UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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Washington, DC 20001-2866
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AGENCY DOCKETING STATEMENT

Administrative Agency Review Proceedings (To be completed by appellant/petitioner)

1. CASE NO. 19-1085 2. DATE DOCKETED: 4/18/2019

3. CASE NAME (lead parties only) Irregulators, et al v. FCC, et al

4. TYPE OF CASE: ☒ Review ☐ Appeal ☐ Enforcement ☐ Complaint ☐ Tax Court

5. IS THIS CASE REQUIRED BY STATUTE TO BE EXPEDITED? ○ Yes ◉ No
If YES, cite statute

6. CASE INFORMATION:

a. Identify agency whose order is to be reviewed: Federal Communications Commission

b. Give agency docket or order number(s): CC Docket 80-286, FCC 18-182

c. Give date(s) of order(s): Released December 17, 2018

d. Has a request for rehearing or reconsideration been filed at the agency? ○ Yes ◉ No
If so, when was it filled? By whom?
Has the agency acted? ○ Yes ○ No If so, when?

e. Identify the basis of appellant's/petitioner's claim of standing. See D.C. Cir. Rule 15(c)(2):
See Attached Supporting Affidavits and Standing Argument.

f. Are any other cases involving the same underlying agency order pending in this Court or any other?
○ Yes ◉ No If YES, identify case name(s), docket number(s), and court(s)

g. Are any other cases, to counsel's knowledge, pending before the agency, this Court, another Circuit Court, or the Supreme Court which involve *substantially the same issues* as the instant case presents?
○ Yes ◉ No If YES, give case name(s) and number(s) of these cases and identify court/agency:

h. Have the parties attempted to resolve the issues in this case through arbitration, mediation, or any other alternative for dispute resolution? ○ Yes ◉ No If YES, provide program name and participation dates.

Signature W. Scott McCollough Date May 20, 2019

Name of Counsel for Appellant/Petitioner W. Scott McCollough

Address 2290 Gatlin Creek Rd., Dripping Springs, TX 78620

E-Mail wsmc@dotlaw.biz Phone (512) 888-1112 Fax (512) 692-2522

ATTACH A CERTIFICATE OF SERVICE

Note: If counsel for any other party believes that the information submitted is inaccurate or incomplete, counsel may so advise the Clerk within 7 calendar days by letter, with copies to all other parties, specifically referring to the challenged statement.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May, 2019, I electronically filed the foregoing Petitioners' Agency Docketing Statement and Attached Supporting Affidavits and Standing Argument with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ *W. Scott McCollough*
W. Scott McCollough

AFFIDAVITS IN SUPPORT OF STANDING

AFFIDAVIT OF THOMAS ALLIBONE IN SUPPORT OF STANDING

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

The Irregulators, New Networks Institute, Bruce A. Kushnick, Mark N. Cooper, Tom Allibone, Kenneth Levy, Fred Goldstein, and Charles W. Sherwood, Jr.,
Petitioners

v.

Federal Communications Commission and United States of America,
Respondents

Case No. 19-1085

Petition for Review of Order by the Federal Communications Commission

AFFIDAVIT OF THOMAS ALLIBONE IN SUPPORT OF STANDING

1. My name is Thomas William Allibone. I am one of the named Petitioners in the above captioned proceeding.

2. The purpose of this Affidavit is to provide evidence of standing to pursue the matter. I will provide some of the basic facts particular to my individual circumstances, but also rely on the presentations contained in the Affidavits of Bruce A. Kushnick, Mark N. Cooper and Fred Goldstein to explain why the basic facts I present below demonstrate that I have suffered (1) injury-in-fact (2) traceable to the Freeze Order (3) that could be redressed by an order from this Court holding unlawful, vacating, enjoining, and/or setting aside the Freeze Order and remanding the matter to the FCC for further consideration and action.

3. My home address is 1062 Embarcation Road, Washington Crossing, Bucks County, Pennsylvania. The Incumbent Local Exchange Carrier serving my residence and area is Verizon Pennsylvania.

4. I currently receive the following communications services:

A. I receive wireline basic local telephone exchange and exchange access service from Verizon Pennsylvania. This company is an incumbent local exchange carrier.

B. The presubscribed telephone toll provider (the IXC that handles all intrastate and interstate outbound non toll-free telephone toll calls) associated with my wireline basic local telephone exchange and exchange access service is also Verizon Long Distance. When I make or receive toll calls using my basic wireline service the IXC is assessed access charges from my LEC, and also pays the access charges to the LEC associated with the other side of the call.

C. I obtain broadband internet service from Verizon Online. This service is provided over fiber. My FiOS service bundle – which includes basic local telephone exchange service and exchange access – is all provided using the same fiber optic plant.

D. I obtain commercial mobile radio service (also known as "mobile wireless" or "cellular") from AT&T Wireless. As part of my service package I also receive commercial mobile data service for Internet access and other data services such as texting

(SMS, MMS). My mobile wireless provider, like most others, often obtains dedicated transmission service over fiber or copper to support communications between the provider's towers and its core network, and pays the rates associated with that service to a LEC in the area. Therefore AT&T Wireless pays Verizon Pennsylvania for transmission service, and passes the costs on to me.

E. Each of my communications service providers are required to pay into the state and/or federal Universal Service Fund(s), based on a percentage of the revenue they receive from me for assessable communications services. They pass this amount through to me each month (along with all other service charges, fees, assessments and taxes) as part of my bill. The service charges and, potentially, some of the separately stated fees, assessments and taxes, are mandatory parts of the bill that I pay each month.

F. The FCC is charged with regulating the jurisdictionally interstate communications services I receive. The Pennsylvania Public Utility Commission regulates the jurisdictionally intrastate communications services I receive, although the state commission is statutorily pre-empted from price regulation over my CMRS service, even to the extent it is jurisdictionally intrastate.

5. In my area, we only have two choices for a bundled service offering – Verizon or Comcast. I do not believe duopoly is actual "competition." My contract with Verizon for fiber-based triple play service has expired. Verizon has repeatedly raised prices and I now pay $40/month more. I am currently planning to switch to Comcast triple play because its prices are marginally lower. But even so it is apparent that Verizon and Comcast do not significantly price compete, and their other terms and conditions of service are quite similar. They would not be able to explicitly or implicitly so coordinate if there were other competitive options.

6. This concludes my Affidavit, but as noted above I am also relying on the Affidavits of Bruce A. Kushnick, Mark N. Cooper and Fred Goldstein for the purpose of explaining why the particular facts described above demonstrate standing.

Thomas William Allibone

SUBSCRIBED AND SWORN TO BEFORE ME this 10 day of May, 2019, to certify which witness my hand and official seal.

[Seal]

Christi Dascher

Notary Public in and for Bucks County, PA

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Christi Dascher, Notary Public
Upper Makefield Twp., Bucks County
My Commission Expires Aug. 16, 2020
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

AFFIDAVIT OF KENNETH A. LEVY IN SUPPORT OF STANDING

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

The Irregulators, New Networks Institute, Bruce A. Kushnick, Mark N. Cooper, Tom Allibone, Kenneth Levy, Fred Goldstein, and Charles W. Sherwood, Jr.,
Petitioners

v.

Federal Communications Commission and United States of America,
Respondents

Case No. 19-1085

Petition for Review of Order by the Federal Communications Commission

AFFIDAVIT OF KENNETH A. LEVY IN SUPPORT OF STANDING

1. My name is Kenneth Allan Levy. I am one of the named Petitioners in the above captioned proceeding.

2. The purpose of this Affidavit is to provide evidence of standing to pursue the matter. I will provide some of the basic facts particular to my individual circumstances, but also rely on the presentations contained in the Affidavits of Bruce A. Kushnick, Mark N. Cooper and Fred Goldstein to explain why the basic facts I present below demonstrate that I have suffered (1) injury-in-fact (2) traceable to the Freeze Order (3) that could be redressed by an order from this Court holding unlawful, vacating, enjoining, and/or setting aside the Freeze Order and remanding the matter to the FCC for further consideration and action.

3. My home address is 2745 N Van Buren Ave., Tucson, Pima County, AZ 85712. The Incumbent Local Exchange Carrier serving my residence and area is CenturyLink.

4. I currently receive the following communications services:

   A. I obtain broadband internet service from CenturyLink. This service is provided over copper, digital subscriber line.

   B. I obtain commercial mobile radio service (also known as "mobile wireless" or "cellular") from Verizon Wireless. As part of my service package I also receive commercial mobile data service for Internet access and other data services such as texting (SMS, MMS). My mobile wireless provider, like most others, often obtains dedicated transmission service over fiber or copper to support communications between the provider's towers and its core network, and pays the rates associated with that service to a LEC in the area.

   C. Verizon Wireless is required to pay into the state and/or federal Universal Service Fund(s), based on a percentage of the revenue it receives from me for assessable communications services. It passes this amount through to me each month (along with all other service charges, fees, assessments and taxes) as part of my bill. The service charges and, potentially, some of the separately stated fees, assessments and taxes, are mandatory parts of the bill that I pay each month.

D. The FCC is charged with regulating the jurisdictionally interstate communications services I receive. The Arizona Corporation Commission regulates jurisdictionally intrastate communications services, although the state commission is statutorily pre-empted from price regulation over my CMRS service, even to the extent it is jurisdictionally intrastate.

5. This concludes my Affidavit, but as noted above I am also relying on the Affidavits of Bruce A. Kushnick, Mark N. Cooper and Fred Goldstein for the purpose of explaining why the particular facts described above demonstrate standing.

Kenneth Allan Levy

SUBSCRIBED AND SWORN TO BEFORE ME this 16th day of May 2019, to certify which witness my hand and official seal.

[Seal]

Rita Morado
Notary Public
Pima County, Arizona
My Comm. Expires 08-12-2022
Commission No. 552222

Notary Public in and for Pima County, Arizona

AFFIDAVIT OF CHARLES W. SHERWOOD IN SUPPORT OF STANDING

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

The Irregulators, New Networks Institute, Bruce A. Kushnick, Mark N. Cooper, Tom Allibone, Kenneth Levy, Fred Goldstein, and Charles W. Sherwood, Jr.,
Petitioners

v.

Federal Communications Commission and United States of America,
Respondents

Case No. 19-1085

Petition for Review of Order by the Federal Communications Commission

AFFIDAVIT OF CHARLES W. SHERWOOD, JR IN SUPPORT OF STANDING

1. My name is Charles W. Sherwood, Jr. I am one of the named Petitioners in the above captioned proceeding.

2. The purpose of this Affidavit is to provide evidence of standing to pursue the matter. I will provide some of the basic facts particular to my individual circumstances, but also rely on the presentations contained in the Affidavits of Bruce A. Kushnick, Mark N. Cooper and Fred Goldstein to explain why the basic facts I present below demonstrate that I have suffered (1) injury-in-fact (2) traceable to the Freeze Order (3) that could be redressed by an order from this Court holding unlawful, vacating, enjoining, and/or setting aside the Freeze Order and remanding the matter to the FCC for further consideration and action.

3. My home address is 3561 North Honeylocust Drive,Beverly Hills, Citrus County, FL. The Incumbent Local Exchange Carrier serving my residence and area is CenturyLink.

4. I currently receive the following communications services:

A. I receive basic local telephone exchange and exchange access service from what many call Spectrum/Charter. Although they are often thought to be a "cable company" in this instance they are also a competitive local exchange carrier (CLEC"), although their certification as such from the Florida Public Utilities Commission arises under the name of Bright House Networks, LLC. They use the same name for purposes of their FCC "214" authorizations. The Bright House entity has been assigned Operating Carrier Number ("OCN") 927D and Access Carrier Name Abbreviation ("ACNA") BHS. Bright House has published access tariffs at the state and federal level so as to be in position to recover state and federal price-regulated switched access charges from interexchange carriers that use Bright House facilities to originate or terminate toll calls, including so-called "toll VoIP." Bright House has also executed a series of "interconnection agreements" with all necessary incumbent LECs (including but not limited to AT&T, Verizon, Embarq and Consolidated) that serve in the same Local Access and Transport Area ("LATA"). This is relevant because "local" traffic exchange is also regulated by the state PSC and the FCC, and the terms of "local" traffic exchange are established through interconnection agreements rather than tariff.

B. The presubscribed telephone toll provider (the IXC that handles all intrastate and interstate outbound non toll-free telephone toll calls) associated with my wireline basic local telephone exchange and exchange access service is also Bright House. When I receive a toll calls as part of my service the IXC for the calling party pays access charges to Bright House. When I make a toll call to some area outside the LATA Bright House is assessed access charges to the LEC associated with the other side of the call.

C. I obtain broadband service from Spectrum/Charter. This service is provided over fiber to the home. The distribution plant supporting my broadband service is the same plant used to provide my local telephone service.

D. I obtain commercial mobile radio service (also known as "mobile wireless" or "cellular") from Sprint. As part of my service package I also receive commercial mobile data service for Internet access and other data services such as texting (SMS, MMS). My mobile wireless provider, like most others, often obtains dedicated transmission service over fiber or copper to support communications between the provider's towers and its core network, and pays the rates associated with that service to a LEC in the area.

E. Each of my communications service providers are required to pay into the state and/or federal Universal Service Fund(s), based on a percentage of the revenue they receive from me for assessable communications services. They pass this amount through to me each month (along with all other service charges, fees, assessments and taxes) as part of my bill. The service charges and, potentially, some of the separately stated fees, assessments and taxes, are mandatory parts of the bill that I pay each month.

F. The FCC is charged with regulating the jurisdictionally interstate communications services I receive. The Florida Public Service Commission regulates the jurisdictionally intrastate communications services I receive, although the state commission is statutorily pre-empted from price regulation over my CMRS service, even to the extent it is jurisdictionally intrastate.

5. There were several potential suppliers of "wired" voice, video and data services when I moved into my current home. Only Spectrum/Charter could provide "Triple Play" services at the time. CenturyLink could only provide landline service and Comcast could only provide cable TV service. We chose Specturm/Charter so that I could obtain all three services (voice, video and Internet) the same underlying transmission network and receive a unified bill. I would consider whether to instead purchase service from CenturyLink if they offered a Triple Play but despite all the funds they receive through state and federal access charges and Universal Service Support they have not seen fit to deploy high speed facilities in my area.

6. This concludes my Affidavit, but as noted above I am also relying on the Affidavits of Bruce A. Kushnick, Mark N. Cooper and Fred Goldstein for the purpose of explaining why the particular facts described above demonstrate standing.

Charles W. Sherwood, Jr.

NOTARY ON NEXT PAGE

SUBSCRIBED AND SWORN TO BEFORE ME this 7th day of May, 2019, to certify which witness my hand and official seal.

