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

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *Petitioner*, v. FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, *Respondents*.	Case No. 16-1170

PETITION FOR REVIEW

Pursuant to 5 U.S.C. § 706, 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342(1) and 2344, and Rule 15(a) of the Federal Rules of Appellate Procedure, the National Association of Regulatory Utility Commissioners (NARUC) respectfully petitions this Court for review of the Federal Communications Commission's (FCC) "Third Report and Order, Further Report and Order, and Order on Reconsideration"[1]

[1] *In the Matter(s) of Lifeline and Link Up Reform and Modernization,* WC Docket No. 11-42, *Telecommunications Carriers Eligible for Universal Service Support,* WC Docket No. 09-197, *Connect America Fund,* WC Docket No. 10-90, *Numbering Resource Optimization*, CC Docket 99-200, Third Report and Order, Further Report and Order, and Order on Reconsideration, FCC 16-38, (rel. April 27, 2016), at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-38A1.docx. May 6, 2016 ERRATUM: https://apps.fcc.gov/edocs_public/attachmatch/DOC-339239A1.docx.

adopted March 31, 2016 and released April 27, 2016 in the proceeding captioned: *In the Matter(s) of Lifeline and Link Up Reform and Modernization; Telecommunications Carriers Eligible for Universal Service Support, Connect America Fund,* WC Docket Nos. 11-42, 09-197, & 10-90.

A copy of the Order is attached to this Petition.

The Order is a final order and may be appealed under 47 U.S.C. § 402(a).

The Commission is a proper respondent under Rule 15(a) of the Federal Rules of Appellate Procedure, and the United States of America is a proper respondent under 28 U.S.C. § 2344.

Venue is proper in this Court under 28 U.S.C. § 2343.

The Order was published on May 24, 2016 at 81 Federal Register 33025, online at: https://www.gpo.gov/fdsys/pkg/FR-2016-05-24/pdf/2016-11284.pdf

This Petition has been filed within 60 days of issuance of the Order.

In 1996, Congress made clear in 47 U.S.C. §§ 214(e),[2] 253,[3] 254,[4] 1301-3,[5] and other provisions of the Telecommunications Act, that it expects States to

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[2] 47 U.S.C. §214(e) ("State commission shall . . . designate a common carrier that meets the requirements . . . as an eligible telecommunications carrier.")

[3] 47 U.S.C. §253 ("(A) IN GENERAL - No State or local statute or regulation . . . may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. (b) State regulatory authority - Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.") {emphasis added}

[4] 47 U.S.C. §254 ("(b) Universal service principles - The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles . . . There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service...(e) Universal service support . . . only an eligible telecommunications carrier designated under section 214(e) of this title [by a State commission in the first instance] shall be eligible to receive specific Federal universal service support. . .(f) State authority A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. "){emphasis added}

[5] 47 U.S.C. §1301. ("Congress finds . . . The Federal Government should also recognize and encourage complementary State efforts to improve the quality and usefulness of broadband data."); §1302(a) (The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment. §1304. (captioned "Encouraging State initiatives to improve broadband") {emphasis added}

continue to play a continual and crucial role partnering with the FCC with respect to universal service and the promotion of advanced services like broadband.

State Lifeline programs are a crucial part of that equation. Some State Lifeline programs provide support subsidies to low income consumers for phone service ranging from $2.50 to well over $10.00 per month.[6]

As the FCC has acknowledged on numerous prior occasions, Congress specified that 47 U.S.C. "Section 214(e)(2) of the Act provides state commissions with the *primary* responsibility for performing {Eligible Telecommunications Carrier} designations."[7] (emphasis added)

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6 For example, Vermont provides the greater of $7 or 50 % of the basic service charge, California provides a $13.50 subsidy, Connecticut offers $10.42, the District of Columbia between $6.50 & $8.50, Kansas, $7.77, Missouri, $6.50. Several other States offer $3.50/month, including Arkansas, Minnesota, Nebraska, and Oregon. Idaho's subsidy is $2.50 while New York's subsidy varies.

7 *In the Matter of Fed.-State Joint Bd. on Universal Serv.*, 20 F.C.C. Rcd. 6371, 6374 ¶ 8 (Mar. 17, 2005). {footnotes omitted), See also, Id. at ¶ 61, noting: "We believe that section 214(e)(2) demonstrates Congress's intent that state commissions evaluate local factual situations in ETC cases and exercise discretion in reaching their conclusions regarding the public interest, convenience and necessity, as long as such determinations are consistent with federal and other state law." See also, *In the Matter of Connect Am. Fund A Nat'l Broadband Plan for Our Future Establishing Just & Reasonable Rates for Local Exch. Carriers High-Cost Universal Serv. Support Developing an Unified Intercarrier Comp. Regime Fed.-State Joint Bd. on Universal Serv. Lifeline & Link-Up Universal Serv. Reform -- Mobility Fund*, 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."

