

**In The United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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NATIONAL ASSOCIATION OF)		
REGULATORY UTILITY COMMISSIONERS,)		
<i>Petitioner,</i>)	No. 16-1170	
v.)	(consolidated w/ No.16-1219)	
)		
FEDERAL COMMUNICATIONS)		
COMMISSION AND)		
THE UNITED STATES OF AMERICA,)		
<i>Respondents.</i>)		
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**NATIONAL ASSOCIATION OF REGULATORY UTILITY
COMMISSIONERS OPPOSITION TO FEDERAL COMMUNICATIONS
COMMISSION ABEYANCE MOTION**

Pursuant to Fed. R. App. P. Rule 27(a)(3)(A) and Circuit Rule 25(a) and 32(d)(2), the National Association of Regulatory Utility Commissioners (NARUC) respectfully submits this opposition to the Federal Communications Commission’s (FCC) September 29, 2016 *Motion of the FCC to Hold Case in Abeyance and to Defer the Filing of the Record (FCC Motion)* “pending action by the agency on petitions for reconsideration.” *FCC Motion* at 1.

ARGUMENT

The Order on Review¹ ***purports to supplant the State role in the Congressional scheme with a new FCC Broadband Lifeline Provider Designation process.***

The FCC's Order supplants the State designation role specified in the Congressional scheme. As the FCC consistently acknowledged, until this Order, 47 U.S.C. "Section 214(e)(2) of the Act provides State commissions with the *primary* responsibility for performing ETC [Eligible Telecommunications Carrier] designations."² Choosing to ignore this clear text, the FCC purports to "preempt" not a *State* law or regulation, but the Section 214(e)(2) *Congressional* specification of the State's role under the Act. Specifically, the Order at ¶ 249 finds that States performing ETC designations, pursuant to Congresses directions in 47 U.S.C. § 214(e)(1), for Lifeline Broadband Providers (LBPs): "thwart federal universal service goals and broadband competition, and accordingly we preempt such designations." See NARUC's June 3, 2016 *Petition for Review* at pp. 3-8.

¹ *In the Matter(s) of Lifeline and Link Up Reform and Modernization*, WC Docket 11-42, *Telecommunications Carriers Eligible for Universal Service Support*, WC Docket 09-197, *Connect America Fund*, WC Docket 10-90, *Numbering Resource Optimization*, CC Docket 99-200, Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962 (2016).

² *In the Matter of Fed.-State Joint Bd. on Universal Serv.*, 20 F.C.C. Rcd. 6371, 6374 ¶ 8 & ¶ 61 (Mar. 17, 2005) (emphasis added). See also, *In the Matter of Connect Am. Fund A Nat'l Broadband Plan for Our Future*, 26 F.C.C. Rcd. 17663 at 17798 (2011) ("By statute, the states... are empowered to designate common carriers as ETCs" and specifying in the accompanying footnote 622 that: "[S]tates have primary jurisdiction to designate ETCs.")

State lifeline programs sanctioned by Congress programs will be undermined if the FCC bypasses the State role.

On March 17, 2016, ninety-six Commissioners from thirty-seven NARUC member States signed a letter explaining this new FCC designation procedure will, among other things, directly undermine existing complementary State lifeline programs sanctioned by Congress in Section 254 of the Act.³

The legal question of the FCC's authority to conduct such designations, which is the heart of NARUC's appeal, is ripe for review.

Petitioners will be prejudiced if the Court postpones review while the Commission addresses the pending reconsideration petitions. The FCC motion does not provided *any* evidence, citations, or even a *hypothetical* discussion of whether Petitioners could be actually prejudiced by the broad and sweeping implementation of the Order which is clearly underway. The FCC has already announced the effective dates of the new Lifeline Rules.⁴ It has issued guidance to entities wishing to utilize the new FCC procedure that bypasses the State role.⁵ That guidance at ¶ 4 notes, the new FCC “designation process” is effective as of

³ *Letter from 96 Commissioners representing 37 State Commissions to FCC Chairman Wheeler and FCC Commissioners Clyburn, Rosenworcel, Pai, and O'Reilly*, filed in WC Docket Nos 11-42 & 09-197, online at: <http://apps.fcc.gov/ecfs/comment/view?id=60001508686> . While the FCC did *not* choose to bypass the Section 214 procedure entirely as it originally suggested, the policy impact on State programs – and universal service generally, was the same. *Compare*, NARUC's *Petition for Review* at pp. 9-10.

the date of OMB approval – October 3, 2016 – and that the FCC will act on petitions seeking FCC designation within six months of submission unless the carrier qualifies for streamlined treatment, in which case the petitions will be “deemed granted” in 60 days.