[Seal]

FRIEDA ROTH
MY COMMISSION # FF 977917
EXPIRES: April 3, 2020

Notary Public in and for Citrus, FLORIDA

AFFIDAVIT OF FRED GOLDSTEIN IN SUPPORT OF STANDING

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

The Irregulators, New Networks Institute, Bruce A. Kushnick, Mark N. Cooper, Tom Allibone, Kenneth Levy, Fred Goldstein, and Charles W. Sherwood, Jr.,
Petitioners

Case No. 19-1085

Petition for Review of Order by the Federal Communications Commission

v.

Federal Communications Commission and United States of America,
Respondents

AFFIDAVIT OF FRED GOLDSTEIN IN SUPPORT OF STANDING

1. My name is Fred R. Goldstein. I am one of the named Petitioners in the above captioned proceeding.

2. The purpose of this Affidavit is to provide evidence of standing to pursue the matter. I will provide some of the basic facts particular to my individual circumstances, but also rely on the presentations contained in the Affidavits of Bruce A. Kushnick and Mark Cooper to explain why the basic facts I present below demonstrate that I have suffered (1) injury-in-fact (2) traceable to the Freeze Order (3) that could be redressed by an order from this Court holding unlawful, vacating, enjoining, and/or setting aside the Freeze Order and remanding the matter to the FCC for further consideration and action.

3. My address is PO Box 920362, Needham MA 02492. The Incumbent Local Exchange Carrier serving my residence and area is Verizon.

4. I currently receive the following communications services:

   A. I receive telephone exchange and exchange access service from Comcast, using PacketCable.

   B. I obtain broadband service from Comcast. This service is provided over hybrid fiber coaxial cable. Cable companies, like IXCs and CMRS providers, extensively use ILEC-provided Business Data Services and sometimes higher capacity fiber based services for "backhaul" and for other purposes.

   C. I obtain commercial mobile radio service (also known as "mobile wireless" or "cellular") from Verizon. As part of my service package I also receive commercial mobile data service for Internet access and other data services such as texting (SMS, MMS). My mobile wireless provider, like most others, often obtains dedicated transmission service over fiber or copper to support communications between the provider's towers and its core network, and pays the rates associated with that service to a LEC in the area. When I make or receive interMTA toll calls using my wireless service the general rules would appear to require that "Verizon the CMRS" be assessed access charges from my LEC (Verizon the ILEC).

D. Each of my communications service providers are required to pay into the federal Universal Service Fund, based on a percentage of the revenue they receive from me for assessable interstate communications services. They pass this amount through to me each month (along with all other service charges, fees, assessments and taxes) as part of my bill. The service charges and, potentially, some of the separately stated fees, assessments and taxes, are mandatory parts of the bill that I pay each month.

E. The FCC is charged with regulating the jurisdictionally interstate communications services I receive. The Commonwealth of Massachusetts regulates the jurisdictionally intrastate communications services I receive, although the state commission is statutorily pre-empted from price regulation over my CMRS service, even to the extent it is jurisdictionally intrastate.

5. My consulting practice has largely focused on two sets of clients. One features smaller competitive service providers around the country. I helped many small CLECs get their start in the decade following the Telecommunications Act of 1996. More recently I have largely worked with the Wireless ISP industry. These competitive providers are impacted when incumbent LECs enter markets at below-cost rates, subsidized by their state-utility affiliates via improper separations. The other set of clients has been state and local governments. In that role I have seen how local telephone network, made to seem unprofitable by improper allocations of cost, have been allowed to deteriorate. Especially in rural areas where competition does not exist, subscribers are left with no option except the local wireline ILEC service. The FCC's Freeze on separations has played a role in these and other industry problems which impact me and my clientele:

A. The Federal Communications Commission's principal justification for maintaining the Freeze appears to be that it reduces "burdensome" regulatory filing requirements on the part of Incumbent Local Exchange Carriers, and that it is not relevant to the bulk of subscribers, only to "a small percentage of Americans" who "receive their telecommunications services from providers subject to rate-of-return regulation." But those arguments are disingenuous. The impact of the Freeze extends well beyond those areas.

B. The first excuse, that the separations rules are burdensome, is only notable in context of the what the Commission then states in its Order: "In 1997, the Commission recognized the need to comprehensively reform the separations rules and referred separations reform to the Federal-State Joint Board on Jurisdictional Separations (Joint Board) for a recommended decision. More than twenty years later, the Joint Board has not reached agreement on comprehensive separations reform."

C. It is true that the existing Part 36 rules are dated and use terminology and categorization that date back to the analog copper network of the 20th century. But those are, literally, technicalities. Certainly a more modern, simpler set of separations rules could have been drafted over the past 22 years, and especially within the past 15 years. The problem is that over this period traffic patterns have shifted very far from pre-Freeze levels. It is clear that over the 22 years since 1997, essentially no effort has been made to update these rules to track relative jurisdictional use. The Freeze has been the Commission's substitute for reform. While the network has evolved dramatically, and

usage patterns have changed dramatically, the Freeze prevents any meaningful accounting of these changes from being performed.

D. A more important issue is the Freeze impacts far more than rural rate-of-return carriers. While only those carriers are subject to direct separated cost-based FCC regulation of their interstate access rates, the Freeze impacts how states view and thus regulate all Incumbent Local Exchange Carriers, including Price Cap Carriers. Jurisdictional separations, by definition, impact both state and federal jurisdictions, and states are required to use these same metrics to regulate within their intrastate jurisdiction.

E. Exactly how states use separated costs within their own jurisdiction varies from state to state. Retail regulation of ILEC rates has largely been relaxed, but even this varies between states. Some maintain price caps for some basic services, such as residential POTS. Some maintain quality-of-service regulation, such as a requirement that most repairs be performed within a certain time frame, or that routine installations be performed within a certain time. Others retain some form of traditional cost-of-service ratemaking or require reporting using separated costs as a means to ensure rates are reasonably priced.

F. The Commission's own Order notes in paragraph 18 that, "States also use separations results to determine the amount of intrastate universal service support and to calculate regulatory fees, and some states perform rate-of-return ratemaking using intrastate costs." Universal service funds exist within many states and are generally applicable to all carriers. Thus separations directly impacts the total charges paid by customers of competitive, as well as incumbent, carriers, even when retail rates are not regulated.

G. Because of the Freeze, the cost of POTS appears to be far higher than it really is. These services are unprofitable because their revenues have plummeted over the past 15 years, while the share of common expenses allocated to them have remained at frozen levels. Thus fewer and fewer lines are expected to cover the same expenses. Because these lines then appear to be unprofitable, ILECs reduce their investment, reduce their maintenance, and often request to discontinue these residual state-regulated services. They then offer unregulated, off-tariff substitutes, either directly or via CLEC affiliates. This back-door deregulation is facilitated by the false losses booked as a result of the Freeze.

H. The putative losses in copper-line POTS have also been used to justify discontinuance of copper-based services, both regulated and the unregulated DSL that piggybacks atop it. And when copper is discontinued, CLECs lose access to unbundled copper loops as well, especially those used for their own DSL-type services, including Ethernet over Copper, a more modern business service than the simple mass-market ADSL formerly promoted by the ILECs. This reduces the competitiveness of the market and in turn allows all remaining providers, typically the ILEC-cable duopoly, to raise their own prices. In the past I consulted for several CLECs using unbundled local loops. As the copper has been retired, or simply deteriorated beyond usability, they have lost

their investments and either pivoted to a different modality, such as wireless, or gone out of business.

I. Policies may also vary between states with regard to intrastate switched access rates. While the Commission has capped intrastate rates at parity with interstate rates, and largely reduced terminating switched access rates to zero or near-zero levels, originating access rates have not yet been reformed. These rates were originally intended to be paid by stand-alone long distance carriers who sold interexchange service to consumers via Equal Access. The IXC paid the LECs on both ends of the call, with the IXC paying the carrier whose customer originated the call as well as the carrier whose customer terminated the call. As local telephone plans began to bundle in long distance again, reverting to the pre-1984 norm, originating access was no longer primarily paid by interexchange carriers. Instead, it remained a punitive rate charged to competitive carriers who were deemed in some way to be providing an "interexchange" service on calls originated by ILEC customers.

J. States can and do allow ILECs to apply intrastate and sometimes interstate access charges these to non-local calls made within a state, where "local" is defined by the ILEC in its tariff or price book. VoIP providers are sometimes exempted and CMRS providers are always exempt from these, while stand-alone IXCs have largely disappeared. Certificated CLECs, however, are not exempt. Thus the primary impact of these rates is to create an impediment to what little CLEC competition still exists. If a Verizon customer in Boston calls a non-local CLEC number in Worcester, Verizon is both the originating and interexchange carrier, so no originating access applies (it would be paying itself), and the terminating access charge to the CLEC has been zeroed out by the same FCC reforms that make robocalling profitable. Originating access, however, does remain on the books, at levels that were not brought down by the past decade's reforms.

K. Because many Interconnection Agreements contain clauses dating back to the dial-in modem era that explicitly classify all calls from ILEC lines to foreign-exchange (FX, also known as Virtual NXX) numbers as subject to intrastate originating access charges, CLECs are not able to provide intraLATA interexchange number portability. This is still the case even though the Commission has opened a Docket on nationwide number portability, a far more complex problem. IntraLATA portability by a CLEC, even between adjacent but not "local to each other" exchanges, is now constructively prohibited even though there are no technical impediments, based on the claim it creates FX service. Competitive carriers, such as cable companies, are thus loath to risk it.

L. This has personally affected me, as I recently moved between two adjacent rate centers which are "local" to each other in the relevant ILEC tariff. My home telephone number provided by Comcast could not be ported to my new location, even though they are served by the same head end, because Comcast, as well as its competitor RCN, implemented a ban on porting numbers across rate center boundaries. That ban is a direct result of the existence of those punitive intrastate originating access tariffs. Their rate level is in part justified by the putatively high costs of Verizon's intrastate service, which is in turn maintained by the Freeze. Under the terms of Verizon's standard interconnection agreement, even calls to wireline foreign exchange numbers within a

local calling area are subject to intrastate originating access. And as a result, I was only able to port the numbers to a mobile carrier, and from there to Google Voice, a VoIP service (deemed jurisdictionally interstate), which forwards the calls to "local" Comcast numbers. This preposterous complexity has preserved the numbers across rate center boundaries but because both sets of numbers, new and old rate centers, are still in service, it has doubled the "attack surface" for robocallers, and thus I receive at least twice as many robocalls as I would have otherwise. My outgoing calls also display the "local" numbers, not the ones I have had for many years and still wish to use.

M. Separations may also impact the way Universal Service Fund monies, at both the state and federal levels, are calculated, collected and disbursed. Federal USF is paid by providers of interstate telecommunications, who are assessed a fee equal to about 20% of their jurisdictional revenues. The provider then passes the fee through to consumers as a line item on the bill. I and every other consumer of interstate telecommunications therefore support the Connect America Fund, which subsidizes broadband service providers in unserved areas and pays providers that offer a discount to eligible low-income beneficiaries. Some states have their own USF, though Massachusetts does not. USF fees and the disbursements, especially to legacy rural ILEC recipients, are impacted by the distorted separations regime. The Freeze Order recognizes the link between separations and USF in paragraphs 18, 43 and 49.

6. As explained above, the Freeze Order does inflict several concrete injuries in fact on me and all other consumers of intrastate and interstate communications services. If the Commission is required to revisit the issue because of a remand on review it will be forced to finally confront the serious harms inflicted by currently "frozen" jurisdictional allocations. The FCC and the states will be required to stop kicking this 22 year old can down the road several years, only to kick it again for an even longer period once the deadline approaches. The ultimate result will be allocation methods that more fairly represent relative use. This will benefit consumers, the carriers and the entire economy because it will lead to more rational regulatory treatment.

7. This concludes my Affidavit, but as noted above I am also relying on the Affidavits of Bruce A. Kushnick and Mark Cooper for a further explication on why I and the other petitioners have standing.

Fred R. Goldstein

SUBSCRIBED AND SWORN TO BEFORE ME this 17th day of May, 2019, to certify which witness my hand and official seal.

Seal

JOSEPH VALENTIN
Notary Public
Massachusetts
My Commission Expires
Apr 11, 2025

Notary Public in and for

Joseph Valentin

AFFIDAVIT OF MARK COOPER IN SUPPORT OF STANDING

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

The Irregulators, New Networks Institute, Bruce A. Kushnick, Mark N. Cooper, Tom Allibone, Kenneth Levy, Fred Goldstein, and Charles W. Sherwood, Jr.,
Petitioners

Case No. 19-1085

Petition for Review of Order by the Federal Communications Commission

v.

Federal Communications Commission and United States of America,
Respondents

AFFIDAVIT OF MARK COOPER IN SUPPORT OF STANDING

1. My name is Mark Neal Cooper. I am one of the named Petitioners in the above captioned proceeding.My home address is 504 Highgate Terrace, Silver Spring Maryland.

2. I provide basic facts in this Affidavit but also express certain opinions that underlie the questions this Affidavit is presented to resolve. I consider myself an expert by training and education for purposes of Fed. R. Ev. 702. I have written several books and articles in this field, and accepted as an expert qualified to express opinions bearing on similar topics in both federal and state courts. My bio is attached hereto.

3. The purpose of this Affidavit is to provide evidence of standing to pursue the matter. I will provide some of the basic facts particular to my individual circumstances, but also rely on the presentations contained in the Affidavits of Bruce A. Kushnick and Fred Goldstein to explain why the basic facts I present below demonstrate that I have suffered (1) injury-in-fact (2) traceable to the Freeze Order (3) that could be redressed by an order from this Court holding unlawful, vacating, enjoining, and/or setting aside the Freeze Order and remanding the matter to the FCC for further consideration and action.

4. The Incumbent Local Exchange Carrier serving my residence and area is Verizon.

5. I currently receive the following communications services:

   A. I receive wireline basic local telephone exchange and exchange access service from Verizon. This company is an incumbent local exchange carrier.

   B. The presubscribed telephone toll provider (the IXC that handles all intrastate and interstate outbound non toll-free telephone toll calls) associated with my wireline basic local telephone exchange and exchange access service is also Verizon. When I make or receive toll calls using my basic wireline service the general rules would appear to require that “Verizon the IXC” be assessed access charges from my LEC (Verizon the ILEC). They would also require that my IXC also pay access charges to the LEC associated with the other side of the call. I question, however, whether “Verizon the IXC” is in fact paying the same access charges to “Verizon the ILEC” that “Verizon the LEC”

would impose on calls to and from my local line if I presubscribed to a different IXC. There is some evidence that given their familial relationship Verizon the IXC and Verizon the ILEC have implemented different and potentially discriminatory prices in comparison to what unaffiliated IXCs are charged. This may be the case for both switched and special access (Business Data Service) and in both the intrastate and interstate jurisdictions.To the extent Verizon the IXC uses fiber-based services that are not classified as BDS I believe Verizon the ILEC and Verizon the IXC are engaging in similar discriminatory and anti-competitive behavior. The Affidavit of Bruce Kushnick provides more detail on these points.