Only "telecommunications carriers" so designated can qualify to receive any federal universal service subsidies. The nature of the service does not matter.[8] Congress specifies that the FCC simply has no role in the designation process unless the State cannot act as a result of State law.

Atypically, the Order did not discover an ambiguity in Section 214(e)(2) as a prelude to its effort to scale back States' ability to act as an active partner in promoting universal service. This is understandable, the text of the Statute is clear. The agency has never in the 20 year history of the targeted provision found any ambiguity in the provision as none exists.

Instead, the Order breaks new ground and establishes a novel approach to statutory analysis. Choosing to ignore the U.S. Constitutions' concept of separation of powers, along with the clear text and unambiguous structure of the Telecommunications Act of 1996, the FCC purports to "preempt" not a *State* law

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[8] Compare, *Verizon v. F.C.C.*, 740 F.3d 623, 638 (D.C. Cir. 2014) (Observing that the statute applies to both "[t]he Commission *and* each State commission with regulatory jurisdiction over telecommunications services," 47 U.S.C. § 1302(a) (emphasis added), Verizon contends that Congress would not be expected to grant both the FCC and state commissions the regulatory authority to encourage the deployment of advanced telecommunications capabilities. But Congress has granted regulatory authority to state telecommunications commissions on other occasions, and we see no reason to think that it could not have done the same here. *See, e.g., id.* § 251(f) (granting state commissions the authority to exempt rural local exchange carriers from certain obligations imposed on other incumbents); *id.* § 252(e) (requiring all interconnection agreements between incumbent local exchange carriers and entrant carriers to be approved by a state commission)."

or regulation, but this Section 214(e)(2) *Congressional* specification of the State's role under the Act.

If upheld on review, this flawed view of the power of an Agency vs. the power of Congress to specify the scope of that agency powers will break new ground transferring yet another substantial swath of authority from Congress to agencies.

Specifically, the Order at ¶ 249 finds that States performing 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,[9] and accordingly we preempt such designations."

In a triumph of circular reasoning,[10] after preempting State authority granted by 47 U.S.C. § 214(e)(1), the FCC goes onto find "[i]n the absence of state

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[9] Compare, 47 U.S.C. §253. Subpart (a) of that provision is targets State barriers to competition and grants the FCC explicit permission to preempt any STATE law (as opposed to Congressional enactment) that could inhibit any carrier from providing any "telecommunications service" (like the broadband internet access services that is the subject of the new Lifeline program). However, subpart (b) bars the FCC from preempting any STATE universal service requirements – even if they have the effect of reducing competition – as long as they are "imposed on a competitively neutral basis" and are consistent with section 254 of this title). If Congress will not continence preemption of such State laws, even if they could inhibit "competition" in telecommunications services, how likely is it they expected the FCC would be able to rewrite the statute because it thinks the structure Congress established is not optimum.

[10] The Order's decision to "preempt" concedes the fact that Congress indeed specified that States do in fact have jurisdiction *as a matter of federal law*.

jurisdiction to designate providers as LBPs, the Commission has authority to designate such ETCs under Section 214(e)."

As FCC Commissioner Ajit Pai explains in his dissent, *mimeo* at 213:

> [N]othing in the Act, its legislative history, or our precedent suggests that state commissions lose their authority to designate ETCs with respect to interstate services. Congress expressly chose to limit state authority to intrastate services only in unserved areas: "If no common carrier will provide [supported] services . . . to an unserved community . . . *the Commission, with respect to interstate services* or an area served by a common carrier to which paragraph (6) applies, or a *State commission, with respect to intrastate services*, shall determine which common carrier . . ." (paragraph (e)(3)).[] In other words, Congress knew how to draw a jurisdictional line in section 214, but chose not to do so outside of unserved areas. And that same paragraph makes another thing clear: In unserved areas, the FCC can designate *both* a carrier with respect to interstate services *as well as* a "carrier to which paragraph (6) applies," i.e., a carrier not subject to the jurisdiction of a state commission. That parallel construction means Congress viewed the questions as separate and distinct—not one and the same. So to now draw another line around state commission jurisdiction would be to rewrite subsection 214(e), not reinterpret it.
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> {footnote omitted; emphasis in the original}

FCC Commissioner O'Reilly expressed similar sentiments in his dissent at 220, noting the:

Otherwise *there is no reason to preempt* – and some other reason or new method of statutory construction must be discovered and offered for not following explicit Congressional directives.

