forbearance Order* ¶ 19 (listing "various reforms" in the 1990s and 2000s that "eliminated features of the original price cap regime that required rate-of-return regulation accounting inputs").

661 F.3d 80, 84 (D.C. Cir. 2011). Because the Irregulators did not make this argument before the Commission, it is waived.[10]

In any case, it is baseless. The agency forbore under Section 10 from requiring price cap carriers to comply with the separations rules. *AT&T Forbearance Order* ¶ 12. Section 10 states: "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" Section 10. 47 U.S.C. § 160(e). As the agency explained in the *AT&T Forbearance Order*, states would "not have authority to enforce the federal Cost Assignment Rules." *AT&T Forbearance Order* ¶ 33. Indeed, in response to arguments that the FCC should not forbear, the agency made clear it did not have authority to "maintain federal regulatory requirements…in order to maintain regulatory burdens that may produce information helpful to state commissions for intrastate regulatory purposes solely." *Id.* ¶ 32.

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[10] Similarly, Petitioners assert for the first time in this Court that New York requires Verizon to provide "separated data using Part 36 outcomes." Br. 53. Because they never introduced this asserted fact below, they are precluded from arguing based on it here. But in any case, even now they do not explain what New York does with these data or explain how different allocations would lead to better outcomes.

To be sure, "state commissions may exercise their own state authority to conduct their rate and other regulation as permitted under state law," and the FCC stated it "would expect that any states that may rely on the Cost Assignment Rules and resulting data for state regulatory purposes would assert their jurisdiction to obtain the needed information." *Id.* In short, if any states are requiring cost accounting from price cap carriers in a format that mirrors the Part 36 separations rules, they do so under state authority. Those rules decidedly do not "bind" the states (Br. 55).

Before this Court, Petitioners offer a new argument on the effect of forbearance. Br. 56. Because Section 10(e) states, "A State commission may not continue to apply or enforce any provision *of this chapter*," 47 U.S.C. § 160(e) (emphasis added), Petitioners seem to argue that the effect on states of FCC forbearance from FCC *rules*, as opposed to *the Act*, is "entirely unclear." Br. 56-57. Because they did not make this argument before the Commission, it is also waived, 47 U.S.C. § 405. In any case, it confuses what states may do and what they must do. Even if Petitioners were right that Section 10(e) does not apply to agency forbearance from regulations, the only conclusion would be that states "may" continue to apply the Part 36 rules after forbearance. Petitioners seem to argue instead that the states "must" continue to apply the Part 36 rules, but that does not follow from the text.

It would also be bizarre. Once the FCC has decided under Section 10 that forbearance from its own rules would be in the public interest, it would make no sense that states must nonetheless apply those rules for intrastate regulation. This is especially so here because the agency is not even required to issue separations regulations. The Act says that the agency "may" do so, 47 U.S.C. § 221, and the Commission did not issue formal separations rules until 1969. *AT&T Forbearance Order* ¶ 4.[11]

To be sure, if the agency has separations rules in effect for a carrier, states must abide by them as well in regulating that carrier, "because a nationwide telecommunications system with dual intrastate and interstate rates can operate effectively only if one set of separations procedures is employed." *Hawaiian Tel. Co.*, 827 F.2d at 1275. But where the federal rules are no longer being enforced by the FCC, that logic no longer holds. In any case the Court need not reach the issue, first because the argument is waived, and second because states are at most permitted, rather than required, to rely on the federal Part 36 rules after forbearance.

[11] The Irregulators cite an order from the Maine Public Utilities Commission that stated, in a very brief aside, that new state separations rules would be "likely preempted." Br. 63. The Maine decision contains no analysis on the point and does not grapple with the FCC's forbearance. The FCC took no part in the Maine proceeding.