C. I obtain broadband service from Comcast. This service is provided over hybrid fiber coaxial cable. The underlying transmission is obtained from Comcast and sometimes Verizon the ILEC and my broadband provider pays fees to Verizon the ILEC to use this line. Cable companies, like IXCs and CMRS providers, extensively use ILEC-provided Business Data Services and sometimes higher capacity fiber-based services for "backhaul" and for other purposes.

D. I obtain commercial mobile radio service (also known as "mobile wireless" or "cellular") from Verizon. As part of my service package I also receive commercial mobile data service for Internet access and other data services such as texting (SMS, MMS). My mobile wireless provider, like most others, often obtains dedicated transmission service over fiber or copper to support communications between the provider's towers and its core network, and pays the rates associated with that service to a LEC in the area. When I make or receive interMTA toll calls using my wireless service the general rules would appear to require that "Verizon the CMRS" be assessed access charges from my LEC (Verizon the ILEC). They would also require that my CMRS provider also pay access charges to the LEC associated with the other side of the interMTA toll call. I question, however, whether "Verizon the CMRS" is in fact paying the same access charges to "Verizon the ILEC" that "Verizon the LEC" would impose on calls to and from my wireless service if I used a different CMRS provider such as Sprint or T-Mobile. There is some evidence that given their familial relationship Verizon the CMRS and Verizon the ILEC have implemented different and potentially discriminatory prices in comparison to what unaffiliated IXCs are charged. This may be the case for both switched and special access (Business Data Service) and in both the intrastate and interstate jurisdictions. To the extent Verizon the CMRS uses fiber-based services that are not classified as BDS I believe Verizon the ILEC and Verizon the CMRS are engaging in similar discriminatory and anti-competitive behavior. The Affidavit of Bruce Kushnick provides more detail on these points.

E. Each of my communications service providers are required to pay into the state and/or federal Universal Service Fund(s), based on a percentage of the revenue they receive from me for assessable communications services. They pass this amount through to me each month (along with all other service charges, fees, assessments and taxes) as part of my bill. The service charges and, potentially, some of the separately stated fees, assessments and taxes, are mandatory parts of the bill that I pay each month.

F. The FCC is charged with regulating the jurisdictionally interstate communications services I receive. The Maryland Public Service Commission regulates the

jurisdictionally intrastate communications services I receive, although the state commission is statutorily pre-empted from price regulation over my CMRS service, even to the extent it is jurisdictionally intrastate.

6. As part of my business I have prepared testimony and research and made presentation of the results in and visited for personal reasons every state in the United States except New Mexico and Alaska.[1]In the course of conducting that business I have consumed local telecommunications services, the price of which has been distorted by the cost accounting practices at issue in this proceeding. While I cannot identify every individual transaction that constitutes this harm, there is no doubt that I have engaged in these transactions hundreds, if not thousands of times, and I continue to do so. Moreover, to the extent that my clients are harmed by the accounting practices at issue, they must pass that injury (recover the costs) in some fashion, which undoubtedly harms me indirectly.

7. There is a second and extremely important way the accounting practices at issue harm me. They allow incumbent communications companies to distort or undermine competition, and this has denied me the benefit of a much more competitive environment at home and throughout the United States. These practices have directly contributed tohigher prices and fewer choices than would otherwise obtain. To appreciate this important harm to consumers we must step back and view the overall distortion and harm that has resulted from these practices in general and how they are dealt with in the Freeze Order in particular.This requires an appreciation of the central issues in this case and proceeding.

A. Two defining aspects of communications networksare that a large proportion of total costs are fixed in nature and many costs – both fixed and variable – are common and joint. Fixed costs are those that stay relatively constant without regard to demand or consumption of the asset that gives rise to them. Fixed costs are also often "common" to several different services and used to jointly provide both intrastate and interstate services. There are also "joint" costs – those that relate to activities used by both the intrastate and interstate jurisdictions. There are some costs that are both joint and common, there are some that are common but not joint and some that are joint but not common. The classic example of a fixed cost that is fixed but also joint and common is the local loop. Most loop costs do not vary with usage, but loops support many different intrastate and interstate services. There are also variable or usage related costs (costs that vary depending on volume) and they too can be common or joint. An example would be a central office switch, which supports several intrastate services and several interstate services. Some central office costs are fixed and some are variable but most are joint and common.

B. It has long been recognized that competition is socially beneficial largely because it drives prices for goods and services toward cost.[2] Economic regulation was deemed

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[1] Attachment A presents my resume, which documents the extensive geographic scope of my testimony and analysis, much of which requires travel to the location being analyzed.

[2] Adam Smith, *An Inquiry into the Nature and Causes of The Wealth of Nations,"* Edwin Cannan (Ed.) (University of Chicago Press, 1976), Book 1, Chapter VII. "When the price of any commodity is neither more nor less than what is sufficient to pay the rent of the land, the wages of the labour, and the profits of the stock [of] bringing it to

necessary because some markets are not competitive. Thus, regulation was instituted to act as a substitute for competition. This is well-recognized in the scholarly literature and some regulatory statutes expressly so state. The FCC's "cost accounting" rules (Part 32), the "separations" rules (Part 36) and then ultimately the rules that assign costs to individual jurisdictional services (Parts 51, 61, 64 and 69) are important because a principal measure of whether a rate is fair, just and reasonable is the extent to which the price of the service recovers the costs incurred to provide that service and thus matches as closely as possible what would obtain in a fully competitive marketplace. One therefore cannot persuasively claim that a rate is "reasonable" where there is a significant mismatch between the cost incurred to provide a service and the revenue from that service, unless there has been an express public policy determination that the service should substantially subsidize other services or activity, or be subsidized by some other service or activity.

C. The FCC generally believes that it can rely on market forces as a short-cut mechanism and substitute for traditional cost of service ratemaking. It has increasingly eschewed cost of service ratemaking in favor of alternative regulation techniques such as price caps, forbearance and outright deregulation based on the view that competition will sufficiently constrain prices. But these "light regulation" tools only work if there is some correlation between costs and rates at the onset of the relaxed regulatory measures and the product actually succeeds in reasonably matching up with what would obtain in a competitive market. The Freeze Order so recognized in ¶¶30-31 by allowing some "rate of return" ILECs to "unfreeze" and "update" their "category relationships." Paragraph 30 states, in pertinent part that "some, if not all, carriers with frozen category relationships are unable to recover their business data services costs from business data services customers or from NECA traffic sensitive pool settlements." A translation into plain English is that the FCC is fully aware that the long-standing "freeze" to separations has led to the situation where costs that are clearly jurisdictionally *interstate* have been stranded on the intrastate side, and even on the interstate side costs properly attributable to business data services are being recovered from other interstate services. In other words, intrastate ratepayers are subsidizing interstate services and some interstate services are cross-subsidizing other interstate services, including BDS. Paragraph 43 "agree[s] with NARUC that the existing separations rules, which presume circuit-switched, primarily voice networks, require updating to reflect today's network configurations and mix of broadband, video, and voice services" and "share[s] NARUC's and the Irregulators' concern that those rules necessarily misallocate network costs." Some of the comments in the proceeding below prove this is so. The ITTA's August 27, 2018 comments contended on page 4 that "it is plausible that a rate-of-return carrier that elected to freeze its categories in 2001 would see business data services rates more than double what they are today if it now was to unfreeze its categories." WTA's August 27, 2018 filing asserted on page 6 that "unfreezing of 2001 category relationships will result in a shifting of costs in most affected study areas from intrastate to interstate, and from

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market, accruing to their natural rates… the commodity is then sold precisely for what it is worth, or for what it really costs the person who brings it to market (62)"

common line to special access." What these carriers are clearly saying is that the longstanding "freeze" to separations has led to a huge cost misalignment between jurisdictions and among various services.

D. What the Freeze Order fails to recognize is that the same cost misalignment it agreed exists for rate of return carriers also exists for price cap carriers. This disconnect has affected interstate services but is even more impactful and prejudicial to intrastate ratepayers. Freeze Order ¶28 baldly asserts that "the separations rules are irrelevant to price cap carriers" but this is legally and factually incorrect, at least insofar as intrastate costs and rates are concerned. The Kushnick affidavit so demonstrates.

E. 47 U.S.C. §§201 and 201 require that rates for interstate telecommunications services be just, reasonable and nondiscriminatory. The "interstate" portion of services that rely on a local loop and FCC-regulated special access – now known as Business Data Services or "BDS" – have always been regulated utility services under Title II of the Act. They are still regulated utility services, and still subject to §§201 and 202. The FCC merely replaced the then-applicable *ex ante* cost-based reasonableness mechanisms with new *ex post* mechanisms to review for reasonableness, and decided that §§201 and 202 "do not explicitly require rates to correspond to costs – only that such rates be just and reasonable and not unreasonably discriminatory." *See*, *Business Data Services in an Internet Protocol Environment*, 32 FCC Rcd 3459, 3565, 3567, ¶¶260-261, 265 (2017). The Commission recognized that "when considering whether rates are just and reasonable" costs remain "a factor." 32 FCC Rcd at 3567 n. 651. So, to this day, and despite its deregulatory zeal, even the FCC acknowledges that costs remain an important factor towards assessing reasonableness, even though they are no longer the primary ratemaking tool in the interstate jurisdiction. In the forbearance context the Commission has admitted that "We cannot rule out all 'possible future need for cost data' even under price capregulation. And there are several instances in which we have a specific need for some data related to costs for price cap carriers in order to ensure just and reasonable rates, protect consumers and serve the public interest." *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c)from Enforcement of Certain Legacy Telecommunications Regulations*, 28 FCC Rcd 7627, 7650, ¶38 (2013), *pet. for rev. denied sub nom. Verizon v. FCC,* 770 F.3d 961 (D.C. Cir. 2014).

F. One of the specific "needs" the FCC recognized in the various forbearance orders mentioned in Freeze Order note 45 was a way to ensure compliance with 47 U.S.C. §254(k), which prohibits a telecommunications carrier from using services that are not competitive to subsidize services that are subject to competition. In each of its sequential "cost rules" forbearance orders for AT&T, Verizon and Qwest and then all price cap ILECs the FCC required the benefiting ILECs to certify they were in compliance with §254(k). As the FCC observes in the last sentence of note 45 it terminated this and other conditions in 2017. *Comprehensive Review of the Part 32 Uniform System of Accounts; Jurisdictional Separations and Referral to the Federal-State Joint Board*, 32 FCC Rcd 1735, 1748-49, ¶44. Basically, the Commission decided it does not in fact "need" cost information after all, even though separated costs are still "necessary" to administer the purposes listed in Freeze Order ¶18. The FCC is purposefully blinding itself, thus obstructing enforcement of the duties Congress delegated it to perform.

G. The Commission accomplishes this by way of a sub-delegation of its just and reasonableness oversight to the silent hand of competition, even where there is in fact no such competition or at least not enough competitive pressure to provide a sufficient incentive for the dominant ILECs to adjust and maintain prices that would obtain in a competitive market, *e.g.*, rates that trend toward marginal cost and result in a market price that equals marginal cost (MC) that in turn is the same as average total cost (ATC), since in the long-term, all costs including fixed or capital costs must be recovered, but they will earn only a normal rate of profit.[3] I noted above that a significant portion of communications network costs are fixed, joint and common. This means it is very difficult to obtain a scenario where prices do ever equal both MR and ATC. That is why industries with high fixed costs are often a "natural monopoly": only one firm (or sometimes two) can achieve the scale where the MR/ATC intersection occurs. This, in turn, explains why the communications industry has high barriers to entry for facilities-based local transmission, and those that try to enter often fail because they never reach the necessary scale.

H. The problem is therefore that without cost information it is simply impossible to identify and cure the very subsidization and competitive distortions the FCC *admits are endemic to the current separations regime* in the Freeze Order. And, even more important, while it may or may not be the case that federal regulators will want and use cost information the FCC has effectively prevented the states from using proper cost data to set intrastate rates even where the state law requires some reference to cost. The states have to obey and apply FCC-prescribed separations outcomes, but for price cap carriers that have received forbearance they cannot obtain the information they must have to do that very thing. For the rate of return carriers that choose to not "unfreeze" the states are stuck with the admitted costs that should and would be assigned to the interstate jurisdiction if separations better reflected relative use. In sum, intrastate ratepayers and in particular those receiving basic local exchange service from incumbent LECs are being forced to subsidize interstate rates and services and other nonregulated activities and there is nothing they can do about it for at least another 6 years.

I. Rates that do not at least roughly approximate costs can do great harm. In economic terms, unjust rates and cross subsidies create inefficiency (reducing total social welfare) and inequity (unjustly transferring wealth between classes of consumers, between consumers and producers and between groups of producers).

J. The 1996 Act reflected a hope and expectation the communications sector could rely more on competition and less on regulation, so it allowed the FCC to forebear from regulation where competition rendered regulation no longer necessary in the public interest. Deregulation was supposed to come after the competition arrived. Unfortunately, it never did, not with sufficient force to ensure rates would be just and reasonable. The in-

[3] Id., notes that "The … price, therefore, which leaves him this profit, is not always the lowest at which a dealer may sometimes sell his goods,; it is the lowest at which he is likely to sell them for any considerable time (63)." Smith describes fluctuation over short periods and also the long-term trend noting that "the market price of every particular commodity is in this manner continually gravitating… toward the natural price (67)."

region market share of the companies that inherited their network from the monopoly period is still above 50%, almost a quarter of a century after the Act.[4]

K. When companies incur costs to supply competitive services but recover them from local services and in particular basic local telephone service, they do harm in a number of ways.

i) They make it appear that local services are losing money and rate increases are necessary. This makes basic (plain old) telephone service more costly than it should be. (This also is an independent violation of Section 254(k) of the Act).

ii) When incumbent companies provide other competitive services, such as enhanced/information service, they fail to recover the costs associated with those services through the price they charge for those service. These shifts provide artificial profits or a cushion that allows price squeeze against competitors that do not enjoy familial relationship with an incumbent that has local operations. They can also abuse the familial tie as a mechanism to charge non-integrated competitors more than they charge themselves for the competitive service. Regulators at the state and federal level have always been aware of these concerns and implemented long-standing affiliate transactions and cost-accounting rules to identify and prevent this abuse. The FCC is well down the road toward complete abandonment of these tools. Its failure to repair the broken separations process allowed it to rationalize this course because the dumping of costs on the states minimized the impact. But even worse, the same delay has effectively prevented any state that might want to retain these tools from using them to mitigate the harm on the intrastate side even though the burden has fallen on intrastate far more than on interstate.

iii) By not fixing and not constantly reviewing cost allocations, as the FCC has done in the allocation of costs between the federal and state jurisdiction and within the federal jurisdiction in setting price caps, the FCC has created an immense opportunity to earn excess profits, an opportunity that the communications network owners have exploited aggressively.