Already, at least eight carriers have filed petitions seeking those “streamlined” FCC designations as per the new procedure announced in the Order.⁶

Not a single reconsideration petition challenges or seeks to restrict the FCC’s authority to conduct the disputed designations.

“There is no reason for the court to delay deciding” a petition for review where, as here, the FCC’s “treatment of the petitions for reconsideration will not shed light on [a] threshold matter.” *MCI Telecomms. Corp. v. FCC*, 143 F.3d 606, 608 (D.C. Cir. 1998) (holding that petitions for reconsideration of the FCC’s computation of cost differentials did not warrant deferring consideration of

⁴ “Wireline Competition Bureau Announces Effective Dates Following OMB Approval of Lifeline Rules.” (DA No. 16-1133) (October 3, 2016) (https://apps.fcc.gov/edocs_public/attachmatch/DA-16-1133A1.pdf).

⁵ “Wireline Competition Bureau Provides Guidance Regarding Designation As a Lifeline Broadband Provider and Lifeline Broadband Minimum Service Standards.” (DA No. 16-1118) (September 30, 2016) (https://apps.fcc.gov/edocs_public/attachmatch/DA-16-1118A1.pdf).

⁶ See eight October 4, 2016 petitions seeking “streamlined” designation as a Lifeline Broadband Provider Eligible Telecommunications Carriers filed by [Boomerang Wireless, LLC d/b/a enTouch Wireless](#), [TruConnect Communications, Inc.](#), [Free Mobile Inc.](#), [Karma Mobility](#), [i-wireless, LCC](#), [Easy Telephone Services Co.](#), [Assist Wireless, LLC](#) and [Ztar Mobile](#). (A hyperlink to the document on the FCC website is embedded in each name.)

petitions for review challenging, among other things, the reasonableness of the FCC's methodology).

A close examination of NARUC's 14 issues statements demonstrate they are all focused narrowly on the FCC's claim of new authority to conduct these designations.

The FCC alleges the July 11, 2016 filed "NARUC NONBINDING STATEMENT OF THE ISSUES" overlaps with the issues it will review on reconsideration. They simply do not. NARUC's clear focus is on the FCC's authority to bypass the State designation procedure set by Congress. Any examination of NARUC's Petition for Review and NARUC's Statement of Nonbinding Issues themselves make that clear.

Indeed, of NARUC's 14 issues, the only one that arguably has a *partial* overlap with any of the petitions seeking reconsideration is NARUC's issue statement 10 – because it references the FCC's decision to phase out voice services – on its face a peripheral issue. Of course the FCC has raised that as an argument for granting abeyance. *Motion* at 7. However, "NARUC Nonbinding Statement of Issues" is just that: nonbinding. NARUC now has no intention of raising "the phase-out of voice services" as an issue. To do so would just waste the Court's time and invite an FCC ripeness argument, raising what is obviously – to NARUC and other petitioners – a very peripheral issue.

The FCC usurpation of the Congressionally-specified State ETC Designation role is clearly the heart of NARUC's petition and the focus of all its issue statements. The fact is that not a single one of the eight filed petitions for reconsideration *challenge* or *seek to restrict* the FCC's authority to conduct these lifeline broadband eligible telecommunications carrier (ETC) designations. Only three of the eight June 23, 2016 petitions even come close to a focus on the actual federal designation process. *But none question the FCC's authority to bypass States and Congress and make the required designations ab initio.*⁷

⁷ See [NASUCA's Petition for Reconsideration](#), at 1 (*FCC Motion* at 66-67) (focusing on four issues, *none challenging the FCC authority to make ETC designations*: the (i) "failure to require that payment arrangements be offered for backup power"; (ii) "failure to act now to reform the universal contribution mechanism"; (iii) "failure to adopt regulations so that customers who cannot afford bundled service will be able to maintain basic voice service"; and (iv) "decision to remove Lifeline support for stand alone voice services."); [TracFone Wireless, Inc.'s Petition for Reconsideration](#), at i-ii (*FCC Motion* at 116-118) (making four requests, *again – none challenging the FCC's authority to make ETC designations*, but rather requesting (i) reconsideration of removing lifeline support from stand-alone voice, (ii) revision of minimum service standards, (iii) requesting the receipt of text messages be included as usage, and (iv) urging the "non-usage" period remain 60 days); [Petition for Reconsideration of CTIA](#), at 1 (*FCC Motion* at 11-12), (challenging only the FCC decision "to set long-term minimum capacity standards for mobile broadband at 70 percent of the average"); [General Communication, Inc. Petition for Reconsideration and/or Clarification](#), at 1 (*FCC Motion* at 23-24), ("addresses only one aspect of the *Order* – the requirement to recertify subscribers by the anniversary of their service initiation date"); and [Petition for Reconsideration/Clarification of NTCA and WTA](#), at i-iii (*FCC Motion* at 74-76), (asking only the FCC to reconsider (1) "the exception to the Fixed Broadband Minimum Service Speed Standard;" (2) "the phase-down . . . of support for voice services;" (3) "the minimum usage allowance standard;" (4) "rolling recertification requirements," and (5) port freeze provisions.).