2. Petitioners never explained how letting the freeze expire would help.

Even if states were somehow bound by the separations rules in their regulation of price cap carriers (despite the FCC's forbearance from enforcing those rules), Petitioners do not explain how letting the freeze lapse would help. Again, the question before the agency was "between extending the freeze further or allowing long-unused separations rules to take effect on January 1, 2019." *Order* ¶ 20 (JA__). Petitioners claim it was irrational to extend the freeze, but they do not explain why it would be better to allow the freeze to expire and let the outdated rules take full effect. "The current rules focus on allocating between the interstate and intrastate jurisdictions the costs of circuit-switched voice services provided over primarily copper networks." *Id.* ¶ 26 (JA__). In the time since the freeze was put in place, many carriers "have converted much of their networks to packet-based technologies that provide telecommunications, information, and video services over fiber facilities." *Id.* Unfreezing the rules would not create new category relationships or allocators that reflect today's networks and services. For example, the rules are based on increasingly obsolete "circuit switched" technology, *see Id.* ¶¶ 1-2 (JA__), and letting the freeze lapse would not change that fact. Moreover, certain allocation factors between state and federal

jurisdictions are fixed in the rules, and reverting to the rules as written would not update these to reflect new technologies and business practices.[12]

In short, while Petitioners complain that the present rules misallocate costs, they "fail to explain how ending the freeze would alleviate any such misallocation." *Id.* ¶ 24 (JA__). They thus fail to show the agency acted irrationally in extending the freeze.

D. Petitioners' Remaining Arguments Are Meritless

Petitioners make three additional arguments very briefly, but none have merit.

1. Costs to Consumers

First, they argue that maintaining the freeze harms consumers. They did not argue below that the freeze would have this indirect harm on consumers, and so the argument is waived. 47 U.S.C. § 405(a).[13] In any case, it is without merit. The agency specifically found that lifting the freeze would impose significant costs on

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[12] For example, "loop costs," a major cost category of wire infrastructure, are set in the rules at 25% interstate and 75% intrastate. *Order* n.12 (JA__). The Irregulators complain that the frozen rules allocate too many costs to intrastate service, but lifting the freeze would not change many of these allocations.

[13] In the attachment to their Comments, the Irregulators seemed to argue instead that misallocations led to *direct* inefficient subsidies for price cap carriers in "state and federal grants, high cost funds, universal service support and a host of other perks." Irregulators Comments, Annex at 6 (JA__). These comments therefore alleged direct, rather than indirect, effects on price cap carriers.

the small rate-of-return carriers still subject to the rules—"costs that would be borne by their customers." *Order* ¶ 33 (JA__). This is plainly true given that these carriers' rates are directly based on their costs. Petitioners argue that keeping the freeze in place harms *price cap* carriers' customers indirectly through raising wholesale costs. Br. 69. But as explained above at pp. 27-28 & 31-32, even if this indirect effect actually occurs, and even if the magnitude is significant (which Petitioners do not attempt to show), price cap regulation severs the direct link between costs and rates, and Petitioners do not show that lowering price cap carriers' wholesale costs (by some amount Petitioners do not attempt to quantify) would directly and reliably lead to lower rates for consumers.[14] It was certainly reasonable for the agency to base its decision on the far more direct and concrete costs that would be borne by small carriers and their customers if the freeze expired.

[14] Petitioners also argue that higher costs for the very small number of rate-of-return carriers subject to the rules indirectly raises costs to federal and state Universal Service Funds, which cost is indirectly paid by all rate payers. Br. 69-70. This argument is also new, and so waived, 47 U.S.C. § 405(a), and is also baseless. As explained above at pp. 29-30, Petitioners (a) ignore that the alleged effects on federal and state Funds may well cancel out and (b) do not show that this indirect, highly diffuse cost would be at all significant.

2. Spread of Wireless and Broadband

Petitioners also argue that the FCC ignored their argument that the increasing growth of wireless and broadband networks will exacerbate the alleged cost misallocations. Br. 72-73. But this was not a different legal argument from Petitioners' primary argument to the Commission; it is simply an assertion that the alleged problem of misallocation will grow. The agency had already explained that the Irregulators had not demonstrated why their alleged misallocations actually affected price cap carriers, *Order* ¶ 24 & n.65 (JA__); nothing in the Irregulators' assertions about future growth of these purported misallocations remedied this shortcoming.

3. Voluntary Unfreeze

In the *Order*, the FCC allowed rate-of-return carriers that chose to freeze their separations category relationships when the freeze began to voluntarily unfreeze and update those relationships to better reflect their costs and so to "better recover network upgrade costs from ratepayers that benefit from those upgrades and to take greater advantage of universal service programs that incent broadband deployment." *Order* ¶ 29 (JA__). Petitioners argue it was irrational to allow individual carriers to opt out of the category freeze, as opposed to making the unfreeze mandatory for all carriers. Br. 73-74; *see id.* at 20. They also argue that all consumers would benefit if the freeze were lifted because all carriers' cost

allocations would be updated like the allocations of those price cap carriers that choose to unfreeze under the *Order*. Br. 71-72.