L. Since the subscriber line charge was fixed, the misallocated costs had to be recovered from plain old telephone (POTS) users. POTS charges are higher than they should be and suppress demand for lower income consumers, which reduces universal service. Moreover, this is likely to be true of all states, regardless of the current

[4] The effects and harms of the misallocation and over recovery of costs discussed in the remainder of my affidavit have been demonstrated in an academic paper, a presentation to a state bar association, and in joint comments to the FCC as noted by Bruce Kushnick. See my attached resume. "Business Data Services after the 1996 Act: Structure, Conduct, Performance in the Core of the Digital Communications Network The Failure of Potential Competition to Prevent Abuse of Market Power," Telecommunications Policy Research Conference, September, 2016.Overcharged And Underserved: How A Tight Oligopoly On Steroids Undermines Competition And Harms Consumers In Digital Communications Markets, Pennsylvania Utility Law Conference, Pennsylvania Bar Institute, June 1, 2017.

regulatory status of POTS. Since the misallocation occurred before state deregulation, the error was baked into the basic rates that provided the launch pad for deregulation (i.e. price caps started too high and/or the lack of competition allow incumbents to recover all those costs).

M. By misallocating costs and recovering them from the wrong people – not the cost causers – the allocation that the FCC seeks to freeze for another six years wreaks havoc on competition. The most effective first step in dealing with these problems is to cut them off at the source. Without the misallocation and over recovery of costs, the tasks of pursuing the goals of the Communications Act – universal services, just and reasonable rates, increased reliance on competition – will be much easier.

N. Petitioners hope to convince the court on the merits that the Freeze Order is illegal and there must be a timely and more realistic, 21st century separation of costs between the intrastate and interstate jurisdictions. The result would move costs from intrastate to interstate, and then ultimately costs should, would or perhaps might be reallocated between interstate services to better match how these higher interstate costs are incurred to provide each service. Then serious inquiry can be made at the state and federal level whether some of costs that are presently recovered from basic services are more properly attributed to competitive services or affiliated concerns.

O. Predicting how that will come out in the end is difficult, but one thing is certain: **any** separation reform will be far better and more favorable to consumers and competitors than is the case under the current "frozen" regime.

i) The true rate to which basic local service and legacy copper plant will be revealed. Basic ratepayers may yet actually receive some benefit from the immense amounts they were forced to fund for fiber that either did not get deployed or actually used to provide services to the residential mass market.

ii) States that still regulate local rates will be able to lower them to more just, reasonable and cost-based levels.

iii) States that have shifted to some form of price cap will be in position have to adjust the caps in recognition of the dramatic reduction in costs.

iv) States that have deregulated will be under immense pressure to lower rates so that consumers enjoy at least part of the benefit of correcting the misallocation error.

v) At the federal level, the FCC will finally be confronted with the problem it created. The companies will want to raise interstate rates to cover the costs that have been illegally relegated to the intrastate jurisdiction. In the proceeding that follows reallocation of jurisdictional costs, the FCC will be forced to comply with the 1996 Act.

vi) Timing is important, and a six-year delay will be fatal. Ratepayers will soon be called upon to fund another round of network upgrades to support

wireless 5G. The required investment will rival or exceed the amounts dedicated to recent upgrades to digital and fiber plant. The FCC may be content with doubling down on the past misallocations and abuses, but the states are likely to disagree. From a ratepayer perspective a course correction after six years will be much more difficult, if not impossible.

8. I have been harmed, the other Petitioners have been harmed, intrastate ratepayers have been harmed, interstate ratepayers have been harmed and competition has been harmed. The Freeze Order continues and exacerbates the harm. An order from this Court holding unlawful, vacating, enjoining, and/or setting aside the Freeze Order and remanding the matter to the FCC for further consideration and action will redress the harm by requiring separations reform sooner than would otherwise occur.

9. This concludes my Affidavit, but as noted above I am also relying on the Affidavits of Bruce A. Kushnick and Fred Goldstein for a further explication on why I and the other petitioners have standing.

Mark Neal Cooper

SUBSCRIBED AND SWORN TO BEFORE ME this 18 day of May, 2019, to certify which witness my hand and official seal.

[Seal]

Notary Public in and for Minaxi Patel

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MY COMMISSION EXPIRES FEBRUARY 13, 2020

ATTACHMENT “A” TO AFFIDAVIT OF MARK COOPER IN SUPPORT OF STANDING

(COOPER BIO)

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EDUCATION:

Yale University, Ph.D., 1979, Sociology

University of Maryland, M.A., 1973, Sociology

City College of New York, B.A., 1968, English

PROFESSIONAL EXPERIENCE:

President, Citizens Research, 1983 - present

Research Director, Consumer Federation of America, 1983-present

Senior Fellow for Economic Analysis, Institute for Energy and the Environment, Vermont Law School 2009-present

Associated Fellow, Columbia Institute on Tele-Information, 2003-2016

Fellow, DonaldMcGannon Communications Research Center, Fordham University, 2005-2015

Fellow, Silicon Flatirons, University of Colorado, 2009-2014

Fellow, Stanford Center on Internet and Society, 2000-2010

Principle Investigator, Consumer Energy Council of America, Electricity Forum, 1985-1994

Director of Energy, Consumer Federation of America, 1984-1986

Director of Research, Consumer Energy Council of America, 1980-1983

Consultant, Office of Policy Planning and Evaluation, Food and Nutrition Service, United States Department of Agriculture, 1981-1984

Consultant, Advanced Technology, Inc., 1981

Technical Manager, Economic Analysis and Social Experimentation Division, Applied Management Sciences, 1979

Research Associate, American Research Center in Egypt, 1976-1977

Research Fellow, American University in Cairo, 1976

Staff Associate, Checchi and Company, Washington, D.C., 1974-1976

Consultant, Division of Architectural Research, National Bureau of Standards, 1974

Consultant, Voice of America, 1974

Research Assistant, University of Maryland, 1972-1974

TEACHING EXPERIENCE:

Lecturer, Washington College of Law, American University, Spring, 1984 - 1986, Seminar in Public Utility Regulation

Guest Lecturer, University of Maryland, 1981-82, Energy and the Consumer, American University, 1982, Energy Policy Analysis

Assistant Professor, Northeastern University, Department of Sociology, 1978-1979, Sociology of Business and Industry, Political Economy of Underdevelopment, Introductory Sociology, Contemporary Sociological Theory; College of Business Administration, 1979, Business and Society

Assistant Instructor, Yale University, Department of Sociology, 1977, Class, Status and Power

Teaching Assistant, Yale University, Department of Sociology, 1975-1976, Methods of Sociological Research, The Individual and Society

Instructor, University of Maryland, Department of Sociology, 1974, Social Change and Modernization, Ethnic Minorities

Instructor, U.S. Army Interrogator/Linguist Training School, Fort Hood, Texas, 1970-1971

PROFESSIONAL ACTIVITIES:

Member, Advisory Committee on Appliance Efficiency Standards, U.S. Department of Energy, 1996 - 1998

Member, Energy Conservation Advisory Panel, Office of Technology Assessment, 1990-1991

Fellow, Council on Economic Regulation, 1989-1990

Member, Increased Competition in the Electric Power Industry Advisory Panel, Office of Technology Assessment, 1989

Participant, National Regulatory Conference, The Duty to Serve in a Changing Regulatory Environment, William and Mary, May 26, 1988

Member, Subcommittee on Finance, Tennessee Valley Authority Advisory Panel of the Southern States Energy Board, 1986-1987

Member, Electric Utility Generation Technology Advisory Panel, Office of Technology Assessment, 1984 - 1985

Member, Natural Gas Availability Advisor Panel, Office of Technology Assessment, 1983-1984

Participant, Workshop on Energy and the Consumer, University of Virginia, November 1983

Participant, Workshop on Unconventional Natural Gas, Office of Technology Assessment, July 1983

Participant, Seminar on Alaskan Oil Exports, Congressional Research Service, June 1983

Member, Thermal Insulation Subcommittee, National Institute of Building Sciences, 1981-1982

Round Table Discussion Leader, The Energy Situation: An Open Field For Sociological Analysis, 51st Annual Meeting of the Eastern Sociological Society, New York, March, 1981

Member, Building Energy Performance Standards Project Committee, Implementation Regulations Subcommittee, National Institute of Building Sciences, 1980-1981

Participant, Summer Study on Energy Efficient Buildings, American Council for an Energy Efficient Economy, August 1980

Member, University Committee on International Student Policy, Northeastern University, 1978-1979

Chairman, Session on Dissent and Societal Reaction, 45th Annual Meeting of the Eastern Sociological Society, April, 1975

Member, Papers Committee, 45th Annual Meeting of the Eastern Sociological Society, 1975

Student Representative, Programs, Curricula and Courses Committee, Division of Behavioral and Social Sciences, University of Maryland, 1973-1974

President, Graduate Student Organization, Department of Sociology, University of Maryland, 1973-1974

HONORS AND AWARDS:

Ester Peterson Award for Consumer Service, 2010

American Sociological Association, Travel Grant, Uppsala, Sweden, 1978

Fulbright-Hayes Doctoral Research Abroad Fellowship, Egypt, 1976-1977

Council on West European Studies Fellowship, University of Grenoble, France, 1975

Yale University Fellowship, 1974-1978

Alpha Kappa Delta, Sociological Honorary Society, 1973

Phi Delta Kappa, International Honorary Society, 1973

Graduate Student Paper Award, District of Columbia Sociological Society, 1973

Science Fiction Short Story Award, University of Maryland, 1973

Maxwell D. Taylor Award for Academic Excellence, Arabic, United States Defense Language Institute, 1971

Theodore Goodman Memorial Award for Creative Writing, City College of New York, 1968

New York State Regents Scholarship, 1963-1968

National Merit Scholarship, Honorable Mention, 1963

PUBLICATIONS:

ENERGY

Books and Chapters

The Political Economy of Electricity: Progressive Capitalism and the Struggle to Build a Sustainable Power Sector (Praeger, 2017)

"Energy Justice in Theory and Practice: Building a Pragmatic, Progressive Road Map," in Thijs de Graf, Benjamin K. Sovacool, Arunabha Gosh, Florian Kern, and Michael T. Klare (Eds.) *The Palgrave Handbook of the International Political Economy of Energy,* (PALGRAVE, Macmillan, 2016)

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"Renewable and distributed resources in a post-Paris low carbon future: The key role and political economy of sustainable electricity,"*Energy Research & Social Science,* 19 (2016) 66-93.

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"The EPA carbon plan: Coal loses, but nuclear doesn't win,"*Bulletin of the Atomic Scientists,* 70, 2014

"Multi-Criteria Portfolio Analysis of Electricity Resources: An Empirical Framework For Valuing Resource In An Increasingly Complex Decision Making Environment"*, Expert Workshop: System Approach to Assessing the Value of Wind Energy to Society, European Commission Joint Research Centre, Institute for Energy and Transport*, Petten, The Netherlands, November 13-14, 2013

"Nuclear aging: Not so gracefully,"*Bulletin of the Atomic Scientists,* 69, 2013

"Nuclear Safety and Affordable Reactors: Can We Have Both?,"*Bulletin of the Atomic Scientists,* 68, 2012

"Nuclear Safety and Nuclear Economics, Fukushima Reignites the Never-ending Debate: Is Nuclear Power not worth the risk at any price?,"*Symposium on the Future of Nuclear Power,* University of Pittsburgh, March 27-28, 2012

"Nuclear liability: the post-Fukushima case for ending Price-Anderson,"*Bulletin of the Atomic Scientists,*October, 67, 2011.

"Prudent Resource Acquisition in a Complex Decision Making Environment: Multidimensional Analysis Highlights the Superiority of Efficiency,"*Current Approaches to Integrated Resource Planning, 2011 ACEEE National Conference on Energy Efficiency as a Resource*, Denver, September 26, 2011

"The Implications of Fukushima: The US perspective**,"***Bulletin of the Atomic Scientists*, July/August 2011 67: 8-13

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"On Behalf of Manitoba Anti-poverty Organization, the Manitoba Society of Seniors and the Consumers Association of Canada (Manitoba)" before the Public Utilities Board in the Matter of the Request of Manitoba Telephone System for a General Rate Review, February 16, 1989

"On Behalf of the Ohio Consumers Counsel, In the Matter of the Application of GTE MTO Inc. for Authority to Increase and Adjust its Rates and Charges and to Change Regulations and Practices Affecting the Same, Case No. 87-1307-TP- Air," before the Public Utility Commission of Ohio, May 8, 1988

"On Behalf of the Evelyn Soloman, Proceeding on Motion of the Commission as to the Rates, Charges and Regulations of Niagara Mohawk Power Corporation, Case Nos. 29670 and 29671," before the State of New York Public Service Commission, February 16, 1988

"An Economic Perspective - The Status of Competition in the Telecommunications Industry and Its Impact on Taxation Policy," Before the Joint Subcommittee on the Taxation of The Telecommunications Industry, December 8, 1987

"On Behalf of the Office of Consumer Counsel, State of Washington,"In the Matter of the Petition of AT&T Communications of Pacific Northwest, Inc. for Classification as a Competitive Telecommunications Company, March 24, 1987

"On Behalf of Manitoba Anti-poverty Organization and the Manitoba Society of Seniors," before the Public Utilities Board in the Matter of the Request of Manitoba Telephone System for a General Rate Review, March 16, 1987

"On Behalf of the Office of Consumers' Counsel, State of Ohio,"In the Matter of the Application of the Ohio Bell Telephone Company for Authority to Amend Certain of its Intrastate Tariffs to Increase and Adjust the Rates and Charges and to Change its Regulations and Practices Affecting the Same, Case No. 84-1435-TP-AIR, April 6, 1986

"On Behalf of Manitoba Anti-poverty Organization and Manitoba Society of Seniors," before the Public Utilities Board in the Matter of the Request of Manitoba Telephone System for a General Rate Review, February 6, 1986

"On Behalf of Mississippi Legal Services Coalition, in the Matter of Notice by Mississippi Power and Light of Intent to Change Rates"Before the Mississippi Public Service Commission, April 15, 1985

"On Behalf of the Universal Service Alliance, in the Matter of the Application of New York Telephone Company for Changes in it Rates, Rules, and Regulations for Telephone Service, State of New York Public Service Commission, Case No. 28961, April 1, 1985

"On Behalf of North Carolina Legal Services, in the Matter of Application of Continental Telephone Company of North Carolina for an Adjustment of its Rates and Charges, Before the North Carolina Utilities Commission, Docket No. P-128, Sub 7, February 20, 1985

"On Behalf of the Consumer Advocate in re: Application of Southern Bell Telephone and Telegraph Company for Approval Increases in Certain of Its Intrastate Rates and Charges,"Before the South Carolina Public Service Commission, Docket No. 84-308-c, October 25, 1984

"On Behalf of the Office of the Consumers' Counsel in the Matter of the Commission Investigation into the Implementation of Lifeline Telephone Service by Local Exchange Companies,"Before the Public Utilities Commission of Ohio, Case No. 84-734-TP-COI, September 10, 1984