The [Joint Lifeline ETC Petitioners Petition for Partial Reconsideration and Clarification](#), did reference the federal procedure. However, far from *challenging* the FCC's authority to bypass the States and do initial designations, the Joint Lifeline Petitioners instead ask the agency *to extend* the Order's streamlined FCC ETC designation process to voice only services.⁸ The second, a [Petition for Clarification of the Pennsylvania Public Utility Commission](#), again does not challenge the FCC's authority to make the designation, but only seeks clarification where the FCC has already designated a carrier. Indeed, the Pennsylvania Commission concedes that “[broadband] ETCs can only be designated by the [FCC].” *FCC Motion* at 111.⁹ None of Pennsylvania's requested clarifications can be construed by even the most imaginative as attacking the FCC's authority to make designations in lieu of the States. Rather, as that petition points out, the “Pa. PUC seeks clarification on: (1) enforcement and consumer protection; (2) notice requirements; and (3) outstanding compliance plans.”¹⁰ The third, filed by [United States Telecom Association Petition for Reconsideration and Clarification](#), also

⁸ *Id.* at ii, (*FCC Motion* at 11-12) noting “in Section III, Joint Petitioners seek reconsideration of the Commission's decision not to provide streamlined ETC application processing for voice-only Lifeline service.”

⁹ *See also, id.* at 17-19 of their petition, *FCC Motion* at 111-113, where Pennsylvania outlines the clarifications sought in four paragraphs.

¹⁰ *Id.* at 1.

never attacks the new FCC authority to make the ETC designations, just how the FCC applies that authority.¹¹

Indeed, as in *MCI*, expeditious action by this court on the central problem of the legitimacy of the FCC's designation procedure, is likely to be more efficient and actually facilitate final FCC decisions in the outstanding petitions for reconsideration (as it would render many if not all of them moot).¹²

Moreover, even if the FCC grants all the relief requested in the reconsideration petitions, Petitioners' arguments to the Court on this set of unquestionably crucial issues central to the FCC's overall scheme *will not change*.

Except for the very peripheral (and now abandoned) issue discussed earlier, even viewing the FCC's pleading in its most favorable light, the agency has not shown the Court that the discrete reconsideration issues cited overlap with the core issue targeted by 13 and a half of the issues raised by NARUC's petition.

It is clear that crucial issues raised by NARUC are not pending before agency. It is also clear that expeditious Court review of some of those issues is

¹¹ *Id.* A quick review of p. ii, (*FCC Motion* at 146) which lists concisely the associations arguments, makes clear the FCC is not challenging the FCC's authority to do broadband lifeline designations in the first instance.

¹² *MCI*, 143 F.3d at 608 (“Additionally, the pending petitions for reconsideration raise issues related to and contingent on the central problem of the legitimacy of the Commission's methodology in establishing the \$.284 rate; thus resolution of the petitions for reconsideration will benefit from [the court's] resolution of the present case”).

likely to assist the FCC in its handling of the outstanding reconsideration requests cited.

The longer the FCC can continue to implement the disputed elements of its Order, the more difficult it will be for States to turn back the clock when the Court reverses the FCC on this egregious misreading of the statute. In this context, the granting of the FCC motion would be disastrous for Petitioners. The FCC has continual difficulty addressing reconsideration requests, particularly those associated with Universal Service Fund (USF) issues, in anything close to resembling a reasonable time.¹³ For example, the July 11, 2001 FCC Notice to many parties that filed petitions for reconsideration of a much smaller and less controversial FCC Universal Service order OVER THREE YEARS earlier in 1997, asking that:

parties that filed petitions for reconsideration of the *Universal Service First Report and Order* in 1997 now file a supplemental notice indicating which of such issues they still wish to be reconsidered. In addition, parties may refresh the record with any new information or arguments they believe to be relevant to deciding such issues.¹⁴

¹³ See, e.g., *NASUCA v. FCC*, DC Cases Nos. 08-1226 and 08-1353, appeal filed June 23, 2008, FCC motion to hold in abeyance due to pending reconsideration petitions granted in September 2008. Over five years later, after an appeal of the reconsideration order was filed in the Court in July 2013, NASUCA withdrew the original appeal.