Of course, only some rate-of-return carriers are subject to the rules that are at issue—not all carriers as Petitioners assert. Br. 71, 74. Moreover, the FCC directly addressed why it made the category relationships unfreeze voluntary rather than mandatory. As it explained, "the size, cost structures, and investment patterns of rate-of-return carriers vary widely." *Order* ¶ 33 (JA__). "Certain rate-of-return carriers' cost structures may not have changed significantly enough since the freeze began to warrant the administrative costs that these carriers would incur in updating their category relationships," while others would benefit from "the opportunity to more accurately categorize their investments." *Id.* Making the category relationships unfreeze voluntary was a rational means to accommodate this variation.

CONCLUSION

Because Petitioners do not demonstrate Article III standing, the Court should dismiss the petition for review for want of jurisdiction. Should the Court reach the merits, it should deny the petition.

Respectfully submitted,

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September 12, 2019

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I, Matthew J. Dunne, hereby certify that on September 12, 2019, I filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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47 U.S.C. § 160

§ 160. Competition in provision of telecommunications service

(a) Regulatory flexibility

Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that--

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive effect to be weighed

In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

(c) Petition for forbearance

Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the

requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a). The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

(d) Limitation

Except as provided in section 251(f) of this title, the Commission may not forbear from applying the requirements of section 251(c) or 271 of this title under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) State enforcement after commission forbearance

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. § 220

§ 220. Accounts, records, and memoranda

(a) Forms

(1) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to this chapter, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys.

(2) The Commission shall, by rule, prescribe a uniform system of accounts for use by telephone companies. Such uniform system shall require that each common carrier shall maintain a system of accounting methods, procedures, and techniques (including accounts and supporting records and memoranda) which shall ensure a proper allocation of all costs to and among telecommunications services, facilities, and products (and to and among classes of such services, facilities, and products) which are developed, manufactured, or offered by such common carrier.

(b) Depreciation charges

The Commission may prescribe, for such carriers as it determines to be appropriate, the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the classes of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or, after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

(c) Access to information; burden of proof; use of independent auditors

The Commission shall at all times have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carriers, and the provisions of this section respecting the preservation and destruction of books, papers, and documents shall apply thereto. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry and the Commission may suspend a charge or credit pending submission of proof by such person. Any provision of law prohibiting the disclosure of the contents of messages or communications shall not be deemed to prohibit the disclosure of any matter in accordance with the provisions of this section. The Commission may obtain the services of any person licensed to provide public accounting services under the law of any State to assist with, or conduct, audits under this section. While so employed or engaged in conducting an audit for the Commission under this section, any such person shall have the powers granted the Commission under this subsection and shall be subject to subsection (f) in the same manner as if that person were an employee of the Commission.

(d) Penalty for failure to comply

In case of failure or refusal on the part of any such carrier to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, memoranda, documents, papers, and correspondence as are kept to the inspection of the Commission or any of its authorized agents, such carrier shall forfeit to the United States the sum of $6,000 for each day of the continuance of each such offense.

(e) False entry; destruction; penalty

Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by any such carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction, to a fine of not less than $1,000 nor more than $5,000 or imprisonment for a term of not less than one year nor more than three years, or both such fine and imprisonment: Provided, That the Commission may in its discretion issue orders specifying such operating,

accounting, or financial papers, records, books, blanks, or documents which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

(f) Confidentiality of information

No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by a court.

(g) Use of other forms; alterations in prescribed forms

After the Commission has prescribed the forms and manner of keeping of accounts, records, and memoranda to be kept by any person as herein provided, it shall be unlawful for such person to keep any other accounts, records, or memoranda than those so prescribed or such as may be approved by the Commission or to keep the accounts in any other manner than that prescribed or approved by the Commission. Notice of alterations by the Commission in the required manner or form of keeping accounts shall be given to such persons by the Commission at least six months before the same are to take effect.