"On Behalf of North Carolina Legal Services Resource Center in the Matter of Application Southern Bell Telephone and Telegraph Company for an Adjustment in its Rates and Charges Applicable to Intra-state Telephone Service in North Carolina,"Before the North Carolina Utilities Commission, Docket No. P-55, Sub 834, September 4, 1984

"On Behalf of Mississippi Legal Services Coalition in the Matter of the Citation to Show Cause Why the Mississippi Power and Light Company and Middle South Energy Should not Adhere to the Representation Relied Upon by the Mississippi Public Service Commission in Determining the Need and Economic Justification for Additional Generating Capacity in the Form of A Rehearing on Certification of the Grand Gulf Nuclear Project,"Before the Mississippi Public Service Commission, Docket No. U-4387, August 13, 1984

"On Behalf of the Mississippi Legal Services Corporation Re: Notice of Intent to Change Rates of South Central Bell Telephone Company for Its Intrastate Telephone Service in Mississippi Effective January 1, 1984," before the Mississippi Public Service Commission, Docket No. U-4415, January 24, 1984

"The Impact of Rising Energy Prices on the Low Income Population of the Nation, the South, and the Gulf Coast Region," before the Mississippi Public Service Commission, Docket No. U4224, November 1982

"In the Matter of the Joint Investigation of the Public Service Commission and the Maryland Energy Office of the Implementation by Public Utility Companies Serving Maryland Residents of the Residential Conservation Service Plan," before the Public Service Commission of the State of Maryland, October 12, 1982

"The Impact of Rising Utility Rates on he Budgets of Low Income Households in the Region of the United States Served by the Mississippi Power Company and South Central Bell Telephone Company," before the Chancery Court of Forrest County, Mississippi, October 6, 1982

"The Impact of Rising Energy Prices on the Low Income Population of the Nation, the South and the Gulf Coast Region," before the Mississippi Public Service Commission, Docket No. U-4190, August 1982

AFFIDAVIT OF BRUCE A. KUSHNICK IN SUPPORT OF

STANDING

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

The Irregulators, New Networks Institute, Bruce A. Kushnick, Mark N. Cooper, Tom Allibone, Kenneth Levy, Fred Goldstein, and Charles W. Sherwood, Jr.,
Petitioners

Case No. 19-1085

Petition for Review of Order by the Federal Communications Commission

v.

Federal Communications Commission and United States of America,
Respondents

AFFIDAVIT OF BRUCE ALLAN KUSHNICK IN SUPPORT OF STANDING

1. My name is Bruce Allen Kushnick. I am one of the named Petitioners in the above captioned proceeding.

2. The purpose of this Affidavit is to provide evidence of standing to pursue the matter. I will provide some of the basic facts particular to my individual circumstances, but also rely on the presentations contained in the Affidavits of Fred Goldstein and Mark Cooper to explain why the basic facts I present below demonstrate that I and the other Petitioners have each suffered (1) injury-in-fact (2) traceable to the Freeze Order (3) that could be redressed by an order from this Court holding unlawful, vacating, enjoining, and/or setting aside the Freeze Order and remanding the matter to the FCC for further consideration and action.

3. My address is 185 Marine Ave, Apt 4E, Brooklyn, New York.

4. The Incumbent Local Exchange Carrier serving my residence and area is Verizon New York, the state telecommunications public utility which my family (and I used) since 1951 through May, 2012 at this address. In 2012, this service was also used for dial-up internet, which also included my email service through a New York based Internet Service Provider, Bway.net, which I had been using since 1997.

5. From 1951 through 2012 the residence used AT&T for long distance service.

6. I currently receive the following communications services:

   A. I receive telephone exchange and exchange access service from Spectrum, sometimes called Charter Spectrum, which is a trade name of Charter Communications. The service relies on “packet cable.” The local exchange part is provided though Charter Fiberlink CCO, LLC and/or Time Warner Cable Information Services (New York) LLC – NY, OCN 532D. These two companies are CLEC affiliates of Charter Spectrum.

   B. I obtain broadband service from Spectrum. This service is provided over hybrid fiber coaxial cable. Cable companies, like IXCs and CMRS providers, extensively use ILEC-provided Business Data Services and sometimes higher capacity fiber based services for “backhaul” and for other purposes.

C. I obtain commercial mobile radio service (also known as "mobile wireless" or "cellular") from Tracfone, which is a "mobile virtual network operator" or "MVNO." Tracfone resells the services of several facilities-based wireless carriers. The company does not typically make any representation in their advertising, web site or their collateral materials who is the actual carrier. I do know that my telephone number is associated with an OCN held by AT&T Mobility and my device usually advises that it is authenticated on AT&T Mobility's network, so it appears that my Tracfone service comes from AT&T Mobility. As part of my Tracfone service package I also receive commercial mobile data service for Internet access and other data services such as texting (SMS, MMS). These services are also supplied via a resale arrangement with AT&T Mobility

7. I have been a telecom analyst for 37 years. In 1985, I was a senior telecom analyst with International Data Corp (IDC) NY office, now IDC/Link. I established New Networks Institute (NNI) as a market research and consulting firm focusing on the new fiber optic networks that were part of the original Information Superhighway plan in 1992. New Networks Institute today acts as the Managing Director of the IRREGULATORS. SEE APPENDIX A: VITA OF BRUCE KUSHNICK.

The IRREGULATORS is an independent consortium of senior telecom experts, analysts, forensic auditors, and lawyers who are former staffers from the FCC, state advocate and Attorneys General Office, as telecom auditors and consultants. Members of the group have been working together, in different configurations, since 1999.[1] SEE APPENDIX B: FILINGS & BIBLIOGRAPHY, NNI, IRREGULATORS 1985-2019. These two consortia are not incorporated. They employ a "brand" I own as a useful moniker for our collaborative efforts in search of rational telecommunications policy.

8. Detailing the Case and How I and the Rest of the Country were Harmed.

Underlying this case is what we contend is one of the largest telecommunications accounting scandals in American history. Basic local consumers have been forced to fund carrier activities costing billions of dollars, but did not receive the corresponding benefits. The funds were spirited away through accounting tricks, including separations, and used for purposes other than provision of basic wireline telephone exchange and exchange access service. The principal beneficiaries were the telephone companies' affiliates or their unregulated activities, for the most part wireless service, telephone toll service, information service and video. The freeze to separations has locked in "category relationships" for cost distribution between jurisdictions that do not resemble the way telephone company plant is used, with the result that the intrastate jurisdiction in general and the "Local" category in particular is forced to support a significantly higher proportion of common costs, including corporate expenses and loop costs, than should be the case under any reasonable method of attributing costs based on relative and actual use. The ultimate result is that regulated captive local wireline local customer revenues cross-subsidize other, more competitive activities and services and especially the telephone companies' less-regulated affiliated or deregulated operations. We contend that the current frozen separations has directly led to unjust, unreasonable and discriminatory rates under 47 U.S.C. §§201 and 202 and a violation of the cross-subsidy prohibition in 47 U.S.C. §254(k).

[1] IRREGULATORS Bios: http://irregulators.org/who-we-are/.

The problem is nationwide in scope, and affects virtually every basic local ratepayer, whether served by a price-cap carrier or a rate of return carrier.

We have repeatedly advised the FCC of this ongoing issue, in several different proceedings, including this one. Our comments and reply comments in the case below expressly pointed them out and provided reams of data and analyses. The FCC agreed with some of our facts and conclusions, but ultimately dismissed all of our concerns and rejected our requests for relief.

9. There are three basic manifestations of the problem.

A. "Frozen" separations assigns a far higher amount of general and corporate expense to intrastate and local than should be the case. The actual relationships have significantly changed, in that there are significantly fewer local loops dedicated to basic service than there were in 2000, but separations still uses the 2000 relationships to assign general and corporate costs. This directly causes a significant mis- and over-allocation of general and corporate expenses to the intrastate and local category.

B. Loop "loss" and "missing loops." Goldstein Affidavit Paragraph 5.G. correctly observes there are many fewer basic local lines in service than were there in 2000 but Local still bears the same proportion of common expenses. This misalignment requires local to bear far more common costs than is appropriate. It leads to higher basic local rates and a higher interstate end user common line ("EUCL") revenue requirement, which is also a rate paid by consumers. It also causes some ILECs' carrier common line ("CCL") rate element to be higher than it should be. When consumers make long-distance calls to certain areas their IXC pays an inflated CCL and this cost is ultimately borne by consumers of toll services. The misallocation also contributes to higher universal service pass-throughs borne by local ratepayers throughout the country.

C. The carriers complain about "line loss" but they do not want to fix the separations consequences of this loss. Although they do often report local line reduced counts, they fail to acknowledge that many of these lines do not actually disappear, but are instead repurposed for things like interstate BDS. We have been able to show that the carriers are not complying with the separations requirement that access lines dedicated to BDS or other interstate services be assigned to the interstate jurisdiction. In 2006, NASUCA, the National Association of State Regulatory Utility Consumer Advocates, detailed that the FCC had not enforced this 'direct assignment' requirement, and that there were already large misallocation of expenses. The FCC never investigated these claims, even though NASUCA repeatedly advised of this problem through comments in 80-286 and related proceedings. In fact, in 2010, NASUCA claimed that the customer overcharging was $2-$6 billion, and that it had repeatedly attempted to get the FCC to deal with these issues to no avail.[2]

D. Affiliate and unregulated activities. Frozen separations also allows the ILECs to use monopoly revenue to support their unregulated or less-regulated affiliates and operations. Verizon the ILEC, for example, extensively supplies network services and

[2] Comments of the National Association of State Utility Consumer Advocates and the New Jersey Division of Rate Counsel, Jurisdictional Separations and Referral to the Federal-State Joint Board, Docket 80-286, April 19th, 2010. http://www.nasuca.org/nwp/wp-content/uploads/2014/01/NASUCA-NJ-SeparationsComments-4-19-10-FINAL.pdf.

facilities to its wireless, IXC, information service and video operations and affiliates, but these operations do not contribute a fair and nondiscriminatory share of the ILEC's direct or common network and operations costs. This has twin effects: consumers pay higher basic rates and competitors that do not enjoy a familial tie to an incumbent suffer competitive disadvantages because they pay higher prices for similar network services and facilities. But even so, none of these services actually pay what they should. Interstate BDS is directly subsidized by intrastate basic local due to current frozen separations rules and outcomes.

10. I will now provide a slightly more detailed summary of these basic facts and issues. I emphasize that our comments in the proceeding below set out a far more detailed analysis, so the Commission is surely aware of the problem. Indeed, Freeze Order ¶43 agrees there is a problem when it states that the Commission "share[s] NARUC's and the Irregulators' concern that those rules necessarily misallocate network costs."

A. The "freeze." The FCC has 'frozen' the cost accounting rules so that all of the different services that use the state-based telecommunications infrastructure will pay the same percentage of expense they did in the year 2000 – 19 years ago. The FCC has extended the freeze 8 times now, and the action below extends it for another 6 years—through 2024.

B. The FCC claims, however, that this is proceeding is only about incumbent phone companies that use the 'rate-of-return' regulatory framework, and not the 'price cap' companies like AT&T, Verizon and CenturyLink, the US major telecommunications utilities. Appendix 1 to the FCC's decision,[3] however, amended separations regulations that still expressly apply to price cap carriers and, by extension to state commissions that regulate price cap carriers for intrastate services. The best example is the one quoted in full by the *Freeze Order* on page 22. But many others still do as well. A short and non-exhaustive list includes 47 C.F.R. §§36.3(b), 36.123(a)(5), 36.124(c), 36.125(h), 36.126(b)(6), 36.141(c) and 36.154(g).

C. The FCC claims that many companies received enforcement forbearance from these separation rules, starting in 2008. It is true that price cap carriers have all been granted forbearance for interstate purposes, but that is not the end of the story or a sufficient excuse. States are still bound for intrastate purposes and use intrastate separated data for several purposes, including rate-setting. One would also think that the FCC would analyze and check-in on how price cap carriers have fared since then. More important the Commission should have investigated whether end user customers – both interstate and interstate – actually benefited from forbearance.

D. It turns out they have not. The Commission has not examined even the more limited financial data it required as a condition of forbearance. FCC Chairman Ajit Pai, in an interview with Re/code, was asked about his "weed-whacking" of various rules that

[3] Report And Order And Waiver, Jurisdictional Separations and Referral to the Federal-State Joint Board, CC Docket No. 80-286, FCC 18-182, Released: December 17, 2018 ("Freeze Order").

"hold back investment."[4] Chairman Pai responded that "the FCC hadn't relied on any of that paperwork in years" and he asked his staff, "When was the last time you looked at these reports?" They said, "Pretty much never."[5]

11. Test case - Verizon NY Financial Information. The IRREGULATORS and New Networks Institute have spent almost a decade documenting what has occurred. Our "test case" involved the Verizon New York annual financial reports that are required by the NY Public Service Commission. These reports are all based on the FCC's cost accounting and separations rules. New York still uses – and must use – separations for intrastate purposes even though Verizon is a "price cap" company and received forbearance from the FCC's separations rules for interstate purposes. The Verizon New York 2017 Annual Report lays out, in vivid, clear, concise detail, the impact of the separations freeze.

A. The most recent is Verizon NY's 2017 Annual Report, published in June 2018.[6] The Verizon New York 2018 Annual Report is supposed to be published on May 23rd, 2019.

B. Our research and reports helped to start an investigation of Verizon NY in 2015 with Communications Workers of America and Public Utility Law Project, PULP. The case was settled in July 2018.[7]

C. The parties were allowed to conduct discovery in the New York proceeding. These materials exposed:

i) The Verizon NY annual report and all of the financials and expenses are based on the FCC cost accounting and separations rules, despite the fact that Verizon obtained forbearance from them for interstate purposes.[8]

ii) The same cost information is also used by the NY Public Service Commission to determine whether rates are reasonable.

iii) Everything from the tax payments and the company's reported intrastate losses, and past local telephone rate increases that were allowed were all based on the FCC's supposedly forborne cost accounting and separations rules.

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[4] The Irregulators do not oppose investment in modern plant; to the contrary. Our problem is that basic local service is allocated much of the cost of new investment as a result of frozen separations but local ratepayers receive very little of the benefit since the investment is largely used for purposes other than basic local service.

[5] Full transcript: FCC Chairman Ajit Pai on Recode Decode, Re/Code Staff, VOX, May 5th, 2017 https://www.vox.com/2017/5/5/15560150/transcript-fcc-chairman-ajit-pai-net-neutrality-merger-recode-decode.

[6] Verizon New York, Inc. Annual Report of Telephone Corporations for the period ending DECEMBER 31, 2017, State of New York Public Service Commission, Published , June 2018 http://irregulators.org/wp-content/uploads/2019/04/VerizonnyAnnualreport2017.pdf.