> order absolutely mangles section 214 of the Act . . .I do not think we have the authority to bypass the statutorily-set state role in designating {Eligible Telecommunications Carriers}, as set forth in section 214. To the extent that these provisions should be changes, Congress is the proper venue to do so. {emphasis added; footnote omitted}

NARUC represents the interests the State utility commissions that are directly impacted by the FCC's order. NARUC's members oversee the regulation of, *inter alia*, telecommunications services. The association has been recognized both by Congress in several statutes[11] and consistently by Article III courts[12] as the

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[11] See 47 U.S.C. § 410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Board to consider issues of concern to both the Federal Communications Commission and State regulators with respect to universal service, separations, and related concerns; Cf. 47 U.S.C. § 254 (1996) (describing functions of the Joint Federal-State Board on Universal Service). Cf. NARUC, et al. v. ICC, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains "...Carriers, to get the cards, applied to...(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the "bingo card" system.).

[12] See, e.g., United States v. Southern Motor Carrier Rate Conference, Inc., 467 F. Supp. 471 (N.D. Ga. 1979), aff'd 672 F.2d 469 (5th Cir. 1982), aff'd en banc on reh'g, 702 F.2d 532 (5th Cir. 1983), rev'd on other grounds, 471 U.S. 48 (1985) (The Supreme Court noted: "[t]he District Court permitted . . . (NARUC), an organization composed of State agencies, to intervene as a defendant. Throughout this litigation, the NARUC has represented the interests of the Public Service Commissions of those States in which the defendant rate bureaus operate." 471 U.S. 52, n. 10. See also NARUC v. DOE, 851 F.2d 1424 (D.C. Cir. 1988); Indianapolis Power and Light Co. v. ICC, 587 F.2d 1098 (7th Cir. 1982); Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir. 1976); NARUC v. Federal Energy Regulatory Commission, 475 F.3d 1277 (D.C. Cir. 2007); NARUC v. Federal Communications Commission, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985).

proper entity to represent the collective interests of the State utility commissions.

NARUC actively participated in the agency proceedings below, and the changes adopted in the Order will cause members of NARUC direct and concrete injury.

On March 17, 2016, ninety-six (96) Commissioners from thirty-seven (37) NARUC member States signed a letter to the FCC. The letter explained the unavoidable impact on the lifeline program if the FCC chose to bypass the Congressionally-mandated Section 214 procedure.[13] It also explained how the proposed approach is inconsistent with crucial Congressional goals.

According to those 96 Commissioners, the FCC's policy, which takes these Congressionally designated State "cops" off the beat for *broadband* Lifeline services, can only increase fraud and abuse in the program, *directly undermine existing complementary State lifeline programs sanctioned by Congress in Section 254 of the Act*, and undermine service quality for Lifeline consumers.[14] The letter

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[13] See, *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, by purporting to excise specific sections of the Act the policy impact on State programs – and universal service generally, was the same.

[14] See, e.g., Order at ¶ 227 confirming the impact of State oversight, noting where States retain designating authority for certain carriers, that the State process

also pointed out logical gaps in the FCC's rationale before ending with an outline of the legal frailties of any approach that bypasses the plain text of Section 214.

NARUC seeks an order and judgment that portions of the FCC order are arbitrary and capricious, 5 U.S.C. § 706(2)(A), beyond the FCC's jurisdiction, authority or power, 5 U.S.C. § 706(2)(C), an abuse of discretion, and otherwise not in accordance with law, 5 U.S.C. § 706(2)(A). NARUC requests that portions of the order be vacated, set aside, modified, and/or enjoined, and the matter remanded with directions to the FCC, and that the Court provide such other relief as is just and proper.

Respectfully submitted,

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"ensure[s] that carriers have the financial and technical means to offer service, including 911 and E911, and have committed to consumer protection and service quality standards. These structures that protect consumers and ensure carriers meet service quality standards ensure that the services supported by the Lifeline program serve the Commission's goals of achieving "[q]uality services" offered at "just, reasonable, and affordable rates."

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the National Association of Regulatory Utility Commissioners (NARUC) respectfully submits this disclosure statement. NARUC is a quasi-governmental nonprofit organization founded in 1889 and incorporated in the District of Columbia. NARUC is a "trade association" as that term is defined in Rule 26.1(b). NARUC has no parent company. No publicly held company has any ownership interest in NARUC. NARUC represents those government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with the duty of regulating, *inter alia*, the regulated electric utilities within their respective borders.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3st day of June 2016, I caused a copy of the foregoing petition for review and disclosure statement, along with a copy of the subject order, to be served upon the parties listed below by first-class mail, postage prepaid.[15]

Respectfully submitted,

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DATED: June 3, 2016

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[15] See,, Circuit Rule 15: "In carrying out the service obligations of FRAP 15(c), in cases involving informal agency rulemaking such as, for example, those conducted pursuant to 5 U.S.C. § 553, a petitioner or appellant need serve copies only on the respondent agency, and on the United States if required by statute, see, e.g., 28 U.S.C. § 2344. See also, Sierra Club v Environmental Protection Agency, 118 F.3d 1324 (5th Cir. 1997) ("Implicit in this local rule is the D.C. Circuit's determination that participants in informal rulemaking proceedings are not "parties" for purposes of FRAP 15(c).")