¹⁴ *Parties Asked To Refresh The Record Regarding Reconsideration Of Rules Adopted In The 1997 Universal Service First Report And Order*, FCC Notice DA No. 01-1647 in Docket No. 96-45 (rel. July 11, 2001), available online at: http://transition.fcc.gov/Daily_Releases/Daily_Digest/2001/dd010711.html.

Interestingly, in the same document, the FCC notes that:

Since then, there has been substantial litigation concerning many of the rules adopted in the *Universal Service First Report and Order*. As a result, many of the issues raised in the petitions for reconsideration may no longer remain in dispute.¹⁵

Indeed, in the undersigned's experience, often in the USF context, waiting for the FCC to act is an exercise, if not in futility, of at least extreme patience.¹⁶

In these circumstances, for practical purposes on the preemption issue, a grant of this FCC abeyance motion eviscerates the right of aggrieved petitioners to

¹⁵ *Id.*

¹⁶ More than one Appellate panel has expressed frustration with the agency's delaying tactics to insulate its decisions from judicial scrutiny. *See, e.g., Qwest Corp. v. FCC*, 398 F.3d 1222 at 1239 (10th Cir. 2005) (noting it took FCC three years to respond to first remand and court expects FCC to comply "in an expeditious manner." The FCC did not issue the final remand order until April 26, 2010). *See also, Nat'l Commc'ns Ass'n, Inc. v AT&T*, 46 F.3d 220, 225 (2d Cir. 1995) (reversing district court's application of primary jurisdiction because court would conclude the case far more expeditiously than could the agency); *In re Core Commc'ns Inc.*, 531 F.3d 849 (D.C. Cir. 2008) (granting writ of mandamus in light of FCC's six-year delay); *Radio-Television News Directors Ass'n v. FCC*, 229 F.3d 269 (D.C. Cir. 2000) (issuing writ of mandamus due to FCC's twenty-year delay in rendering final decision); *Telecomms. Research and Action Ctr. v. FCC*, 750 F.2d 70, 81 (D.C. Cir. 1988) (retaining jurisdiction over the case and requiring regular status reports where agency had delayed final decision for more than three years and failed to meet prior self-declared deadlines); *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322 (D.C. Cir. 1980) (ordering schedule for FCC final decision in case pending for several years); *Nader v. FCC*, 520 F.2d 182, (D.C. Cir. 1975) (court *sua sponte* imposed a schedule for FCC's resolution of issues in matter that had been pending for ten years); *Fidelity Television, Inc. v. FCC*, 502 F.2d 443, 450 (D.C. Cir. 1974) (finding FCC's attempt to hinder judicial review "perturbing, to say the least" and setting case for full review despite FCC's protest that there had been no final order in case pending for nine years); *Am. Broad. Co. v. FCC*, 191 F.2d 492, 500 (D.C. Cir. 1951) (finding unreasonable FCC delay of ten years in final resolution of award of broadcast frequency).

prompt review. If past is prologue, the FCC might decide some of the issues on reconsideration over a series of years, while the essential provision of that Order challenged here before this Court – on which those reconsideration requests hinge – remains in effect during a Court-ordered abeyance. This will effectively freeze crucial issues in the stale swamp of what all-too-often is the FCC’s reconsideration process. Effective judicial review will be stymied as the Order takes effect and the markets, companies, and NARUC’s State members are forced to readjust to the new rules, however legally flawed.

CONCLUSION

The motion presents no justification for holding NARUC’s appeal in abeyance. The FCC posits no evidence and little more than one paragraph of flawed argument that mischaracterizes both the reconsideration petitions and the thrust of NARUC’s Petition for Review. It does not even address the obvious prejudice to NARUC’s members that would be caused by granting the motion. As this Court has recognized, “when the Congress passed the Hobbs Act . . . it determined that the agency’s interest generally lies in prompt review of agency regulations.”¹⁷ The rules are in effect and petitions seeking streamline review using the disputed procedure are pending, and could be granted before briefs are filed in this appeal. NARUC’s members will suffer significant prejudice if the

¹⁷ *Mountain States Tel. & Tel. Co. v. FCC*, 939 F.2d 1035, 1040 (D.C. Cir. 1991).

Court's review of this new FCC procedure is delayed. The Court should deny the request.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 11, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ James Bradford Ramsay

JAMES BRADFORD RAMSAY