[7] Case 16-C-0122 –Proceeding on Motion Of The Commission To Consider The Adequacy Of Verizon New York Inc.'s Retail Service Quality Processes and Programs, New York PSC, July 12th, 2018, http://irregulators.org/wp-content/uploads/2018/07/settlementagreementjul17.pdf.

[8] Case 16-C-0122 – Proceeding on Motion of the Commission to Consider the Adequacy of Verizon York Inc.'s Retail Service Quality Processes and Programs, Verizon Response to CWA Discovery Request 3-5 (Oct. 12, 2016), http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7B4A90C732-0AD7-44FE-A49C-D7C65C9F8762%7D.

iv) Verizon New York is a $5 billion dollar state utility and Local Service generated $1.1 billion in revenues, around 21.6%.

v) In 2000, Verizon New York Local Service was 65% of the revenues and it paid 65% of the expenses. By 2017, Local Service, which is mostly driven by the "intrastate cost" associated with basic copper-based phone lines, was 22% of the revenues. But "Local" was still paying the majority of all of the expenses – including the construction budgets for all of the "interstate" services, such as the fiber optic wires for FiOS or the wires to the cell sites for Verizon Wireless. At the same time, these other services are not paying market prices or properly developed private line/special access/BDS prices. The Verizon wireless affiliate is currently paying a fraction of the costs they impose on the Verizon ILEC for the services they obtain.

vi) Verizon NY Local Service paid $1.8 billion (61%) of total $3 billion in Corporate Operations expense[9] in 2017, but it only had $1.1 billion in revenues. This over-allocation due to accounting mismatches makes Local Service appear unprofitable. The separations freeze based on year 2000 relationships assigned 65% of Corporate operations to Local Service and that never changed. At the same time, Business Data Services and FiOS, received 80% of the revenues in 2017 but were artificially assigned a fraction of this expense.[10] The reason is that use radically changed after 2000 but the category relationships were frozen and could not be adjusted to track what was really going on.

vii) Local Service paid 65% of the Corporate Operations Expense in 2000 because it was 65% of the revenues; in 2017 Local contributed only 21.6% of revenues but was still paying 61% of this Corporate expense.

viii) Verizon Local Service was charged $1.2 billion in construction and Maintenance, (plant and Non-specific Plant) yet the record shows Verizon was spending less than $100 a year for its copper-based networks.

ix) "Interstate" services paid a fraction of the Corporate Operations expenses, and less than Local Service in construction and maintenance. Nonregulated and Access services were profitable.

x) In 2017, Verizon New York reported a total of $2.5 billion in total company losses. It claimed $2.9 billion in losses due to local service, so it apparently obtained $400 million in profits from some other endeavor. These losses allowed Verizon to claim a $943 million tax benefit.

D. Allowing the FCC to extend this freeze for 6 more years, based on actual financial data from a state-based telecommunications utility that has relied on these rules, leads to unjust and unreasonable rates for local customers. As the Goldstein Affidavit explains in Paragraph 5.G. there are many fewer local lines in service than were there in 2000 but Local still bears the same proportion of common expenses. Local rates are assigned

[9] Corporate Operations includes the cost of lawyers, executive pay, lobbying, and corporate jets, among other things.

[10] SEE: "Local Service, $1.8 Billion for Corporate May 8th, 2019, Medium, https://bit.ly/2YxbwFR.

expenses that belong elsewhere (and in particular interstate BDS) with the result that noncompetitive intrastate Local is being forced to unfairly subsidize interstate services and BDS in particular.

12. Inquiry in other states would yield results similar to those from Verizon New York.

A. New York was useful since it still requires a full annual accounting report from Verizon. We are not so fortunate in some other jurisdictions, including interstate. The FCC erased the paper trail on 2007 by eliminating the publicly available Statistics of Common Carriers. This useful report had been continually published since 1939 but it is no longer available.

B. The Verizon NY results would almost certainly match up with the other states if they were to obtain and use the same type and granular level of data. We do know that the FCC's accounting rules used by all of the state utilities in 2007 based on the last publicly available data. The FCC's ARMIS report for that year showed:

AT&T, Verizon &CenturyLink Corporate Operations Expense, by State, 2007
Source:FCC ARMIS REPORTS

	Total	Local	Access	Local	Access
AT&T-Illinois Bell	$248,908	$193,626	$55,283	78%	22%
AT&T- Kansas	$55,097	$39,030	$16,067	71%	29%
AT&T-Ohio Bell	$180,067	$136,166	$43,901	76%	24%
AT&T-Pacific Bell - California	$743,215	$559,141	$184,074	75%	25%
AT&T-Tennessee	$110,541	$81,025	$29,515	73%	27%
AT&T-Texas	$484,584	$348,590	$135,994	72%	28%
Centurylink-Qwest-Colorado	$131,869	$97,716	$34,153	74%	26%
Centurylink-Qwest-Oregon	$58,678	$41,835	$16,842	71%	29%
Verizon-California GTE	$258,859	$203,080	$55,780	78%	22%
Verizon Florida LLC	$162,990	$122,508	$40,482	75%	25%
Verizon-Maryland	$239,740	$173,268	$66,472	72%	28%
Verizon- Massachusetts	$326,090	$216,948	$109,142	67%	33%
Verizon New Jersey	$425,805	$303,828	$121,977	71%	29%
Verizon New York Telephone	$1,092,744	$740,543	$352,201	68%	32%
Verizon Pennsylvania	$422,168	$303,753	$118,415	72%	28%
Verizon Washington D.C.	$67,115	$43,884	$23,231	65%	35%
Total Percentage				**72%**	**28%**

C. We were able to corroborate that other states would yield similar outcomes through open records or discovery requests in two other Verizon states.

i) In Massachusetts, Verizon MA responses to a discovery request showed that the basic percentages of revenues and expenses aligned with our figures from

New York, including Corporate Operations Expense allocations and claims that Verizon MA was incurring losses on the intrastate side for basic local service.[11]

ii) Verizon New Jersey claimed it was losing over ½ billion annually and attributed the losses to Local Service.[12]

D. The pattern is evident. Reported massive "losses" in the intrastate jurisdiction in general and "Local" in particular are driven from a huge over-allocation of costs that do not properly belong in the local category, or even in the intrastate jurisdiction. This over-allocation is directly caused from current separations results, and it all flows from the long-standing "freeze" and untoward affiliate relations between Verizon the ILEC and its Wireless, IXC and information service operations. Local pays, but others – and especially other less-regulated Verizon affiliated entities and operations – benefit.[13]

13. Although we have repeatedly complained about the problem, including in the proceeding below, the FCC has assiduously avoided any examination of the past, current and prospective impact frozen separations rules have on the intrastate jurisdictions.[14] If they get any information they apparently don't read it so they can then profess ignorance. But the consequences in terms of investments used for broadband and the cross-subsidies occurring between Verizon's local, wireless, toll and information service operations are stark and not truly subject to debate. This misfit between the allocation of expenses and the state financial books has infected everything – especially the state utilities that are using price cap regulations.

14. The Freeze Order contends in several places that separations is "irrelevant" to all price cap carriers and many rate of return carriers. But this contention is belied in ¶18, which notes, in pertinent part, that "[s]tates also use separations results to determine the amount of intrastate universal service support and to calculate regulatory fees, and some states perform rate-of-return ratemaking using intrastate costs." The Commission is wrong about irrelevance but correct in its ultimate admission separations is still important and used in several states for intrastate purposes.

15. The National Regulatory Research Institute (NRRI) recently issued "State Universal Service Funds 2018: Updating the Numbers April 17, 2019.[15] This report shows that some states require traditional cost-of-service or other separations-based information for ratemaking or as part of the state USF program. For example New Mexico, New York, Oklahoma, and Texas require carriers to submit financial data to show the amount of high cost funding they require. New York carriers eligible to receive funding from the New York State Universal Service Fund (SUSF) must first seek to meet their revenue requirements through increases in their basic

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[11] SUMMARY REPORT: Verizon Massachusetts & Boston: Investigate the Wireless-Wireline Bait-n-Switch, January 2017 https://ecfsapi.fcc.gov/file/1041707743056/VerizonMAreportjan17.pdf.

[12] New Networks Institute OPRA Request with the NJ Board of Public Utilities; Verizon New Jersey Order to Show Cause in Alleged Failure to Comply with Opportunity New Jersey Commitments Docket No. TO12020155 https://www.nj.gov/bpu/pdf/telecopdfs/KucshnickB%20OPRA.pdf.

[13] Ibid.

[14] "WARNING: 30+ FCC Actions in One Year to Slice & Dice States' Rights & Consumer Protections", September, 26, 2018, Medium https://medium.com/@kushnickbruce/warning-30-fcc-actions-in-one-year-to-slice-dice-states-rights-consumer-protections-6fefa5dfaa7a.

[15] State Universal Service Funds 2018: Updating the Numbers, National Regulatory Research Institute, April 17, 2019 http://nrri.org/download/nrri-19-02-state-universal-service-funds-2018-updating-the-numbers/.

residential rates to the $23 per line state benchmark. Once they meet this benchmark, eligible carriers may file a standard rate case to determine the need for supplemental relief from the SUSF. In New Mexico, support is sometimes based on a showing of a "need" for funds to provide universal service.[16]

16. FCC created this mess and is either intentionally or inadvertently hiding the outcome. The FCC is entirely responsible. The problem was created through a series of prior proceedings dealing with cost accounting and separations. Those orders and actions are not subject to collateral attack or reversal in this case. But the FCC was directly confronted with the issues below and could and should have acted to prevent further harm in its disposition below by not extending the freeze and proceeding to secure new separations category relationships that more sensibly track relative use and cost.

17. It is plain that the FCC's preference for "market" outcomes based on assumed competition that does not exist in sufficient quantity or scale to force rational pricing is a complete failure. Further, despite all the forbearance and alternate regulation the price cap carriers are still subject to the Title II just and reasonable standard and they are still bound by the §254(k) prohibition on cross-subsidization. The simple fact is that the current separations outcomes inexorably lead to direct violations of §§201, 202 and 254(k).

18. The "burden" of doing the cost accounting rules is a fiction. Verizon New York is required to file annual accounting reports based on cost allocation and separations rules with the NY Public Service Commission. They do complain, and often request an extension based on burden and available resources.[17] But the burden is not that great; it is simply that Verizon has chosen to assign only 3 people to prepare and file reports in the reporting team, plus a manager for "300 reports annually in NY and other states." Verizon put $1.8 billion of Corporate Operations expenses into Local Service and yet it complains about employing 4 staffers to do these and other reports in other states. The real burden, it appears, is on basic local consumers.

Separations impact every consumer, because the separations rules directly or indirectly drive intrastate and interstate rates and have a material impact on competition. The FCC refuses to fully appreciate that there are still state-based telecommunications utilities and that they have been improperly funding the unregulated services, interstate services and telco affiliates.

Here are just some of the ways I was harmed, but how New York state and all customers overwhelming harms, based on a decade of investigation and telco-supplied evidence.

19. Direct Harms

A. Beginning in at least 2005 I and every other Verizon NY local user was overcharged for intrastate and basic local service.

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[16] Ibid, pp. 33 (Table 5), 35.

[17] Verizon Letter to NY PSC, Matter 10-01709 — "In the Matter of Telecommunication Company Filings of Financial Reports for Verizon New York Inc." January 18th, 2019 http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={FC10A7DE-EB70-41F9-A631-10CFF274CE39}.

B. Starting in 2005, Verizon NY had multiple rate increases based on "massive deployment of fiber optics" and claimed "losses" from basic local service.[18]

C. Verizon New York's basic local service went up 84%. The rate increases were artificial and should never have been assigned to Local Service because the funds were used to support plant and services dedicated to other purposes and endeavors. But these were only the increases for basic service. All other services, including 'calling features' or 'inside wire maintenance' had increases of 50-525%.

D. Using actual phone bills, we found that customers with service from 2005-2017 paid over $2,760.00 extra due directly to the rate increases established in 2005.

E. In 2012, I asked: Why did my current basic service local phone bill go up by more than $62.00 a month through repeated rate increases? I had basic local phone service, with a package of 'add-on' calling features, which included Call Waiting, Call Forwarding and Touchtone Service. I also had a 'legacy' inside wire charge. As an industry expert I knew that the calling package only had an internal cost of a few pennies, since 2000, and the inside wire had little or no operating costs as it had been put in the 1920s, never changed, and was fully depreciated.

F. While it took through 2018 to unravel the answer to these and other questions through the Verizon NY Annual Reports, we now can directly track these harms. They were all attributable to the FCC cost accounting and separations rules that are still used in Verizon New York.

G. I was harmed because the price of local service should have been in steep decline and I could have kept the land line. The overcharging above is only for the extra charged added to the customer bill for basic service when the state issued price increases based on "losses" or "massive deployment of fiber optics.

H. I was harmed because the state tax assessments I had to pay would have been less and state and city services lost tax revenues for economic growth. Verizon New York reported $2.9 billion in loss, but due to profits in other areas Verizon New York was able to claim $2.5 billion in losses for tax purposes. Verizon New York reported losses of over $2 billion (with a few caveats) each of the last 10 years. Their artificial losses reduced their tax contributions, and this required all other state citizens to make up the difference.

I. I was harmed because the other 'taxes, fees, and surcharges' were all increased due to these losses and rate increases. One has only to examine an actual telecommunications bill to see a host of made up fees, or taxes and surcharges that are tied to the retail services purchased by the end user.

J. I was harmed because I pay Universal Service Fund pass-throughs, and the monies go to carriers that still use separations. Thus even though I am in a "price cap" area I am forced to support rate of return carriers throughout the country.

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[18] "Verizon Granted Residential Rate Increase", Number 09054/09-C-0327NY Public Service Commission press release, 6/18/09, https://www3.dps.ny.gov/pscweb/WebFileRoom.nsf/Web/B849A020314983A3852575D900530827/$File/pr09054.pdf.

K. I was harmed by the underlying 'Business Data Services' networks being inflated with profits but these services contributed a fraction of the 'common costs'. These inflated profits are a direct result of the miss-allocation of expenses caused by the FCC separations rules.

L. No competitive alternatives to Verizon. In 2012, the Verizon New York state-based utility local phone service stopped working. I and my family had used the same service since 1966. When I called Verizon customer service (using a pay phone), I was told that I should switch to FiOS, which had recently been installed in my building. When I asked if I could use my then-current Internet Service Provider, a small, independent ISP called Bway.net, I was told no: my only choice was Verizon Online. The so-called replacement of the existing state utility services blocked my ability to use Verizon's competitors for other services like Internet.

M. I was harmed because all cell service providers that are not Verizon pay more than Verizon for the same service. The financial reports discussed above show that Verizon's wireless affiliate pays a fraction of what Sprint does to use the same network services; moreover, the AT&T payments to Verizon New York also appeared to be questionable.[19] Verizon controls the majority of the critical infrastructure, and through cross-subsidies from basic local service it also manipulates and discriminates charges to its wireless affiliate *vis-a-vis* other wireless providers.