(h) Exemption; regulation by State commission

The Commission may classify carriers subject to this chapter and prescribe different requirements under this section for different classes of carriers, and may, if it deems such action consistent with the public interest, except the carriers of any particular class or classes in any State from any of the requirements under this section in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates.

(i) Consultation with State commissions

The Commission, before prescribing any requirements as to accounts, records, or memoranda, shall notify each State commission having jurisdiction with respect to any carrier involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations.

(j) Report to Congress on need for further legislation

The Commission shall investigate and report to Congress as to the need for legislation to define further or harmonize the powers of the Commission and of State commissions with respect to matters to which this section relates.

47 U.S.C. § 221

§ 221. Consolidations and mergers of telephone companies

(a) Repealed. Pub.L. 104-104, Title VI, § 601(b)(2), Feb. 8, 1996, 110 Stat. 143

(b) State jurisdiction over services

Subject to the provisions of sections 225 and 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

(c) Determination of property used in interstate toll service

For the purpose of administering this chapter as to carriers engaged in wire telephone communication, the Commission may classify the property of any such carrier used for wire telephone communication, and determine what property of said carrier shall be considered as used in interstate or foreign telephone toll service. Such classification shall be made after hearing, upon notice to the carrier, the State commission (or the Governor, if the State has no State commission) of any State in which the property of said carrier is located, and such other persons as the Commission may prescribe.

(d) Valuation of property

In making a valuation of the property of any wire telephone carrier the Commission, after making the classification authorized in this section, may in its discretion value only that part of the property of such carrier determined to be used in interstate or foreign telephone toll service.

47 U.S.C. § 405

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

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

section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

47 U.S.C. § 410

§ 410. Joint boards and commissions

(a) State joint boards; reference of communication matters; composition; jurisdiction, powers, duties, and obligations; conduct of proceedings; force and effect of joint board action; members: nomination, appointment, and rejection; allowances for expenses

Except as provided in section 409 of this title, the Commission may refer any matter arising in the administration of this chapter to a joint board to be composed of a member, or of an equal number of members, as determined by the Commission, from each of the States in which the wire or radio communication affected by or involved in the proceeding takes place or is proposed. For purposes of acting upon such matter any such board shall have all the jurisdiction and powers conferred by law upon an examiner provided for in section 3105 of Title 5, designated by the Commission, and shall be subject to the same duties and obligations. The action of a joint board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The joint board member or members for each State shall be nominated by the State commission of the State or by the Governor if there is no State commission, and appointed by the Federal Communications Commission. The Commission shall have discretion to reject any nominee. Joint board members shall receive such allowances for expenses as the Commission shall provide.

(b) State commissions; conferences with Commission regarding matters of carriers subject to their jurisdiction; joint hearings; cooperation with Commission

The Commission may confer with any State commission having regulatory jurisdiction with respect to carriers, regarding the relationship between rate structures, accounts, charges, practices, classifications, and regulations of carriers subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized under such rules and regulations as it shall prescribe to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Federal-State Joint Board; reference of proceedings regarding jurisdictional separation of common carrier property and expenses between interstate and

intrastate operations and other matters relating to common carrier communications of joint concern; jurisdiction, powers, duties, and obligations; recommendation of decisions; State members; presence at oral arguments and nonvoting participation in deliberations; composition; Chairman

The Commission shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations, which it institutes pursuant to a notice of proposed rulemaking and, except as provided in section 409 of this title, may refer any other matter, relating to common carrier communications of joint Federal-State concern, to a Federal-State Joint Board. The Joint Board shall possess the same jurisdiction, powers, duties, and obligations as a joint board established under subsection (a) of this section, and shall prepare a recommended decision for prompt review and action by the Commission. In addition, the State members of the Joint Board shall sit with the Commission en banc at any oral argument that may be scheduled in the proceeding. The Commission shall also afford the State members of the Joint Board an opportunity to participate in its deliberations, but not vote, when it has under consideration the recommended decision of the Joint Board or any further decisional action that may be required in the proceeding. The Joint Board shall be composed of three Commissioners of the Commission and of four State commissioners nominated by the national organization of the State commissions and approved by the Commission. The Chairman of the Commission, or another Commissioner designated by the Commission, shall serve as Chairman of the Joint Board.