N. This is a national problem because these harms flow directly from the FCC accounting and separations rules. From Verizon New Jersey to AT&T California,[20] since 2004, Local rates have gone up by 120+%, largely based on claims of "losses" (calculated using separated costs).

20. **The next generation of the telco strategy - 5G Vaporware.** "5G" is the newest iteration of the telcos' continuing strategy to fleece local ratepayers and obtain undue competitive advantage. Verizon and all the other telcos, including price cap and rate of return carriers, intend to continue and accelerate "investment" in fiber and other high-bandwidth transmission that it will charge to Local but use for something else. This time it is "5G." Small cell 5G will use the same fiber networks that are currently used mostly for unregulated endeavors like FiOS,[21] but even more will be required because the "small cell" architecture requires more transceivers that must have broadband for backhaul. The cycle will repeat and the harms will compound if the freeze continues because the costs Verizon incurs to support its wireless operations will be mostly allocated to "local" under separations rules. Local will be artificially burdened with even more costs, and the accounting will show even higher losses even though local would in fact turn a profit if proper allocations were employed.

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[19] "It's All Interconnected" published by Public Utility Law Project, PULP, 2014.

[20] "Californians Paid Billions Extra: The State Assembly Should Investigate AT&T's Cross-Subsidies", Huffington Post, August 23, 2017, https://www.huffpost.com/entry/californians-paid-billions-extra-the-state-assembly_b_599d26bee4b0b87d38cbe637.

[21] "Part 2: Verizon Wireless Bait & Switch: What Verizon Tells Investors But Has Been Hiding from the Public", October 3rd, 2018, Medium, https://medium.com/@kushnickbruce/part-2-verizon-wireless-bait-switch-what-verizon-tells-investors-but-has-been-hiding-from-the-ba4e25139ade.

21. **End the harm and prevent even more harm.** If these cross-subsidies are ended intrastate and local rates would no longer be required to subsidize other services. Local rates could be reduced, costs would better align with the services that incur those costs, and society would benefit because incentives, risks and returns would begin to match. The only way to do that is by ending the freeze. If the freeze is not ended then local ratepayers will continue to be burdened far beyond what is appropriate and the burden will be even further increased due to new costs to support 5G that will be inappropriately charged to local.

22. This concludes my Affidavit, but as noted above I am also relying on the Affidavits of Mark N. Cooper and Fred Goldstein for the purpose of explaining why the particular facts described above demonstrate standing.

Bruce Allan Kushnick

SUBSCRIBED AND SWORN TO BEFORE ME this 20th day of May, 2019, to certify which, witness my hand and official seal.

MICHAEL SENZ
Notary Public - State of New York
No. 01SE6114952
Qualified in New York County
My Comm. Expires Aug. 30, 2020

[Seal]

Notary Public in and for New York State, County of New York

APPENDIX A

Bruce A. Kushnick, New Networks Institute

VITA

- **Education:**

Mannes School of Music, with Dan Marek, 1979-1980

Harvard University, Graduate School of Psychology, 1977-1978

Massachusetts Institute of Technology, Special Graduate Student in Interdisciplinary Sciences, 1977-1978, (Part of the Division for the Study and Research in Education, now part of the Media Lab.) Worked with Marvin Minsky, MIT AI Labs creating music with artificial intelligence

Master Class in Musical Theatre, (under Lehman Engel) Broadcast Music Inc. (BMI) 1976-1980

School of Contemporary Music 1976-1977

Harvard University Summer School, 1975-1976

Boston Architectural Center, 1975, 1976

Boston University, 1975, Special Graduate Class, School of Music Education

Sergeant School of Nursing, Boston U, 1975

Massachusetts Institute of Technology, 1975, Linguistics & Music Seminars, with Noam Chomsky and Leonard Bernstein.

Brandeis University 1973-1976, Bachelor of Arts, Magna Cum Laude, (Music Composition, Minor in Psychoacoustics.)

Massachusetts Institute of Technology, Research Laboratories in Electronics, (RLE) 1971-1973. Attended classes on acoustics with Amar Bose

Berklee College of Music, 1971-1972

University of Massachusetts, Computer Programming, 1971

Boston Experimental Electronic Projects, 1971

Brooklyn Academy of Music, 1971

Staten Island Community College, 1970-1971

Brooklyn Technical High School, 1966-1970

- **Experience**

Executive Director, Founder, New Networks Institute (NNI), 1992-

Managing Director, IRREGULATORS, 2015-

Chairman, Founding Member, Teletruth 2002-2014 (Dormant)

President, Co-founder, Strategic Telemedia, 1986-1993

Senior Telecom Analyst, Link Resources, a Division of IDC, 1985-1987

Founding member, The Audiotext Group, (now Kelsey/BIA), 1986-1992

Independent Telecom Analyst, National TeleVoice, (NTV) 1982-1986

Recording Artist, CBS/John Hammond Music, 1981-1982

- **Columnist, Broadband & Telecommunication Expert**

Medium, 2018-

Huffington Post, blogger, 2012 -2018

Harvard Nieman Foundation for Journalism's Watchdog Project, 2006-2012

Alternet, with David Rosen, 2010-2014

- **New Networks Institute (NNI)**

New Networks Institute was founded in 1992 to examine how the break-up of AT&T and the creation of the Regional Bell Operating Companies (now AT&T, Verizon, and CenturyLink), impacted America's communications and customers. NNI published a series of books and reports on various related topics. A bibliography is available at http://www.newnetworks.com/biblio.html

- **IRREGULATORS**

Established in 2015. IRREGULATORS is an independent consortium of telecommunications analysts, experts, forensic auditors and lawyers, some of whom held senior positions at the FCC, Consumer advocate and state Attorney General Offices. The IRREGULATORS gather information, present studies and participate in state and federal regulatory proceedings to expand user knowledge and advance consumer interests.

IRREGULATOR Team: http://irregulators.org/who-we-are/

- **Teletruth & New Networks Primary Activities, 2002-2009**

Founded in 2002, Teletruth has been an independent, advocacy group, and working with New Networks, has filed state and federal comments and complaints with the FCC, IRS, SEC, helped to develop class action suits, made Data Quality Act filings at the FCC and performed hundreds of phone audits, recovering millions of dollars for small businesses and consumers.

Class Action suit settlement against Verizon, NJ for inoperative circuits, based on phone data collected through Teletruth audits. October 2006

In 2004 and 2008, Teletruth received grants from the California Consumer Protection Fund to work with UCAN, to study phone, broadband, Internet, wireless charges.

Member, FCC Consumer Advisory Committee (2003-2004).

Class Action suit settlement against Verizon, NJ for missing small business discounts, based on phone data collected through Teletruth audits. July 2004

Proposed Congressional bill — "The Broadband Bill of Rights". 2001-2002 (with Congressmen Nadler)

Created Roundtable for Small Telecom Businesses with Small Business Administration's Office of Advocacy, 2002

Filed the first Data Quality Act complaints with the FCC over phone bill charges, broadband, small business competition, wireless spectrum issues 1994-2010.

- **Books and Major Reports**

New Report Series: "The Digital Divide by Design" 2018-

New Report Series: "Fixing Telecommunications" 2015-2018

$400 Billion Broadband Scandal & Free the Net, 2015

$200 Billion Broadband Scandal, 2005

Dirty, Little, Secret Lives of Phone Bills, 2003

Regional Bell (RBOC) Revenues, Expenditures and Profits, 2002

Bell Executive Compensation, 2002

Bell Write-offs and Foreign Investment Losses 2002

The Unauthorized Bio of the Baby Bells & Info-Scandal, 1998

Inter-NOT: Online Statistics Reality Check, November 1996

Inter-NOT: The Terrible Twos: Online Industry's Learning Curve, February 1997.

Telephone Bill Databases, California, 2004, 2008 — Wireless, Wireline, Broadband, Internet.

- **With Probe Research**

"10 Years Since Divestiture: The Future of the Information Age.", consists of 14 volumes, with two computerized databases. 1,900 pages, 875 exhibits. Highlights:

The Information Super-Highway: Get A Grip, 1995

Regional Bell Earnings, Expenditures & Profits, 1994

Telephone Charges in America, 1980-1993, two volumes, computer database

Consumer Attitudes Toward Telephone & Cable Services, two volumes, 1993

New Network Services, 500, 600 and *100, published 1992

- **Computer Databases: (Computer Programmer, Designer)**

Telephone Charges in America, 1980-1992 — All charges, All states.

Consumer Attitudes Toward Telephone & Cable Services, 1000 Consumer Interviews, with Fairfield Research, 1993

Telecom Turf Wars, 1995, 1000 Consumer Interviews, with Fairfield Research.

- **NNI's Research Reports were Marketed by:**

Probe Research, Inc. 1992-1996

Fairfield Research, Inc. 1994-1995

Phillips Business Information, Inc. 1994-1996

- **President, Strategic Telemedia, 1988-1993**

As President of Strategic Telemedia, 1985-1992, (originally National TeleVoice) the primary consulting activities included strategic planning, competitive analysis, and new business opportunities using interactive telecommunications. Selected clients: American Express, AT&T, Citibank, Consumer Union, Donnelly Directory, Nippon, MCI, Ogilvy & Mather, Pacific Bell, BellSouth, Sprint, Weather Channel, Westwood One (NBC and Mutual Radio). Specific projects included:

Acted as principal consultant and creator in the rollout of the first "NII", 3-digit number service, "511" (like "311") in America, with Cox Newspapers, 1992.

Acted as principal consultant to Sprint to create a new division for Telemedia services, including competitive and strategic analysis, product planning and implementation, sales and marketing. 1988-1991 (Estimated revenues were $250 million in 1990.).

Worked with The Weather Channel to implement a series of telephone related services, including 800 and 900 Weather. 900-WEATHER, Recipient of the Golden Phone Award, 1992. Work included product planning, media roll out, selection of vendors, down side risk analysis and co-marketing opportunities. 1991-1992.

Worked with American Express, Checks Division, to develop other lines of business in telecommunications related areas. Project included the exploration of new service offerings, including a telephone calling card, as well as creating an independent telecommunications network. 1990-1991.

Helped create a division for Audiotex and Telemedia services for Westwood One's NBC and Mutual Radio Networks, including vendor selections, financial and program planning, including the creation of a premier telephone sports program. Campaign assistance included Burger King, Levi's Jeans, Yoko Ono.

Worked with Donnelly Directory in the analysis of technology and marketing for the first national Talking Yellow Pages service, 1986.

- **As President of Strategic Telemedia, Co-authored first Published Reports on:**

Automatic Number Identification, (Caller ID) 1986-92

"700, 800, 900: The Intelligent Networks", 1987-1992

Telephone as Media: Telemedia, 1987-91

Automated Service Bureau & Telemarketing Service Agencies -1991

- **Strategic Telemedia's Research Reports were Marketed by:**

The Audiotex Group, 1988-1992

Jupiter Communications, 1987-1990

- **Other Business Activities:**

Invented a '500' Caller Paid network, using the 500 Area Code, 1990. (Rolled out by AT&T.) Example: 500 555-1212.

Telecom Director for "Prime Time to End Hunger", part of Bush Administration's "1,000 Points of Light", 1990.

Research, Analysis & Data; State & FCC Filings

Created first industry forums for Billing Services involving all RBOCs and IXCs, 1989-90

Founding member of the National Association of Information Services, NAIS (1990) renamed, "Interactive Services Association", (ISA)

Created "Continuous Information Service" for Link Resources 1986-1987

Created first report about emerging voice technology markets. Link Resources, 1985-86

Founding member, The Audiotex Group, 1986, now "The Kelsey Group/BIA"

- **Coined the Terms:**

"Telemedia", "Interactive Voice", "Intelligent 800", "500 Caller-Paid"

Predicted or Influenced:

Predicted companies would incorporate voice technology and add 'press one of this, press two for that" as their phone interface, 1981

Predicted the addition of new technologies to the networks, combined with the divestiture of AT&T, would create an explosion of new networks, as well as new applications, from online services to intelligent 800 services, 1982.

Predicted Caller ID, Calling features and voicemail would become important phone services and new revenues for the phone companies, 1985

Sprint used NNI's data to create the Candice Bergen add "Do you know what you're paying for long distance per minute?" 1992

Predicted flat rate pricing for residential long distance, 1990.

Predicted 900 services would rise… and then fall, 1986…1990

Predicted the Bells would never deploy advanced networks as promised, 1992

- **Press Interviews, 1987-2014, includes the following:**

Featured in the Emmy-nominated "Bill Moyers In America", "The Net at Risk", 2006 Featured in Pulitzer Prize winder David Cay Johnston, "The Fine Print", 2012

New York Times, Business Week, Wall Street Journal, USA Today, Forbes, Washington Post, Chicago Tribune, L.A. Times, Advertising Age, DM News, CNN, Baltimore Sun, Interactive Age, Interactive Week, CNBC, Bloomberg, Inside Washington, Washington Times, Communications Week, Ad Week, Network World, Telecommunications Mag, Outlook on AT&T, Boston Globe, Communications. Daily, Associated Press, Newsbytes, Telephone Week, Philadelphia Inquirer, ISP Planet, Broadband Reports, Computerworld, ABC News-New York, Fox News-New York, Miami Herald, PhillyNews, the Bergen Record, Ars Technica, Forbes, among others.

- **Other Activities:**

"Touchtone", optioned by, Warner Brothers, Wolper Productions., 1995-1999

"Touchtone" a novel, 1994

"Destiny", a novel, 1993

"Kushnick at Carnegie", Original compositions, Weil Recital Hall at Carnegie Hall, 1990

Recording Artist, with No Laughing, CBS/John Hammond Music, 1982

Opera “Ephiphanies” with Richard Kostelanetz, 1982

“Bruce Kushnick, A Retrospective”, Carnegie Recital Hall, original compositions, 1980, accompanied by Robert Koff, founding member, Julliard Sting Quartet.

- **Highlights of Speaking Engagements and Events, 1989-93**

Asian Direct Marketing Symposium 93, Keynote Speaker, Telemedia, (May, 1993) Hong Kong

Infotext 93, The Creation of Area Codes *100, 500, and 600, and 3-Digit Dialing (January, 1993)

Press Conference, National Press Bldg. 10 Years Since Divestiture: The Future of the Info Age, (July, 1992)

Audiotex in Scandinavia, 92 Automated Services & Telephone Networks in US, (March, 1992)-Copenhagen

Infotext 92, Buying and Selling an Information Service, (January, 1992)

National Database Conference, Databases and New Telecommunications Options, (December, 1991)

American Telemarketing Association, Using New Telecom Options, Annual Conference, (October, 1991)

World Telemedia, Keynote Address, The Growth of Telemedia, (October 1991)-London

Direct Marketing Association, Database Marketing and Telecom Options, (February, 1991)

Telemedia 90, Tutorial Overview on 800 and 900 Service, (November, 1990)

Information Industry Liaison Committee, Automatic Number Identification Applications, (October, 1990)

Intertainment, Growth of 900 and 800 for Entertainment, (October, 1990)

Retrospective At Carnegie Recital Hall, The Music of Bruce Kushnick, (October, 1990)

Society of Telecom. Consultants, Automatic Number Identification Applications, (May, 1990)

Voice 90, The Telemedia Perspective, (March 1990)

Telecom Publishing, Audiotex Potential, Keynote Address, (February, 1990)

- **Strategic Telemedia Industry Forums**

Forum I First Industry Forum for Long Distance cos. on issues of 900, September, 1989

Forum II Brought together the Long distance carriers and the Regional Bells (RBOC) to discuss Billing and Collections for 900 and enhanced services, March, 1990

Forum III Long Distance co. and RBOCs meet Public Utility Commissioners, June 1990

APPENDIX B

Research, Analysis & Data; State & FCC Filings

- Partial list: 2014-2018
- Reports, Research, Data and Legal & Regulatory Actions, 1998-2015
- FCC Filings and Complaints, 1999-2013
- Data Quality Act Filings, 1994-2011

Reports, research, legal and regulatory Actions, 1985-1999

- The Future of the Information Age, with Probe Research, 1992-1999
- Seminal Research Reports of the Interactive Age, with International Data Corp (IDC)-Link Resources and Strategic Telemedia, 1985-1993

New Networks Institute & the IRREGULATORS filed in over 35 separate FCC proceedings and created "Fixing Telecom" series and the Digital Divide by Design series.

FILINGS RELATED TO 80-286 & The Big Freeze

- FILING: Comments filed in "The Big Freeze" Docket 80-286 and FCC 18-99 - FURTHER NOTICE OF PROPOSED RULEMAKING
- FILED WITH COMMENTS: REPORT 1: Did AT&T, Verizon, CenturyLink & the FCC Intentionally Create the Digital Divide?
- FILED AS REPLY COMMENTS: REPORT 2: Verizon New York 2017 Annual Report: An Analysis of Cross-Subsidies and Customer Overcharging DESCRIPTION: This report, based on the Annual Report shows that there is a utility and that it is hemorrhaging money because of the FCC.
- FILED AS COMMENTS: REPORT 3: Bell Access Line Accounting Manipulation 1984-2018 Description: Verizon, AT&T, CenturyLink, and their association, USTelecom, with the help of the FCC, have manipulated the basic accounting of access lines, and have removed or hidden 80% of all lines, including all Business Data Services, (special access) DSL, competitor lines, FiOS, U-Verse, all of the wires to the cell sites or WiFi hot spots, alarm circuits, and this has been done to reinforce a claim that the utility networks are unprofitable.
- **Report:** Solving Net Neutrality: We Found a Fatal Structural Flaw in Every FCC Proceeding", February 26th, 2018

Partial List of the Proceedings We Filed In:

- ***Net Neutrality Internet Order –****Restoring Internet Freedom WC 17-108*
- ***Section 706 —****Inquiry Concerning Deployment of Advanced Telecom Capability to All Americans in a Reasonable and Timely Fashion, GN 17-199*
- ***Shut off the Copper Proceedings —****Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking – WC Docket No. 17-84*
    - *Technology Transitions, GN Docket No. 13-5;*

  - *AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, GN Docket No. 12-353*
- ***Wireless Replacement of Wired Services*** Wireless Infrastructure NPRM Notice of Proposed Rulemaking–*WT Docket Nos. 17-79 and 15-180*
- ***FCC Cost Accounting Rules*** *Review of Part 32 Uniform System of Accounts Docket 14-130*
  - *Jurisdictional Separations and Referral to the Federal-State Joint Board CC Docket No. 80-286*
- ***Business Data Services (Special Access) –i****n Internet Protocol Environment, Docket No.16-143;*
  - *Special Access for Price Cap Local Exchange Carriers, WC Docket No. 05-25;*
  - *AT&T Petition for Rulemaking to Reform Regulation of ILEC Rates for Interstate Special Access Services, RM-10593.*
  - *Investigation of Certain Price Cap Local Exchange Carrier Business Data Service Tariff Pricing Plans Environment WC Docket No. 15-247*

The Details

Shut off the Copper Proceeding Filings

- *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking – WC Docket No. 17-84*
- *Technology Transitions, GN Docket No. 13-5;*
- *AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, GN Docket No. 12-353*
- *Also filed in FCC WTB 17-79, GN 17-83, GN 13-5, WC 12-353, CC 80-286*
  - Reply Comment 1 were filed on July 18th, 2017
  - Appendix, The Book of Broken Promises
  - Report 8: Full Report: Verizon New York 2016 Annual Report Analyzed.
  - Report 5: The Hartman Memorandum proves that the FCC's own cost allocation rules created massive financial cross subsidies between and among the state-based wired utilities, and the companies' other lines of business, such as special access, or the wireless service.
  - Report 6:The History & Rules of Setting Phone Rates in America —The FCC's 'Big Freeze' details that the FCC has set basic cost accounting expenses to based on the year 2000 and the FCC has never audited or investigated the impacts for 18 years.

Internet Order

- **The Book of Broken Promises: $400 Billion Broadband Scandal and Free the Net** is an encyclopedic collection of state-based Fiber optic deployments. It has been filing in multiple FCC proceedings in 2017, including *Restoring Internet Freedom WC 17-108*

Internet Order: Verizon's Use of Title II vs FCC of Title II's Harms

- **NNI have filed a Petition for the FCC to investigate** whether Verizon has committed perjury as Verizon has failed to disclose to the FCC, courts or public that their entire financial investments are based on Title II; filed Jan 13th, 2015.
- **Verizon has responded with a letter** denying our claims, filed, Jan 20th, 2015
- **New Networks Institute & Teletruth Response to Verizon**, Feb 23rd, 2015
- **Verizon: Show Us the Money PART I: Verizon's FiOS, Fiber Optic Investments, and Title I.** – Part 1: supplement original Petition for Investigation.
- Letter to the FCC, Comments: Open Internet proceeding. RE: Verizon's Fiber Optic Networks are "Title II" — here's What the FCC Should Do. DOCKET: Open Internet Proceeding, (GN No.14-28)
- Comments First: FCC Open Internet Proceeding **"Title Shopping: Solving Net Neutrality Requires Investigations" , July 14th, 2014**
- Comment Second: Verizon's FiOS Fiber to the Premise (FTTP) Networks are Already Title II in Massachusetts, Maryland, Florida, New Jersey, District of Columbia, Pennsylvania, New York

Section 706 and Related Filings

- Comment1, Comment 2 *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, Section 706 Inquiry GN 17-199*
- **NNI: 20 Years of Section 706 and related inquiry filings—**New Networks and our previous iteration, Teletruth and current affiliate IRREGULATORS have filed over 20 times over the last 20 years in Section 706
- http://newnetworks.com/20yearssection706/
- **Part II: Facts Missing from the FCC's Section 706 Broadband Reports**
- **NNI First Section 706 Inquiry**, 1998.

Business Data Services: Consumer Federation of America (CFA) New Networks Institute (NNI) Filings

- *Business Data Services in Internet Protocol Environment*, Docket No.16-143;
- *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25;
- *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593.
- *Investigation of Certain Price Cap Local Exchange Carrier Business Data Service Tariff Pricing Plans Environment WC Docket No. 15-247*

    - Hartman Memorandum letter describing the FCC's distorted cost accounting rules and the harms of the unexamined cross-subsidies. November 4, 2015
    - Report 5: The Hartman Memorandum
    - Report 6:The History & Rules of Setting Phone Rates in America

Joint Press Release: Consumer Federation of America and NNI

- The Manipulation of the Financial Accounting & Special Access

- Fact Sheet Highlights

"BUSINESS DATA SERVICE MARKET PLAGUED BY ILLEGAL COST ALLOCATIONS, OVERCHARGES AND EXCESS PROFITS. Consumer Federation of America and New Networks data show deeply anti-competitive, anti-consumer practices.

- Joint Comments Filed On June 28th, 2016 New Networks Institute and Consumer Federation filed Joint Comments in the FCC's Business Data Services Proceeding
- Consumer Federation Ex Parte Meeting with the FCC, September 12th 2016
- Reply Comments Filed, August 5th, 2016

REPORTS: Fixing Telecom Series

In December, 2015, we released the first two reports in a new series, "Fixing Telecom" a project that started seven years ago. They are based on mostly public, but unexamined, information, the findings impacts all wireline and wireless phone, broadband, Internet and even cable TV/video services in America.

REPORTS:

- Report 1: Executive Summary: Verizon's Manipulated Financial Accounting & the FCC's Big "Freeze"
- Report 2: Full Data Report
- Report 3: SPECIAL REPORT How Municipalities and the States can Fund Fiber Optic Wireline and Wireless Broadband Networks.
- REPORT 4: Data Report Proving Verizon's Wireline Networks Diverted Capex for Wireless Deployments Instead of Wiring Municipalities, and Charged Local Phone Customers for It.
- Report 5: The Hartman Memorandum proves that the FCC's own cost allocation rules created massive financial cross subsidies between and among the state-based wired utilities, and the companies' other lines of business, such as special access, or the wireless service.
- Report 6:The History & Rules of Setting Phone Rates in America —The FCC's 'Big Freeze' details that the FCC has set basic cost accounting expenses to based on the year 2000 and the FCC has never audited or investigated the impacts for 18 years.
- Report 7: SUMMARY REPORT: Verizon Massachusetts & Boston: Investigate the Wireless-Wireline Bait-n-Switch, January 17th, 2017
- Report 8: Full Report: Verizon NY 2016 Annual Report Analyzed, June 2017.

FILINGS:

- Letter to the FCC for an Investigation of Cross Subsidies as detailed in the Hartman Memorandum

On December 16th, 2015, we filed the first reports in 31 separate FCC proceedings.

- FCC Filings: Cover Letter, December 16th, 2015
- FCC List of Proceedings

FCC Comments: Joint Board & FCC Cost Accounting Rules.

We filed comments and refreshed the record in CC 80-186, WC 14-139, CC 80-286, CC 96-45, CC 97-21, WC 05-25, WC 10-90, WC 12-353, GN 13-5, GN 15-191, WC RM-11358

On May 24th, 2017 the IRREGULATORS filed comments with the FCC and the Federal-State Joint Board. They asked:

- Re: Federal-State Joint Board on Jurisdictional Separations Seeks to Refresh Record on Issues Related to Jurisdictional Separations, FCC 17J-1
- Re: Federal-State Joint Board on Separations Seeks Comment on Referral for Recommendations of Rule Changes to Part 36 as a Result of Commission Revisions to Part 32 Accounting Rules, FCC 17J-2

- **On May 15th, 2017** the FCC denied our call for audits of the FCC's accounting rules and granted itself an extension, even though the FCC froze the way expenses were assigned to the different lines of business — but always having 'local service pay the majority of costs.
- **On April 17th, 2017,**the IRREGULATORS filed comments with the FCC calling for the Agency to do audits and investigations of the FCC's "Big Freeze". The FCC's accounting rules were 'frozen' 16 years ago and they have created massive financial cross-subsidies, making local phone customers pay the majority of expenses for all services, from wireless to Broadband Data Services (BDS).

This is important because it documents that the FCC can not create new public policies without accurate financial data,

"We refresh this record, again, with 'Fixing Telecom', a report series done as an independent voice, without corporate or political financing, because sometimes the Public should come first."

- Report 5: The Hartman Memorandum
- Report 6:The History & Rules of Setting Phone Rates in America— The FCC's 'Big Freeze' & Cross Subsidies
- Report1: Executive Summary: Verizon's Manipulated Financial Accounting & the FCC's Big "Freeze"
- Report 2: Full Data Report
- Report 3: SPECIAL REPORT: How Municipalities and the States can Fund Fiber Optic Wireline and Wireless Broadband Networks.
- REPORT 4: Data Report Proving Verizon's Wireline Networks Diverted Capex for Wireless Deployments Instead of Wiring Municipalities, and Charged Local Phone Customers for It.

FILINGS:

- Letter to the FCC for an Investigation of Cross Subsidies as detailed in the Hartman Memorandum
- FCC Filings: Cover Letter. On December 16th, 2015, we filed the first reports in 31 separate FCC proceedings
- List of Proceedings: FCC List of FCC Proceedings in which reports were filed
- Joint Filings with Consumer Federation of America in the Special Access, (Business Data Services) proceeding

IRREGULATORS' RESEARCH & ANALYSIS USED IN INVESTIGATION AND SETTLEMENT VERIZON NY, Filed August 8th, 2017

- **COMMENT 1:** Overview and bibliography
- **COMMENT 2:** : Verizon NY in Multi-Billion Dollar Settlement Tangle, Underway in NY State. (Originally published in Huffington Post as summary).
- **COMMENT 3: Full Report:** Follow the Money: Verizon NY 2016 Annual Report Financial Analysis and Implications

Verizon State Based Reports and Analysis

- **2012**"Verizon's State-Based Financial Issues & Tax Losses: The Destruction of America's Telecommunications Utilities" where we called for an investigation of Verizon's financials and the cross-subsidies of its affiliate companies.
- **2013**Verizon Wireless and the Other Verizon Affiliate Companies Are Harming Verizon New York's (The State-based Utility) Customers & the State.
- **2013** Investigation of Verizon Wireline and Wireless Companies Business Relations by the New York State Commission — COMMENTS filed by Common Cause–NY, Consumer Union, CWA and the Fire Island Association culled from data from New Networks Institute research reports.
- **2014**"It's All Interconnected" published by Public Utility Law Project, PULP, with David Bergmann, Esq.
- **Full Report:** Follow the Money: Verizon NY 2016 Annual Report Financial Analysis and Implications
- Note: Current Investigation of Verizon New York's business practices.

STANDING ARGUMENT

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

The Irregulators, New Networks Institute, Bruce A. Kushnick, Mark N. Cooper, Tom Allibone, Kenneth Levy, Fred Goldstein, and Charles W. Sherwood, Jr.,
Petitioners

v.

Federal Communications Commission and United States of America,
Respondents

Case No. 19-1085

Petition for Review of Order by the Federal Communications Commission

PETITIONERS' STANDING ARGUMENT

I. PURPOSE

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

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

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

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

II. DISCRETE PETITIONER FACT PATTERNS

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

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

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

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

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

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

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

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

III. STANDING REQUIREMENTS

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

A. Petitioners suffer an injury in fact.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. The requested judicial relief will redress the injury.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. BACKGROUND AND INTRODUCTION TO SEPARATIONS

A. Action under review.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Freeze Order ¶¶16-18 (notes omitted).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. THE FREEZE ORDERIMPOSED SEVERAL DISTINCT INJURIES ON PETITIONERS

A. The Commission Denied the Petitioners' Requests.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(notes omitted)

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

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

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

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

CONCLUSION

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

Respectfully Submitted,

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Dated: May 20, 2019

CERTIFICATE OF SERVICE

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

/s/ *W. Scott McCollough*